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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT OF APPEALS

OF VIRGINIA.

BY PEACHY R. GRATAN.

VOLUME XXII.

FROM MARCH 15, 1872, TO JANUARY 1, 1873.

JUDGES

OF THE

SUPREME COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

R. C. L. MONCURE, PRESIDENT.

JOSEPH CHRISTIAN,

FRANCIS T. ANDERSON,

WALLER R. STAPLES,

WOOD BOULDIN.*

Attorney General: JAMES C. TAYLOR.

* Judge Bouldin was elected to fill the vacancy occasioned by the resignation of Judge Joynes. He took his seat on the bench on the 2d of April : not on the 10th, as stated in a note to the first case reported.

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CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

Burton v. Brown's Ex'ors & als.*

March Term, 1872, Virginia.

1. **Interlocutory Decree—Acquiescence—Estoppel.**—A party may be concluded by his acquiescence in a decree affecting his rights made in the progress of the cause, under which decree he takes a part of the fund affected by it, and makes no objection to it until after the final decree in the cause made twenty-two years after it.
2. **Equitable Proceedings—Appeal—Penalty of Affirmation.**—An appeal by one party from a decree overruling some exceptions to a commissioner's report, and sustaining others, and recommitting the report, brings up the whole cause; and the decree of the court of Appeals affirming the decree of the court below, concludes all questions previously decided, whether in favor of the appellants or appellees.

*Judge Bouldin did not take his seat on the bench until the 10th of April.

See *Brown v. Brown's Adm'r*, 31 Gratt. 502, for the sequel of the principal case.

†**Equitable Proceedings—Appeal—Finality of Affirmation.**—In *Campbell's Ex'or v. Campbell's Ex'or*, 22 Gratt. 672, it is said: "The decision of this court is not only final in regard to the decree appealed from, but also in regard to all the prior orders and decrees in the case between the appellants and appellees. An appeal from a decree brings up the whole proceedings in the case prior to the decree; and either party can have any error against him in those proceedings corrected without the necessity of a cross appeal in any case. If a party fail to complain of any such error and a decree be made upon the appeal, without correcting or noticing the error, such party will be concluded by the decree from appealing afterwards." Citing the principal case and *Walker's Ex'or v. Page*, 21 Gratt. 684. See also, *Morris v. Garland's Adm'r*, 78 Va. 222; *Eminger v. Kenney*, 79 Va. 553; *Henry v. Davis*, 18 W. Va. 345; *Mason v. Bridge Co.*, 20 W. Va. 226; *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. Rep. 588; *Barton's Ch. Pr.* (2d Ed.) 1293; 4 Min. Inst. (3d Ed.) 1091.

Same—Same—Same—Where Parties Stand on Distinct Rights.—In *Simmons v. Lyles*, 27 Gratt. 932, the court says: "In this latter decree Jamieson has no concern. He was no party to it, and he does not complain of it. The rule comes directly within the operation of the rule laid down by this court in *Walker v. Page*, 21 Gratt. 686, 682; in which it was held, that where the parties stand upon distinct and unconnected grounds; where their rights are separate and not equally affected by the same decree; then the appeal of one will not bring up for adjudication the rights or claims of the other;" citing the principal case.

In February 1843, Alexander S. Brown and Patrick W. Brown, as executors and devisees of James Brown, deceased, filed their bill in the Superior court of Chancery for the Richmond circuit, in which they say that James Brown died in March 1841, leaving a will, which they exhibit; that the burthen of executing this will will be great; and they proceed to state the grounds of the difficulty at great length.

It appears that, in April 1792, James Brown and *Robert Rives formed a mercantile partnership, and they carried on business under the name of Robert Rives & Co., not only in Richmond, but at a number of places in the country; they having, at some of their places in the country, if not all of them, a special partner. In 1794, they admitted into the concern, Robert Burton the elder, as an equal partner, and subsequently the name of the firm was changed to Brown, Rives & Co. This partnership continued until February 1806, when it was dissolved by the death of Robert Burton. After his death the surviving partners formed another partnership, under the name of Brown & Rives, and all the assets of Brown, Rives & Co. were taken possession of by the new firm, which was continued until 1812.

Robert Burton left a will, which was admitted to probate, and James Brown qualified as his executor. He gave to his widow, Anna Pitfield, beside the three hundred pounds agreed to be settled on her by their marriage contract, one-fifth of his estate for her life, which, at her death, was to go to his sons by her. He gave to his two illegitimate daughters in England, one-fifth, and the remainder of his estate he directed to be divided equally between his two sons, Robert Burton, Jr. and John Burton. James Brown married the widow in 1807; and there was a marriage contract by which her property was secured to her; but it was not recorded.

After the dissolution of the partnership of Brown & Rives, Brown became greatly embarrassed by the failure of houses in England with which he was connected; and he and his late partner, Rives, disagreeing as to the settlement of the concerns of Brown, Rives & Co., and Brown & Rives, in 1818 Brown instituted two suits in equity against Rives, one in his own right and as executor of Robert Burton the elder, and the other in his own name, for a settlement of

the accounts of the respective partnerships. In these suits there were two reports by commissioners, the last by commissioner Robinson, who *reported a very large balance as due from Brown to Rives. To this report there were numerous exceptions; and the report had not been acted on by the court when this suit was brought.

The bill sets out several deeds executed by Brown to secure debts. The first was executed in 1819, to secure a large debt to James Scott, executor of John Leslie, deceased; another to secure a debt to the bank of the U. S.; another to secure a debt to Bullock, which Bullock afterwards transferred to Mrs. Brown; and in October 1824, he conveyed the whole of his property in Virginia to secure the devisees and legatees of Robert Burton the elder, and indemnify his sureties in his official bond; and on the same day made another deed, conveying all his lands in Kentucky for the same object.

Of the two sons of Robert Burton the elder, John was sent, when a youth, to Scotland, where he has ever since lived; Robert lived in Richmond until his death in 1837. He died unmarried, and left an olograph will, which was duly admitted to probate; and James E. Heath qualified as his executor. The material parts of his will are as follows: I do give and bequeath unto my dear mother, Anna Pitfield Brown, all and every species of property, both — or personal, and moreover of every kind whatever, which may at the period of my natural death belong or accrue unto me, at any time after said natural death shall occur, provided she be in life and being, as long as she shall live, with power at her death, or before that period shall arrive, to dispose of the same by will or otherwise as to her may seem most proper.

2dly. That this bequest shall be distinctly understood to have been made for her individual benefit, with a firm belief that she will use it for the benefit of all the family, viz: my honoured step-father, James Brown, Sr., and my dear brothers, John, James, Thomas, George L. M., Patrick W. and Charles Brown, and my sister, Anna B.

George, for her sole benefit, or that of her children *after Mrs. George's death, in such manner and form as may not incommode my said dear mother during her life.

3dly. I do hereby request my friends, Joseph Tate, at present mayor of this city, and James E. Heath, first auditor of Virginia, to act as trustees in this matter.

4thly. Six months after the natural decease of my said dear mother, I do will and desire my executors (hereinafter named) should transfer to my brother, John Burton, M. D., at present residing in Scotland, all and every thing, real and personal, or of whatever nature the property may be, that has been above conveyed in this writing testamentary, to him and his heirs for ever.

Tate and Heath were appointed executors, of whom Heath alone qualified.

James Brown died in 1841, never having settled his accounts as executor of Robert Burton the elder, or so far as appears, having kept on his own books any account of the kind.

The bill makes the legatees of Robert Burton the elder, Heath, the executor of Robert Burton, Jr., and his legatees, Rives and Scott ex'or of Leslie and others defendants, states that there is a question upon the construction of the will of Robert Burton, Jr., between Mrs. Brown and John Burton, the latter insisting, that upon the death of Mrs. Brown, the whole estate will pass to him under the fourth clause of the will; asks that various questions stated may be decided, and that the accounts of James Brown as executor of Robert Burton the elder, may be settled; that all necessary accounts may be taken; that the estate of their testator may be lawfully applied to the payment of his debts, and for general relief.

Mrs. Anna Pitfield Brown died in 1843; and left a will, made in the life time of her husband, and professedly in pursuance of the power vested in her by the will of Robert Burton, Jr., by which she gave the property *bequeathed to her by him to her children, including John Burton. And after her death the plaintiffs amended their bill, and made all the parties interested in her estate parties in the cause.

Rives and Scott answered at great length; but it is not necessary to refer to them further. John Burton also answered, and on the question arising on the will of his brother, Robert Burton, Jr., insisting that he was entitled to the whole of his brother's estate.

On the 27th of June 1845, the court made a decree, directing a commissioner to take the accounts of James Brown, as executor of Robert Burton the elder, and of James E. Heath, as the executor of Robert Burton, Jr. And on the 8th of June 1846, commissioner Poiteaux reported the account of Heath as ex'or of Robert Burton, Jr., showing in his hands, ready for distribution on the 31st January 1846, the sum of \$9,280.76.

On the 20th of June 1846, a decree was made by consent in the suits brought by James Brown in his life time and this suit, and two others, by which Robert Rives was relieved from all liability to the representatives of either James Brown or Robert Burton the elder; and the two suits brought by James Brown were dismissed. And on the 20th of November 1846, commissioner Poiteaux made his second report, to which there were numerous exceptions by the plaintiffs and the defendant John Burton.

On the 24th of November 1848, the cause came on to be heard, on only so much of it as involved the judicial construction of the will of Robert Burton, Jr., and the apportionment of his estate among those entitled to it under his will; when the court held that the testator, by his will, gave to his mother, Anna Pitfield Brown, a life estate in the whole of his property, with a power of appointment; and that this power had

been duly executed by her will, made in the life time of her husband; and made a decree distributing the fund in the hands of the *executor, Heath, among her legatees; and her son, John Burton, took his share under that decree.

Subsequently, commissioner Poiteaux's report was recommitting to commissioner Giles, who made two reports; by the last of which he fixed the amount due, on the 31st of December 1830, from James Brown to the estate of Robert Burton the elder, at \$57,083.70 of principal, and \$19,631.66 of interest; and of this there was due to John Burton, \$18,414 of principal, and \$20,664.90 of interest; and to Robert Burton, Jr., \$17,775.51 of principal and \$20,664.90 of interest; and the share of Robert Burton, Jr., as well as a sum reported to be due to Mrs. Anna Pitfield Brown, on account of her annuity of three hundred pounds, and the interest on one-fifth of the estate of Robert Burton the elder, left her by his will, which fell due after the death of James Brown, was apportioned among her legatees.

Numerous exceptions were filed to this report by the plaintiff; and there were two exceptions filed by John Burton; but neither of them related to the apportionment of the estate of Robert Burton, Jr., among the legatees of Mrs. Brown.

Whilst the cause was progressing in the Circuit court, two appeals were taken upon single questions decided after the decree of the 24th of November 1848, settling the construction of the will of Robert Burton, Jr., and distributing the fund in the hands of his executor. One of these appeals was by the plaintiffs, from a decree appointing a receiver of the rents of the real estate of James Brown deceased; and this decree was affirmed by this court. The other was by Scott, executor of Leslie, from a decree as to a sum of money which had been paid him; and this decree was reversed. And there was a third appeal by the executors and devisees and legatees of James Brown and Anna Pitfield Brown, deceased, taken from the decrees, rendered on the 29th of

June 1850, and the 1st of March 1859, based on the *first report of commissioner Giles, which distributed the interest of Robert Burton, Jr., among the legatees of Mrs. Brown; which decrees were affirmed by this court.

The cause came on to be finally heard on the 13th of March 1869, when the court overruled all the exceptions to the commissioner's report, and made a decree in favor of John Burton and the legatees of Anna Pitfield Brown, based upon the last report. From this decree the plaintiffs applied for and obtained an appeal to this court. Subsequently, John Burton applied to a judge of this court for an appeal, which was allowed. In his petition he assigned four errors. These errors are set out in the opinion of the court.

The case was argued by Marshall & Bouldin for the appellants in the first appeal, and by Andrew Johnston, J. Alfred

Jones and Conway Robinson, for John Burton.

Moncure, P., delivered the opinion of the court, sustaining the decree of the court below overruling the exceptions, and decreeing upon the report. Upon the appeal by John Burton, the opinion proceeded as follows:

Having considered and disposed of all the questions directly arising on this appeal, we would now be prepared to say there is no error in the decree appealed from, and that it ought to be affirmed, but for the fact that there is another appeal in this case, which was heard at the same time with this appeal, and the decision of which may affect the decision of this appeal. We will, therefore, proceed now to consider that appeal.

That appeal was taken by John Burton, to the decree of the 28th of March 1848, and also to the decree of the 13th of March 1869. The decree of the 28th of March 1848, was as to the construction of the will of Robert Burton, the younger, and as to the disposition of his estate to be made by his executor. The court was of opinion, that the true intent and meaning of the testator,

*apparent on the face of the will, was to devise to his mother, Anna Pitfield Brown, wife of James Brown, to her sole and separate use, all his estate, real and personal, with power at her death, or before that period should arrive, to dispose of the same, by will or otherwise, as to her might seem most proper; and was further of opinion, that the said Anna Pitfield Brown, by her will or appointment, duly made and published on the 31st day of March 1840, during the lifetime of her husband, duly exercised the power so vested in her; and the court accordingly decreed that James E. Heath, executor of said Robert Burton the younger, should sell certain stocks, &c., and regarding, &c., and after reserving, &c., should divide the whole fund in hand equally among the eight children of the said Anna P. Brown, (to whom she had appointed the estate claimed to have been devised to her by her said son Robert Burton), the eighth part or share of John Burton to be paid to himself or his counsel, without exacting a refunding bond, &c. There was accordingly a distribution made by the said executor in pursuance of the said decree, and the portion of John Burton was paid to his attorney, as appears by a report of Commissioner Poiteaux, returned and filed on the 30th of June 1848.

In John Burton's petition for an appeal, four errors are assigned in the decrees appealed from. The first is, that "in respect of the transactions of James Brown, as executor of Robert Burton the elder, the Circuit court erred in not adjudging to be due from said Brown at least as much as is claimed by the first of the exceptions filed by John Burton on the 8th of March 1869." This assignment of error has already been disposed of.

The second is, that "the Circuit court should have held, under the will of Robert Burton the younger, that all his estate,

other than what was given for life to the mother of him and of your petitioner, was,

after her decease, to pass to your petitioner in absolute property. It may be difficult, perhaps impossible now, to make, in any practical way, a correction of the error committed by the decree of the 28th of March 1848, as to the fund then in the hands of James E. Heath, in giving to your petitioner only one-eighth thereof. But your petitioner is advised that the commission of that error furnishes no sufficient reason for sanctioning the error committed by the decree of the 13th of March 1869, as to the large amount with which James Brown is chargeable in respect of estate bequeathed by Robert Burton the elder, to Robert Burton the younger. He is advised, that from the materials now in the record, there may be a statement showing the amount to which he is entitled, and upon such statement, a decree in his favor for said amount."

This is the main assignment of error on this appeal, and was the cause of it. The question involved is, as to the true and proper construction of the will of Robert Burton the younger, who died in 1837. This question was very distinctly presented for the decision of the court, in the original bill filed in this case in February 1843; in which it was stated, that "as a judicial construction of the said will, for guidance and safety of your orators, is among the objects of this bill, your orators will, for the convenience of the court, here copy it in extenso," &c.; and then the substantial parts of the will are set out, in hæc verba, in the bill. An official copy of the will was also filed as an exhibit with the bill. In the answer of John Burton, filed on the 27th of June 1845, he distinctly concurred in presenting the same question for the decision of the court, using in his answer this language: "This defendant concurs in desiring the court to declare the true construction of the will of Robert Burton the younger; and he prays that the executorial accounts of the said Heath, on the estate of Robert Burton the younger, may be stated, settled and adjusted, and that a decree may be made for the distribution of the assets

in the hands of the said executor, according to the several rights of the parties entitled thereto." On the 28th of March 1848, this question, thus distinctly propounded to the court, both by the bill and the answer of John Burton, was decided separately from all other questions in the cause; it being recited in the decree that "this cause came on this day to be again heard on such only of the papers and pleadings formerly read as involve the judicial construction of the will of Robert Burton the younger, deceased, and the apportionment of his estate among those entitled to it under said will, and also on the report made by Commissioner Poiteaux, dated the 8th day of June 1846, under that part of the interlocutory decree entered herein on the 27th of June 1845, which directed James E. Heath, executor of the said Robert Bur-

ton the younger, to render before the said commissioner an account of his transactions as executor." And the decree was then rendered which has already been substantially set forth. The question appears to have been argued before the court with great ability by counsel on both sides; and at the time of pronouncing the decree an able opinion was delivered by the court, which is referred to in the decree, and made a part of the record. The question was certainly a very doubtful one, upon which counsel and judges might very well differ. Being a question of construction of a will, it depended, almost entirely, upon the terms of the will, and the circumstances which surrounded the testator at the time of its execution. It seems from the record, that John Burton acquiesced in the decree, took no exception to any proceeding had under it, or in conformity with it, made no application for a rehearing of the question, or for an appeal from the decree, from the date thereof, on the 28th of March 1848, until the petition for this appeal was prepared and presented to a judge of this court, on or about the 10th of February 1870, a period of nearly twenty-two years. Very soon after the said decree was rendered, James

E. Heath, executor of Robert Burton the younger, in pursuance thereof, made distribution of a fund in his hands as such executor, among the eight children of the said Anna P. Brown; paying the eighth part or share of John Burton, amounting to \$511.25, to his counsel, as appears by a report of Commissioner Poiteaux, returned and filed in the case on the 30th day of June 1848. In Commissioner Giles' first general report, dated September 18th, 1855, he stated the accounts made out by him, upon the assumption that the estate of Robert Burton the younger was distributable according to the construction put upon his will by the decree of the Circuit court as aforesaid; and there was no exception to his report on that ground. On the 1st of March, 1859, the cause came on to be further heard on the papers formerly read, and the said report of Commissioner Giles, and the exceptions thereto, &c., when a decree was rendered disposing of some of the exceptions, but as to the rest recommitting the report to the commissioner, with instructions. As before stated, there was an appeal from this decree, which was affirmed by the court of Appeals on the 30th of April 1864. In Commissioner Giles' next general report, dated August 22, 1868, made in pursuance of the said decree of the 1st of March 1859, affirmed on the 30th of April 1864, as aforesaid, he stated his accounts in the same way, in regard to the distribution of Robert Burton the younger's estate, in which they had been stated in his former report as aforesaid; and there was no exception to his latter, as there had been none to his former, report on that ground. On the contrary, in the special statements annexed to the special report made by the commissioner at the request of John Burton's counsel, dated September

14th, 1868, and according to which the said counsel claimed that a decree should be rendered, the accounts were stated in the same way in regard to the distribution of the said estate. On the 13th of March 1869, the cause came on to be further heard on the papers formerly read, and the said 12 report of Commissioner *Giles, dated the 22d of August, 1868, and the exceptions thereto, &c., when the court overruled all of the said exceptions, approved and confirmed the said report, and rendered a decree accordingly. From that decree the executors of James Brown applied for and obtained an appeal on or about the 23d of June 1869; after which, to wit: on or about the 10th of February 1870, the defendant, John Burton, applied for the appeal obtained by him as aforesaid.

Now whether the question in regard to the true construction of the will of Robert Burton the younger, was correctly decided or not by the Circuit court, in the said decree of the 28th of March 1848, (upon which question we express no opinion), we think it is now too late, and was too late when the appeal was applied for by John Burton as aforesaid, to object, for the first time, to the correctness of that decision. We think his right to make such an objection has been lost by acquiescence, express or implied, by lapse of time, and (if not lost before) by his failure to make the objection in this court when the appeal from the decree of the 1st of March 1859 was heard in 1864. The issue upon this question was, as we have seen, very distinctly presented by the pleadings in the cause; the parties seem to have desired to have it speedily decided, and it was accordingly the first litigated question which was decided in the case. It was separate from the other numerous questions involved in the case, although in the consequences of its decision it was connected with most of them. We find, therefore, that on the 28th of March 1848, without waiting for the maturity of the cause for a full and general hearing, it was brought on for hearing as to this question only, and upon such of the papers and pleadings only as had relation to it, and, after full and able argument, an opinion and decree were pronounced by the court upon the question. If John Burton had not intended to acquiesce in that decision, he would at once have appealed from 13 it. *He had the strongest motive for doing so, and no motive whatever for delay. His interest and desire were for a speedy termination of the case, so far as he was concerned. An appeal from that decision would not have delayed the case in other respects, at least if it could not be brought to a conclusion in other respects before the termination of the appeal. That course was pursued by James Scott, executor of John Lesslie, in regard to a decree rendered against him in the case on the 23d day of March 1849. On that day, the cause came on for hearing only as to the question which affected Lesslie's executor, and upon such only of the papers and pleadings as

involved that question, when the court rendered the said decree against him. Being dissatisfied with it, he at once appealed from it; and in February 1855, the special court of Appeals reversed it. John Burton would doubtless have pursued the same course if he had not determined to acquiesce in the decree. There was the same reason for appealing from it at once, as there would have been if the question decided had been the only question involved in the case.

John Burton not only acquiesced in the decision by failing to appeal from it, but he also acquiesced in it, as we have seen, by receiving money under it. He received his distributive portion of the money which was distributed in pursuance of the decree, by James E. Heath, executor of Robert Burton, the younger. In other words, he received a portion of the estate of Robert Burton the younger, under the will of his mother, Anna P. Brown; and he now claims the whole of that estate against the said will. This is claiming under and against the same will, which in law is inadmissible. When, therefore, he claimed and received money under the will, he concluded himself from afterwards claiming against it. As a general rule, a decree or order made by consent of counsel, cannot be the subject of appeal. 3 Daniel's Ch. Pl. and Pr. 1602, 1st Am. Ed.; Atkinson v. Marks,

14 *1 Cow. R., 691, 709. In that case it was held that there could be no appeal from a decree, not only when it was by consent, but also if contested and the party acted under it; as where there is a decree for an account, settling principles and instructing the master accordingly, and the party, though he considers it erroneous, pursues the reference instead of taking an appeal at once. The latter branch of the rule, however, as laid down in the case in 1 Cowen, appears not to be the English rule, Morgan v. Morgan, 7 Eng. Law and Eq., 216, 220, as it certainly is not the rule in this State. In this case, as we have seen, John Burton not only pursued the reference, but accepted money under the decree, did not except to any of the reports of the commissioner made in pursuance of the decree, claimed a decree according to special statements made out by his counsel, upon the principles settled by the decree of the 28th of March 1848, and made no objection in any way to that decree for 22 years after it was rendered, or until his appeal was applied for on the 10th of February 1870; and that too, when the cause came on for general and final hearing, and there was a decree therein on the 1st of March 1859, from which decree there was an appeal by the executors and devisees of James Brown and of Anna P. Brown, and others, on which appeal the said decree was affirmed by this court on the 26th of April 1864.

If John Burton wished to object to the correctness of the decree of the 28th of March 1848, and had not previously given up for lost his right to do so by his acquiescence as aforesaid, he ought to have

made such objection, as he might have done, in the Circuit court, when the cause was there heard on the 1st of March 1859; or, at all events, in this court, when the appeal was here heard on the 26th of April 1864. That appeal was taken in 1859. John Burton was a party to it as one of the appellees. He was represented by able counsel, who were present in this court when the 15 appeal came on *to be heard, and argued the case in behalf of their clients. Not having made the objection on either of those two occasions, his failure to do so would, of itself, have precluded him from the right of appealing afterwards from the decree of the 28th of March 1848, if his previous conduct or neglect had not already precluded him from such right.

Whatever may be the rule of equity practice in England, New York, or elsewhere, we think that, according to our law and practice, the decree of this court of the 26th of April 1864 operated as an affirmation of all the prior decrees rendered in the cause which had not been previously reversed, including the decree of the 28th of March 1848, even supposing that decree not to have become irreversible by acquiescence as aforesaid.

What was said by the Lord Chancellor (Lord St. Leonards) and Lord Brougham, in the case of *Birch v. Joy*, referred to by the counsel of John Burton, 3 House of Lords cases, 578, to the effect that the part of a decree unappealed from remains as before, and is not rendered final by the decision of the appellate court on the part which is the subject of the appeal, is therefore, not true and not applicable, at least as a general rule, in this State—"As in the case of an appeal from a final decree, not only any error in that, but any error in the former proceedings, ought to be corrected, so upon an appeal from an interlocutory order, not only error in that order, but errors in the former proceedings should be corrected. In either case, the effect of the appeal is to bring up the whole proceedings prior to the decree or order from which the appeal is taken." Thus the principle is laid down in 2 Rob. Pr., old ed., p. 433; and in support of it, the following cases are cited: *Lomax v. Picot*, 2 Rand., 247; *Jacques, &c., v. Methodist Episcopal Church*, 17 John. R., 548; *Atkinson v. Marks*, 1 Cow. R., 691; *Teal v. Woodworth*, 3 Page, R. 470. This principle prevails in this State. *Huston's adm'r v.*

16 *Cantril, &c., 11 Leigh*, 136. In that case, Judge Stanard, in considering two questions, the first of which was, "Can the court, on this appeal from the dismissal of the supplemental bill, examine the previous decrees, and correct them, if they be erroneous," said: "The cases referred to in 2 Rob. Pr., 433, leave no doubt that the first question must be answered in the affirmative."

There is another rule of equity practice in this State, which authorizes the appellate court to correct, not only all errors in the proceedings of the court below against the

appellant, but also all errors in those proceedings against the appellee. That rule is thus laid down in 2 Rob. Pr., p. 434; "The whole proceedings prior to the decree or order being brought up, if error against the appellee is perceived in the record, the appellate court will reverse the proceedings, either in whole or in part, in like manner as it would have done if the appellee had brought the same before it by appeal;" and in support of the rule, the author cites *Day v. Murdock*, 1 Munf., 460. In that case it was held by this court, in October 1810, that upon an appeal from a decree in chancery, an error to the injury of the appellee ought to be corrected, although he did not appeal. This seems to be the first express reported judicial sanction which was given to the rule; but it has been acted upon ever since; and the same author cites a case from the next volume of Munford's reports, in which it was acted upon, viz: *Defarges v. Lipscomb*, 2 Munf., 451. Indeed, as early as the 2d of October 1811, this court established the following general rule: "It is the opinion of this court, founded as well on a full consideration of the law as on various decisions which have heretofore been had, that in future, where a judgment or decree is reversed, neither in the whole nor in part, on the ground of error against the appellant or plaintiff, in any appeal, writ of error or superseas; yet if error is perceived against the appellee or defendant, the court will consider the

17 *whole record as before them, and will reverse the proceedings, either in whole or in part, in the same manner as they would do were the appellee or defendant also to bring the same before them, either by appeal, writ of error or superseas; unless such error be waived by the appellee or defendant, which waiver shall be considered a release of all errors as to him." This rule, in substance, or one like it, has been in force ever since, and the existing rule on the subject is the 9th of the rules of the court, as published in the 20th volume of Grattan's Reports. This court recently had occasion, in an opinion delivered by Judge Christian, in the case of *Walker's ex'or, &c., v. Page, &c.*, 21 Gratt., 636, to express its views in regard to the subject of this rule, which opinion embraces all that is necessary to be said upon the subject.

Then, whether John Burton had a right or not to ask for a correction of the error in the decree of the 28th of March 1848, of which he now complains, when the case was before the appellate court, on the appeal of *Lesslie's ex'or* from the decree of the 23d of March 1849, or on the appeal of *Alexander S. Brown* and others from the decree of the 19th of November 1853, appointing a receiver (those appeals being from special decrees upon particular questions arising in the case), upon which question we deem it unnecessary now to express an opinion; there can be no doubt, but that he could have asked for such correction, when the case was before this court on the appeal from

the decree of the 1st of March 1859, unless he had previously abandoned his right to do so, or lost or given it up by acquiescence as aforesaid. And unless he had so abandoned, lost or given up such right, or intended to waive it, he ought to have exercised it on that occasion; and his failure to do so was equivalent to a waiver of such right, and a release of all error as to him. Having then an opportunity to exercise the right when the whole case was already before the appellate court, *there can be no reason in permitting him to forego that opportunity, and afterwards to take a new and independent appeal, for the purpose of obtaining the same relief he might have obtained on the former appeal. To permit him to do so would not be a benefit to him, but rather an injury, while it would subject his adversaries to unnecessary expense and inconvenience. There is wisdom therefore in our rule of practice, which authorizes the appellate court to correct errors against the appellee as well as against the appellant, and in that construction of the rule which requires the appellee to invoke the exercise of such authority, unless he means to waive all error as to him.

We are therefore of opinion that the appellant, John Burton, had no right to obtain this appeal upon the ground relied on in the second assignment of error, that "the Circuit court should have held under the will of Robert Burton the younger, that all his estate other than what was given for life to the mother of him and your petitioner was, after her decease, to pass to your petitioner in absolute property."

In regard to the third assignment of error, it has already been disposed of in deciding the other appeal. In regard to the fourth and last, it does not arise, under the view we have taken of the case. As to the suggestion made in the latter part of that assignment of error, that there should be a "provision in respect to descendants of James Brown who shall have received money arising from the proceeds of lands embraced in the deed of October 28, 1824, to George Clark and others;" that "under the distribution in Virginia of the estate of Robert Burton the elder, no portion should be paid to any of those descendants until there shall first be deducted what shall have been paid to them respectively in Kentucky;" that is a subject of which the court below will have control when the cause goes back to it, and which properly belongs to that court. Out of abundant *caution, if desired, the affirmance may be without prejudice to the right of the said court to make such decree in that respect as may seem to it to be proper.

Upon the whole, we are of opinion, that in the case of Brown's ex'ors, &c. v. Burton's adm'r, &c., there is no error in the decree appealed from, and that it be affirmed, without prejudice as aforesaid, and that in the other case, that of Burton v. Brown, &c., the appeal be dismissed as having been improvidently allowed.

The decree was as follows:

The court is of opinion, for reasons stated in writing, and filed with the record, that the second of the above named appeals was improvidently allowed from the said decree of the 28th of March 1848, and therefore it is decreed and ordered that the same be dismissed; and that the appellant pay to the appellees in that appeal, their costs by them about their defence in that behalf expended. And the court, for reasons stated and filed as aforesaid, is further of opinion, that there is no error in the said decree of the 13th of March 1869, and that the same ought to be affirmed. But it being suggested to the court that the descendants of James Brown, or some of them, may have received money arising from the proceeds of sales of land in Kentucky embraced in the deed of 28th of October 1824, to George Clarke and others, in the proceedings mentioned; and that, in that event, no portion of the proceeds of the trust estate in Virginia, embraced in the deed of the same date to Charles Copland and others, also in the proceedings mentioned, should be paid to any such descendants as may have so received money as aforesaid, until they shall have duly accounted for the money so received, in order that there may be a just and equitable apportionment of all the trust fund which may be realized under either of the said deeds among the parties entitled to the benefit thereof, according to their respective rights; the court *is of opinion that the court below may make any orders and decrees which may seem to it proper in that respect, but that out of abundant caution the said affirmance should be expressed to be without prejudice to the right of that court to make such orders and decrees. Therefore, it is further decreed and ordered that the said decree of the 13th March 1869, be affirmed, without prejudice as aforesaid, and that the appellants in the first of the above named appeals, do, out of the estate of their testator, James Brown, deceased, pay to the appellees in that appeal, their costs by them about their defence in that behalf expended. Which is ordered to be certified to the Chancery court of the city of Richmond.

Appeal of John Burton dismissed.

The decree affirmed.

21 *Thorndike & als. v. Reynolds & als.

March Term, 1872, Richmond.

1. *Wills—Powers—Validity.*—A husband who by his will gives property, real and personal, to his wife, absolutely, if she survives him, may by his will authorize her to make a will in his lifetime disposing of said property. And the wife having made a will in the lifetime of her husband, disposing of the property, and afterwards surviving her husband, and dying without re-executing or revoking her will, the same is valid to pass the property to her devisees and legatees.

**Wills—Construction—Powers.*—See *M'Camant v. Nuckolls*, 85 Va. 330, 12 S. E. Rep. 160; *Phillips v. Ferguson*, 85 Va. 516, 8 S. E. Rep. 241.

2. **Same—Same—Will Made in Pursuance of.**—Though the will of the wife does not say, in terms, that it is made in pursuance of the power vested in her by her husband's will; yet as his will was shewn to her by his directions, and she had no property of her own at the time, and the provisions of her will have obvious reference to his will, it will be held that her will was made in pursuance of the power.
3. **Same—Same—Construction.**—The clause in the will of the husband giving the power to the wife, must have been intended to take effect from its date; and so the will of the wife as an execution of the power will be intended to take effect from its date; though not to divest and pass the title in the lifetime of her husband and herself.
4. **Same—Revocation.**—The will of the wife was not revoked by the death of the husband, leaving the wife surviving him, and therefore it was not necessary for her to re-execute the will after his death.
5. **Same—Power—Extinguishment.**—Though the wife survives the husband, and thereupon becomes absolutely entitled to the property, this does not extinguish the power; but the will of the wife executed under the power, in the lifetime of the husband, not having been revoked by her, or re-executed, passes the property at her death to her devisees and legatees.
6. **Same—Same—Construction.**—H. dies, leaving a will and three codicils, in each of which he gives valuable property to his wife, if she survives him; and in some of these bequests he authorizes her to make a will in his lifetime to dispose of it. By the third codicil he gives her one-half of his residuary estate, and then adds: "And for all the purposes contemplated in my will and the codicils thereto, I authorize and empower my wife to make a will in my lifetime which shall be good and
- 22 "effectual in law and equity." This is a valid power to the wife to make a will in the lifetime of the husband, to dispose of the property bequeathed to her; and looking to the language employed, all the provisions of the will, and the surrounding circumstances, the intention of the testator was held to be that the power was not confined to the bequest of the residue, but to all the bequests to her in the will and codicils.

In June 1868, Sarah Thorndike, of Connecticut, filed her bill in the Circuit court of the city of Richmond, against Richard F. Reynolds, the executor of Ann Hubbard deceased, and others, to set aside the will and codicil thereto of Mrs. Hubbard, which had been admitted to probate in said court. The plaintiff was the sister, and one of the heirs at law and next of kin of Mrs. Hubbard; and the grounds on which she sought to set aside the will and codicil were, that they were made during the lifetime of Mrs. Hubbard's husband, and without authority, she having survived her husband.

An issue of devisavit vel non was directed, and the jury returned a special verdict, the important facts of which are as follows: William H. Hubbard, a native of the State of Connecticut, came to the city of Richmond in 1809, where he engaged in the mercantile business, and amassed a large estate. He married, and for forty years he and his wife lived together in Richmond;

and having no children of their own, they adopted Miss Anna Hubbard Gardner, a niece of Mrs. Hubbard, who was ever considered and treated by them as their daughter. In July 1859, when Mr. Hubbard was seventy-nine years old, he made his will. The second clause of his will is as follows: "2. Should my beloved wife Ann survive me, I give and bequeath unto her the sum of one hundred thousand dollars in stock of the State of Virginia, and of the city of Richmond, to be her absolute property, and with full power in her to dispose of the same by will. I also give, devise, and bequeath to her the lot of ground, dwelling-house, and improvements in which we now live, situate on Broad street, in the 23 city of Richmond, together *with all my household and kitchen furniture, library, paintings, and engravings, and wearing apparel, and I desire that no inventory or appraisement of said property, or any part thereof, be made."

By the third clause of his will, he gives to James H. Gardner, as trustee, for the benefit of his adopted daughter, Anna Hubbard Gardner, the sum of twenty thousand dollars in stock of the State of Virginia and the city of Richmond, for her separate use, free from the claim of any husband she might marry, with power in her to receive, control, and enjoy the interest and dividends, to direct the sale of the stocks and their re-investment on the same trusts, and with power in her to dispose of the same by will; and if she should die not leaving a will, the said trust fund should at her death belong to her next of kin, according to law.

The testator gave numerous legacies to his own relations, and others; and provided that should any misfortune reduce his estate below the amount of the specific legacies and bequests, then that his beloved wife Ann, and his much loved adopted daughter, Ann Hubbard Gardner, should receive in full their legacies, and that all the other legacies be curtailed and abated in proportion to the amounts given them. And he appointed his wife Ann Hubbard executrix, and James H. Gardner and Ambrose Carlton executors, of his will; and directed that they should not be required to give security.

In December 1859, Mr. Hubbard made the first codicil to his will. After various bequests to his relations and others, by the twelfth clause he gave to James H. Gardner, as trustee, his undivided part (being two-thirds) of a lot of ground, storehouse, &c., on Main street, in trust for the benefit of his adopted daughter, Ann Hubbard Gardner, upon the same trusts mentioned in the previous provision for her.

In the thirteenth clause he says: "In the event that my beloved wife Ann should 24 not survive me, I desire *and intend that the property in my will given and devised to her shall be disposed of according to what I believe to be her wishes." And he then proceeds to give to James H. Gardner, in the event that Mrs. Hubbard does not survive him, the house and lot, &c., which he had given to her by his will, and

fifty thousand dollars of the stock of the State of Virginia and the city of Richmond, in trust for his said adopted daughter; and the remaining fifty thousand dollars he gives to the brothers, sisters, and nieces of his wife.

In October 1861, Mr. Hubbard made a second codicil to his will. In it, beside legacies to other parties, he, in addition to the property given in his will to his beloved wife, devises to her, in fee simple, another house and lot on Broad street.

In March 1863, the testator made a third codicil to his will. By the tenth clause of this codicil he revokes the previous residuary bequests, and directs that the surplus of his estate, after satisfying the devisees and specific legacies, shall be divided into two equal parts, one of which parts shall belong in absolute property and estate to my wife, if she survives me, and, if not, shall pass and belong as she may by her will direct; and the other half shall be equally divided among my nephews and nieces at the time of my death, and to the descendants per stirpes of such of them as may be then dead. But if, at the time of my death, any of my said nephews or nieces, or their descendants, be an alien enemy, or so circumstanced that the legacy herein contemplated would be liable to sequestration, confiscation, or forfeiture, then it is my will that the share of said surplus, otherwise intended for such person, shall belong to my wife, if she survives me, and if she do not, shall go as she may by her will direct. "And for all the purposes contemplated in my will and codicils thereto, I authorize and empower my wife to make a will in my lifetime, which shall be good and effectual in law and equity but nothing *herein shall impair or affect that part of the thirteenth clause of the first codicil to my will, which relates to my adopted daughter."

Mrs. Hubbard, with full knowledge of her husband's will and codicils, which were exhibited to her by his request, in June 1863 made her will, and in August 1864 she made a codicil to it. By the first clause of her will she gives to James H. Gardner, in trust for her adopted daughter, Ann Hubbard, then married to Richard F. Reynolds, the house and lot on Broad street in which her husband and herself then lived, with the furniture, &c.; also the other house and lot on Broad street, given to her in the will of Mr. Hubbard; fifty thousand dollars in stocks of the State of Virginia or the city of Richmond, and pew No. 64 in St. Paul's church, which is also given to her in Mr. Hubbard's will: upon certain trusts, and with the powers set out in the clause.

By the second clause of her will she says, if my husband die before me, I give to James H. Gardner, as trustee, fifty thousand dollars, in stocks of the State of Virginia or city of Richmond, to be divided and appropriated as follows: And she then distributes this sum among her brother, nieces, and nephews. There are other legacies given among her relations, and a residuary

bequest in favor of her adopted daughter Mrs. Reynolds.

All the property and estate owned by Mrs. Hubbard, and which her will and codicil purport to dispose of, came to her from her husband, Wm. H. Hubbard, under his will and codicils. Wm. H. Hubbard died in May 1865, and in October of the same year his will and the three codicils were admitted to probate in the Circuit court of the city of Richmond. After his death Mrs. Hubbard kept the papers purporting to be her will and codicil without change, and frequently recognized them as her will, and spoke of them as such; and this was repeated in her last sickness. She died on the 15th of October 1865, and in November following her will and *codicil were admitted to probate in the Circuit court of the city of Richmond.

The plaintiff having died, the suit was revived in the name of Wm. H. Thorndyke and others, her heirs at law and next of kin; and came on to be finally heard on the 16th of July 1870, when the court held that the papers which had been admitted to probate as the will and codicil of Mrs. Hubbard was her will, and dismissed the bill with costs. Whereupon the plaintiffs applied to this court for an appeal, which was allowed.

Crumpp, Page & Maury, for the appellants. R. T. Daniel, and Ould, for the appellees. Anderson, J. This is a proceeding by bill in chancery, under the statute of wills, to contest the validity of paper writings purporting to be the last will and testament of Mrs. Ann Hubbard deceased, which had been admitted to probate in the Circuit court of the city of Richmond as her last will and testament. An issue devisavit vel non, as required by the statute, was directed to be tried by a jury. Upon the issue the jury found a special verdict; whereupon the court gave judgment for the defendants, and decreed that the bill of the plaintiffs be dismissed with costs: from which decree an appeal was allowed to this court.

Two questions are raised upon the record in this cause, which comprehend the whole case: I. First. Can a husband devise or bequeath to his wife an estate, and empower her by his will to make her will in his lifetime, and designate the person, or persons, to whom the estate shall pass at her death, if she survive her husband, or, at his death, if he survive her?

Our statute of wills empowers a married woman to make a will, in the exercise of a power of appointment. But it is contended that such power cannot be conferred by the will of the husband, to be exercised by the wife *in his lifetime, because the property so devised, and upon which the power of appointment is to operate, is his while he lives, and may be otherwise disposed of by him, by a change in his will, which is ambulatory and revocable.

Under our statute of wills, which declares that the power of making a will "shall extend to any estate, right or interest to which the testator may be entitled at his death,

notwithstanding he may become so entitled subsequently to the execution of the will" (Code of 1860, ch. 122, § 2, p. 572), an estate devised by A to B, who is *sui juris*, will pass to C, by the will of B, though made in the life time of A, provided A dies without revoking the devise, and B survives him, and then dies without revoking his will. Is there any difference as to the effect of a will made by a married woman, if she has authority to make a will? Within the power given to her by the statute, her will is as effectual to pass the estate as if she were a feme sole.

But in this case, the wife having no separate estate, could only make a will in the exercise of a power of appointment. If the ambulatory and revocable character of the will does not incapacitate the devisee to dispose of a devise made by it to him, by his will, in the lifetime of the devisor, I can perceive no reason why the donee of a power under the will may not exercise the power of appointment by will in the lifetime of the testator. In either case, the efficacy of the devise by the will of the devisee, or of the execution of the power of appointment by the donee of the power, depends upon the testator dying without making a revocation. In the one case, the will of the devisee is valid to pass the estate to his devisee if his devisor dies without making a revocation, he surviving. In the other, the appointment is good and effectual if the donor of the power dies without revoking the power, whether the donee of the power survives him or not. It is difficult to

28 perceive a *reason why the owner of an estate may not by his will grant to another the power of appointing in his lifetime the succession to that estate, after his decease, if he can bequeath the estate directly to the person whom he intended to be the appointee. It would seem to be reasonable that, when the donee has exercised the power of appointment by will, it should be as valid to pass the estate to the appointee as if it had passed to him by the will of the devisee of the donor of the power. In both cases his title and succession to the estate depends upon the donor dying without revocation of the power in the one case, or of the devise in the other. There is this difference, however: If the donee of the power dies in the lifetime of the donor, having executed the power, it is valid to pass the estate at the death of the donor; but, if the testator survives his devisee, the estate cannot pass to his devisee, but lapses into the residuary estate, or passes to the issue of the first devisee. So that an appointment by the will of the donee of the power would be a more certain means of investing the title in the appointee than a devise by the devisee of the donor.

But it may be objected, that the donee, after executing the power by her will, may revoke the same before, or, if she survive him, after the death of her husband; and that consequently the will of the donor can vest no right in the appointee, except at the will and pleasure of the donee of the

power. But it will be perceived, that if this would invalidate the power conferred by the will of the donor, it would invalidate every power of appointment, for its exercise in every case depends on the will and pleasure of the donee of the power.

But it is further contended, that the will of the husband cannot confer the power in his lifetime, because it must be given directly, by conveyance to the donee of the power, or by creating a seisin in a third person, to serve and feed the uses, to be raised by the exercise of the power, so that the power may work and take effect
29 *under and by means of the instrument which creates it; for the act of appointing under the power merely gives force and effect to the instrument creating it, by which alone the appointment has effect.

It is true, that where the power has been executed, the appointee holds directly from the donor of the power, under the instrument creating the power; but it is not perceived how it would be necessary to create a seisin in a third person, to serve and feed the uses to be raised by the exercise of the power, in order to vest the estate in the appointee. If the appointee takes by virtue of the execution of the power by the will of the wife, she takes and holds under the will of the donor, which was the instrument creating the power. Nor, to pass the title to her in this way, was it necessary to create a seisin in a third person. The testator was seised until his death. If the power of appointment was exercised by the wife, by making and publishing her will in his lifetime, and he survived her, the estate passed, immediately on his death, to the appointee. If she survived her husband, upon his death she was immediately invested with the fee *sub modo*, and held it until her death, when it passed under her will, which had not been revoked, to her appointee; so that there was no necessity to create a seisin in a third person to serve and feed uses to be created by the exercise of the power. These conclusions seem to be consonant with reason, and they are not without the sanction of authority.

Bright, in his able treatise on Husband and Wife, says, that a will made by a wife of her husband's residuary estate—bequeathed to her by his will—under the power given to her by his will, to dispose of it by her testament, made either in his lifetime, or afterwards, is valid, 2 Bright on Husband and Wife, p. 68. And in support of this principle, he relies upon *Scammell v. Wilkinson*, in Kings Bench, 2 East., p. 552, and *Stevens v. Bagwell*, in the High Court

30 of Chancery, 15 Ves. R. *139, 155, as direct authority. But it is contended by the able and learned counsel for the appellants, that the principle in question was not involved in those cases, and that they do not sustain the appellee in this pretension. Whilst it is true the principle was not contested in those cases, and was not directly in issue, we think it was indirectly involved in both cases. It was admitted to

be the law by the able and distinguished counsel on both sides, and received the express sanction and approval both of the Kings Bench and the High Court of Chancery. In *Stevens v. Bagwell*, Sir William Grant says, referring to the case of *Scammell v. Wilkinson*, "It was there held that the Spiritual court ought not to grant a general probate; but the court thought the probate was more limited than was necessary; for they say that as Mrs. Pearce, besides what she could dispose of by the will of her husband, to which the limited probate is confined, had the power to make a testament and appoint an executor of the goods which she had as executrix of her brother, to which that probate does not extend, the probate in this case may be more extensive than what the plaintiffs insist that it should be." They insisted that it should be limited to the estate bequeathed to her by the will of her husband. "My opinion is (said Sir Wm. Grant), that this will of hers had no operation whatsoever, except to pass what she took under her husband's will, and to transmit the representation to Wm. Stevens, to her own executors." We think these cases do sustain the proposition, that a husband may, by his will, give an estate to his wife, and a power of appointment to direct the course of its succession, to be exercised by her will, executed in his lifetime. And so have they been regarded, not only by Bright, but by Roper and other eminent text writers and jurists; and we have found no case to the contrary.

The case of *Morwan v. Thompson*, 31 Hagg. R. 239, is *to the same effect, and is directly in point, at least as to the validity of the execution of the power by the wife, by her will, made in the lifetime of the husband. In that case the will of the wife was made in the lifetime of her husband, under an ante-nuptial settlement, and by authority also of her husband's will, executed during coverture, by which he made an additional settlement on her. The wife survived the husband, and died without re-executing her will after the death of her husband. Sir John Nicholl says, "She was testable when she made the will, and when she died—both under the settlement and under her husband's will—there are no alteration of circumstances from which an intention to revoke can be presumed." Our conclusion, therefore, is, both upon reason and authority, that the first question must be answered in the affirmative.

II. The second question raised by this record is, if such power can be conferred, has it been validly executed by the wife in this case? Are the paper writings in question a valid execution of the power?

1st. It is contended, that because a will cannot take effect to pass the title until the death of the testator, the will of Mrs. Hubbard could not be an execution of the power until her death, which occurred subsequently to the death of her husband, and that therefore the power was not executed by her in the lifetime of her husband.

The power granted was to make a will, and she made and published her will in the lifetime of her husband. No other act was necessary to be done by her to complete the execution of the power. It was an execution of the power, though it could not pass the title in *præsentia*, and not until the death of Mrs. Hubbard and her husband in *futuro*. But if the will of Mr. Hubbard as to the bestowment of this power, and Mrs. Hubbard's will as to the exercise of the power, can be construed to speak, the former from the date of his last codicil, and

32 *the latter from the date of her will, the making and publishing of her will by Mrs. Hubbard was a complete execution of the power on her part, subject, of course, to her right of revocation. But nothing more being necessary to be done by her to complete the execution, and it being sufficient to pass the title at her death, and after the death of her husband, from the donor of the power to the appointee, as designed, it was a complete execution. Under our statute, when a will may be construed to speak and take effect, is, in a qualified sense, a question of intention. The statute provides that it shall be construed to speak and take effect, as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. Code of 1860, chap. 122, sec. 11, p. 573. It plainly appears, we think, from the will of Mr. Hubbard, that he intended the clause of his will, by which he grants to his wife the power to make a will in his lifetime, should speak and take effect immediately, and not be postponed until his death. It is equally clear Mrs. Hubbard intended that her will should speak and take effect, as an execution of the power, from its date, though not to divest and pass the title in the lifetime of her husband and himself. We are of opinion, therefore, that the position, that the power has not been executed, because it was not executed in the lifetime of Wm. H. Hubbard, and during coverture, cannot be maintained.

2d. Because the paper writings in question were not re-executed and re-published, as and for the last will and testament of Mrs. Hubbard, after the death of Mr. Hubbard. In *Morwan v. Thompson*, supra, Sir John Nicholl says, "There is no rule of law, of which I am aware, that holds that a will validly made during coverture, shall become invalid merely by reason of the husband's death." But it seems to me that we need not pursue this investigation farther than to look to our statute of wills,

33 which declares what shall be a revocation *of a will. Section 7 makes marriage, except in the case specified, a revocation.

Section 8 declares that no will or codicil shall be revoked, except in the cases specified, to wit: revocation by marriage, as set out in the preceding section, "or by a subsequent will or codicil," or by some writing declaring an intention to revoke the same and executed in a manner in which a will,

is required to be executed, or by the testator, or some person in his presence and by his direction, cutting, tearing, burning, obliterating, cancelling, or destroying the same, or the signature thereto, with the intent to revoke." Code of 1860, chap. 122, sec. 7, 8, p. 573. This section enumerates every mode by which a will validly made may be revoked; and it authoritatively declares, that "no will or codicil, or any part thereof, shall be revoked" in any other way. And the death of the husband, as a revocation of the will of his wife validly made in his lifetime, is not embraced in this enumeration, and must, therefore, be excluded. But if the will of the wife, made in the lifetime of the husband, is not revoked by his death, it cannot be necessary to re-execute and re-publish it after his death to preserve its vitality.

3d. Because the succession of the donee of the power, by the death of the husband, to the property over which the power was to ride and operate, must work an extinguishment of the power. Mr. Roper, in his work on husband and wife, 2 Rop. Hus. and Wife, p. 102, Citing Clere's Case, 6 Rep. 17 b.; Cox v. Chamberlain, 4 Ves. R. 631; Roach v. Wadham, 6 East. R. 289; says, "great difference of opinion has prevailed upon the merger of the power, when the fee subject to it was limited to the donee of such power. Some of the cases have determined, that the power merged in the fee: while others, that the fee vested in the donee sub modo, viz: subject to be divested on a due execution of the power. This

latter, he says, appears to be the right determination. In *support of this opinion he cites very high authority." And herewith Sir Edward Sugden agrees. He says, Lord Ashburton thought the separate existence of the power was incompatible with the ownership of the fee. But it is now settled that the power is not merged. 1 Sugd. on Powers, p. 105. From Sir Edward Clere's case to that of Maundrell v. Maundrell, 10 Ves. R. 246, it had been considered clear, that the power in question was not absorbed by the fee. Lord Chancellor Eldon held clearly that the power might well subsist with the fee. And Mr. Sugden says, his authority has settled the point. Ibid, p. 109, 110. Mr. Spence says, in his work on equitable estates and interests,—If an estate be conveyed to a married woman in fee, with a superadded power of appointment, though it was formerly held that the power was merged in the fee, it is not settled that the wife has the power to appoint the fee. 2 Spence Eq. Ju. of the court of Chancery. The question arose in this court in the case of Shearman's adm'rs v. Hicks & al., and was decided in the same way, 14 Gratt., 99.

4th. And fourthly and finally, that the power exercised by Mrs. Hubbard is not within the purposes of the powers granted, and therefore invalid. It is contended that the power only extended to the tenth clause of the third codicil, which made provision for the residuary estate, in certain events

named therein, and was only designed to prevent lapses. But that had already been provided for, by directing that, in the event of his wife's dying before him, those interests should pass and belong as she by her will should direct.

But he adds, "And for all purposes contemplated in my will and codicils thereto." Not only in relation to his residuary estate, "but for all purposes contemplated in his will and codicils"—implying that there were other purposes contemplated for which additional powers were necessary, and which were not confined to the tenth clause of the third codicil—"for all the purposes contemplated *in my will and codicils," language could not be more comprehensive, "I authorize and empower my wife to make a will in my lifetime."

In reading a will we should read the thoughts and intents of the testator. The meaning of the testator is what we want; and we may transpose words and sentences, or supply them, if necessary, to get at it. The intention of the testator is the great desideratum. And whatever was his intention, as disclosed by his will rightly construed, so as to speak the mind of the testator, ought to be carried out, if lawful and possible.

Then what did the testator intend by the clause under consideration? It seems designed to complete and perfect the whole of his testamentary disposition, including will and codicils. Upon a careful examination and analysis of the sentence, I think there can be no uncertainty as to his meaning; and that without transposing or supplying words or sentences.

Whatever ambiguity there may be as to other expressions, there is none as to this; that he expressly gives his wife power to make a will in his lifetime. A will of what? Unquestionably of the property he had previously given to her, in his will and codicils thereto. She had no other property. The power to make a will which he gave to her, necessarily imports a power to make a testamentary disposition of all the property which he had devised and bequeathed to her by his will and codicils. And this he empowered her to do in his lifetime.

This power he gave her for all the purposes contemplated in his will and codicils. If for all, then for a part—for any of those purposes. He had given her power expressly to dispose of a particular bequest by will, the legacy of one hundred thousand dollars in stocks. And in this very clause, he had provided, that if she did not survive him, the interest which he had given her in his residuary estate, should pass and be-
36 long as she might by *her will direct; which necessarily implies that she

might make a will, which may or may not be limited to the case supposed—her not surviving him. But now, in this final sentence of his testamentary disposition, to carry out all the purposes contemplated in his will and codicils, and to remove all ambiguity, he gives her a general power to make a will in his lifetime. It is not de-

pendent upon any condition of her surviving him, or of his surviving her. The language implies no such condition or qualification; and such construction is repugnant to it. It is a general power to make a will in his lifetime; to dispose of the property which he had devised and bequeathed to her; that is, to designate the persons to whom it should pass at her death, if she survived her husband, and at his death, if he survived her, according to the purposes contemplated in the will and codicils. Those purposes were evidently, that the husband should not be divested of the property in his lifetime; and that at his death it should pass to his wife, if she survived; and if not, to be disposed of according to her wishes. Whether she survived him or not, it was his wish and purpose that the property should pass and belong according to her wishes. If she survived him, the devises and bequests which he had made to her would give her the power of disposal, and therefore according to the purposes contemplated in his will and codicils. If she did not survive him, he expresses his purpose, in the first sentence of the thirteenth clause of the first codicil, in these words, "I desire and intend that the property in my will given and devised to her, shall be disposed of according to what I believe to be her wishes; and as we have seen, such were his purposes, if she should survive him; for such is the legal effect of the devises and bequests he made to her. And now by this general clause, at the close of the last codicil to his will, to secure the execution of these

37 purposes contemplated *in his will and codicils, he gives her power to make a will in his life time. Nearly four years had elapsed, when he made this codicil, since he had executed his will, and he was still living, and might yet live a good many years. If the exercise of the power by his wife, to direct the succession of the estate, which he had given to her, was postponed until after his death, it might never be done. If it was not done in his life time, it could not be done by her, if she should not survive him. And if she survived him, he may have been admonished, by her advancing years and increasing infirmities, that she might then be incapable of making a will. This must have been a subject of much solicitude to both of them, as they had adopted Anna H. Reynolds from her birth, and had for her the affection of parents for their own child. It was undoubtedly well understood between them, how Mrs. Hubbard would direct the succession; and that her wishes and intentions, were exactly in accord with his own. They thought and felt alike on this subject. But, whatever were the considerations operating on Mr. Hubbard's mind, it is not material. We have his act. Here is his will, by a clause in which he, unequivocally and unqualifiedly, empowers his wife to make a will in his lifetime for all the purposes contemplated in his will and codicils; the chief of which was, as touching the property he had devised and bequeathed to Mrs. Hub-

bard, that she should have the power of disposing of it, and directing its succession. If she did not survive him, the power had as yet been only partially given; if she did, the devises and bequests, according to their legal effect, would invest her with that power; but if she did not exercise that power of disposition until after his death, it might never be done; she might then be incapable of doing it. For these, or other reasons, which may have influenced his mind, he came to the conclusion, (and I think

38 a very *prudent and judicious determination, as this case shows) to authorize her to exercise that testamentary power in his lifetime; and to designate who shall succeed, in any event, to the estate he had given to her. It seems to me that this is the plain and sensible interpretation of this clause of his will, and such as its language clearly imports.

Again, that he intended his wife should have power to make a will, which should have effect in the event that she survived him, is conclusively shown by the provision in the second clause of his will, before referred to. He bequeaths to her a legacy of \$100,000 in stocks, in the event that she survives him. It is hers only in that event; and yet, in the same sentence, he gives her expressly power to dispose of it by will; thus authorizing her to make a will which would take effect if she survived him.

The only disability to make a will was the disability of coverture. From that she is relieved by the act of her husband. That disability being removed, she makes and publishes her will in the presence of her witnesses, and with all the solemnities required by law. There is no reason why she should make it over again after her husband's death. It was executed strictly within the terms of the power granted.

And such is the cotemporaneous construction given to it by the testator, the testatrix, and the draughtsman of both wills, as shown by the will of Mrs. Hubbard. Both wills were probably drawn by R. R. Howison, a well known attorney in Richmond, who is a subscribing witness to the will and each of the three codicils of Mr. Hubbard, and to the will of Mrs. Hubbard. Her will seems to have been made at the suggestion of her husband, as it is shown that his will and codicils were exhibited to her by his request; and it was made with his assent, as shown by his will, which author-

39 ized her to *make a will in his lifetime. He lived nearly two years after Mrs. Hubbard's will was executed, and it does not appear that he ever made any objection to it. And what is still stronger evidence of his approbation, it is in harmony with his own will, and gives the succession to the chief part of the estate he had given to his wife to his much loved adopted daughter. Mrs. Hubbard's will was written a short time after Mr. Hubbard's was completed, and, as we presume, by the same draughtsman; and in the very commencement sets forth the object and purpose of her will, consistently with the power given

as we construe it: "I make and ordain this my last will and testament, to take effect at my death, if I survive my said husband, and at his death if he survive me;" and then disposes of the property given to her by her husband's will in harmony with it. I conclude, therefore, that these facts show that the cotemporaneous interpretation of the clause in question in Mr. Hubbard's will by the testator, the testatrix, and the intelligent draughtsman of both, is in agreement with ours: and contemporanea expositio fortissima est in lege.

I am satisfied that the will of Mrs. Hubbard was made in the exercise of the power given to her by her husband's will; that the power she exercised is clearly embraced in the terms and spirit of the power granted; and that her husband was well satisfied with the disposition she made, and so departed this life in peace, believing that the fruits of his long and useful life would be enjoyed by those upon whom he intended to bestow them, especially his "much loved adopted daughter, Anna Hubbard Reynolds," who, next to his "beloved wife," was the chief object of his affection and bounty; and I am unwilling to divert it from that channel and course of succession, and disappoint the wishes of the testator and testatrix, unless the law clearly and imperatively requires; which I do not

40 think it does. Where there is *doubt in this case, if it exists, I think it should be resolved in favor of the will. Upon the whole I am of opinion that there is no error in the decree of the Chancellor, and that it should be affirmed.

Moncure, P., and Staples, J., concurred in the opinion of Anderson, J.

Christian, J., concurred in the decree affirming the decree of the court below.

Decree affirmed.

41 *De Rothschilds v. The Auditor.

March Term, 1872, Richmond.

Liability of Present State Government for Acts of Richmond Government.—Between May and November 1860, D. deposited tobacco, for inspection and storage, in the public warehouse at Richmond, and paid the inspection fees. The tobacco remained in the warehouse until March 1863, when the warehouse was accidentally consumed by fire, and the tobacco was burned. The present State government is not responsible to D. for the loss.

This was a bill filed in the Circuit court of the city of Richmond, by De Rothschild Brothers against the Auditor of Public Accounts, to recover the value of two hundred and fifty hogsheads of tobacco, which had been destroyed by fire on the 10th of March 1863, in the public warehouse in the city of Richmond. The Auditor filed his answer,

***Liability of Present State Government for Acts of Richmond Government.**—See *Com. v. Chalkley*, 20 Gratt. 404; *Robinson v. Rogers*, 24 Gratt. 319. The principal case is distinguished in *Dinwiddie County v. Stuart, Buchanan & Co.*, 28 Gratt. 526.

and the parties agreed the facts; and dispensing with a jury, submitted the case to the court.

From the facts agreed, it appears that the "public warehouse" in the city of Richmond belonged to the State of Virginia, from the time of its erection until after its practical destruction by fire in March 1863. That between the 13th of May 1860, and the 2d of November in the same year, the plaintiffs deposited in said warehouse, for inspection and storage, three hundred and seventy-eight hogsheads of leaf tobacco; that said tobacco was received by the regularly appointed and qualified inspectors of said warehouse, and was actually inspected thereat; the inspectors giving, in the usual form, a tobacco note for each hogshead at the time at which it was received; and that the plaintiffs have never sold the tobacco, and still hold the tobacco

42 *notes. That said tobacco remained in said warehouse until the night of the 10th of March 1863, when the warehouse was partially destroyed by fire, and two hundred and fifty hogsheads of said tobacco were consumed; and that each of said hogsheads of tobacco so destroyed was then worth \$105.88 in gold coin, making an aggregate of \$26,470.

It appears, further, that the inspectors who received and inspected the tobacco continued in office during the year 1860; that inspectors were regularly appointed and qualified for the year 1861; but that no inspectors were appointed for 1862 or 1863 by the restored government of Virginia; but that the inspectors of 1861 were re-appointed for these years by the government at Richmond, and qualified and acted as inspectors at said warehouse, for the years 1862 and 1863, under the Richmond government. It appears, further, that the fees for inspection were paid to the inspectors at the date of the inspection; that no other charges than for inspection had been paid on said tobacco, and that nothing has been received on account of the same by the restored government of Virginia; that tobacco in a warehouse, by universal custom in Richmond, is held bound for all charges due the State, which are to be paid when the tobacco is removed; and that all unpaid charges due the State on said two hundred and fifty hogsheads of tobacco amount to \$462.50, as of the 10th of March, 1863.

It appears, further, that the said warehouse consisted of large connected sheds, one story in height, except that over a portion thereof a second and third story had been built, which were not and could not be used for the inspection or storage of tobacco. That these rooms were at the time of the fire occupied by an officer of the Confederate States army, with the sanction of the Richmond government; and the fire originated in the rooms in the second story, by accident or carelessness, and not by design; *and at the time of the fire the inspectors of the warehouse remained in the exclusive charge and control of the first story. That from the 17th of

April 1861, to the 3d day of April 1865, the city of Richmond, and the public property of the State therein, was under the control of the Richmond State government; and that the authority of the government of Virginia at Wheeling, and afterwards located at Alexandria, was not recognized or enforced in said city of Richmond. And that the Richmond government was, between the periods aforesaid, aiding and assisting in the war against the Government of the United States.

The cause came on to be heard on the 17th of November 1870, when the court dismissed the bill with costs. And thereupon the plaintiffs applied to this court for an appeal, which was allowed.

Ould & Carrington, for the appellants.

The Attorney-General, for the Commonwealth.

Staples, J. This case brings before the court the question of the liability of the State for plaintiffs' tobacco, stored in a public warehouse in the city of Richmond, and destroyed by fire on the 10th March 1863. It is a question of novelty, and considerable difficulty. As there is no adjudged case, no precedent, to guide the court in its decision, we must act according to our best convictions of the principles of law controlling the rights and obligations of the parties.

This court held, in Chalkley's case, 20 Gratt. 404, that the present government is not legally responsible for any debt contracted, or liability incurred, by the authorities having control of the State after the ordinance of secession was adopted. This decision has been the subject of some complaint and criticism. It is easy, however, to demonstrate that this is not the Richmond government, nor the successor to that government, and consequently
44 *that it is not answerable for the debts contracted by that government. It is well known that on the 19th June 1861, a convention assembled at Wheeling, adopted an ordinance reorganizing the State government, providing for the election of officers, prescribing an oath of fidelity to the Constitution of the United States and of the State, and declaring vacant all offices upon the failure of the incumbents to take the oath so prescribed.

The government thus restored, as it was termed, continued until the adoption of the Alexandria constitution, on the 12th February 1864. Under this constitution a legislature assembled on the 19th June 1865, in the city of Richmond. It passed an act for the election of members of the General Assembly, and for taking the sense of the people in relation to the disqualifications for office imposed by that constitution; and it required that all persons voting in such election should take an oath to uphold and defend the government restored by the convention at Wheeling. Under the authority of this act, the legislature of 1865 and 1866,

and 1866 and 1867, assembled in the city of Richmond. The various acts passed by that body constitute important and valuable laws for the adjustment of many perplexing questions growing out of the war.

The government thus organized at Alexandria continued in existence until superseded by the reconstruction laws under which the present constitution was framed, and adopted by the people. How is it possible, in the light of these facts, to maintain that the present government is identical with, or is the successor to that Richmond government? Besides all this, the constitution expressly prohibits the payment of any debt or obligation created in the name of the State of Virginia, "by the usurped and pretended State authorities assembled at Richmond during the late war." It is not our province to discuss the propriety of this provision, or the language in which it is expressed. We are sworn to expound

45 the *constitution and laws as they are written, and not as we would have them. The Richmond government may have been the true and lawful government of Virginia, as maintained by some. No doubt it represented the views and wishes of a large majority of the people; but neither its contracts nor its liabilities can impose any legal obligation upon the State which the courts can recognize, under the present constitution and laws.

In Chalkley's case, the contract was made with the Richmond authorities, and the credit given to them or their agents exclusively; and this court held that the present government could not be held accountable for the debt thus contracted. In the present case, it is true, the original contract, if such it be, was made in 1860 with the regular State government; but we are to consider the true import and operation of that contract, and how far it was modified or affected by subsequent events. This renders necessary a brief consideration of the statutes in regard to the inspection and storage of tobacco. They are too numerous and complex to justify a citation in this opinion. It is clear, however, that they contemplate in the first instance an inspection and storage for a year; in which case the owner is not responsible for the payment of a rent. He may at the expiration of that period, or sooner, remove his property upon the payment merely of the officers' fees for inspection, and the State charges. These charges and fees amount to sixty cents for each hogshead of tobacco inspected, stored, or delivered, and a special charge of thirty cents upon the hogshead, supposed to be intended for the risk of insurance. They are to be paid, as is conceded, whether the deposit be for inspection merely, or inspection and storage, embracing one day or one year. But this compensation did not embrace a longer time than the year. At the expiration of that period, the State might have repealed its statutes, or discontinued the arrangement, without any just cause of complaint. At the
46 date of the *inspection, or storage, it

was bound to know the owner might continue the same for the year; but it was not required to know that he would exceed that period. If the year being ended, he elected to continue the storage, he might so do for three years, inclusive of the first year. In that event, however, a new contract arose—a new charge was made of five cents on the hogshead per month, in the nature of a rent for the use of the warehouse upon such extended storage. In this case the storage commenced between the 10th May and the 2d November 1860. Upon the expiration of the year, they elected to continue the use and occupation of the warehouse. At that time the government with which the original contract was made had been overthrown, and another established in its place, officers owing allegiance to, and deriving their authority from, the new government, had the management and control of the warehouse in which the tobacco was stored. The Confederate authorities had also established their capital in this city; their officers and employees were in the occupancy of every available building, public and private, and their armies quartered within and without the city limits, in every direction. Under these circumstances the owners of this tobacco thought proper to continue its storage indefinitely in a warehouse not in the possession of the government with which they had contracted, nor under the direction of officers appointed by, and responsible to, that government. They made this election *flagrante bello*, and they persisted in it from month to month, and year to year, although the city was in continued danger of bombardment and conflagration. The plaintiffs must have had some information of the extraordinary events occurring here; they must have been apprised that war existed; that old governments were being overthrown, and new ones struggling into existence. If they were ignorant of these matters, it was their fault or their misfortune. By the exercise of a very moderate share of diligence, 47 they *might easily have informed themselves of occurrences which so much concerned them. The French consul resided in this city throughout the war. He should have kept them advised, and no doubt did, of the condition of affairs in this State. It is true, that the blockade would probably have prevented the removal of the tobacco from the country; but there was nothing to interfere with its storage in some other and more secure place, under the supervision of the plaintiffs' own agents. It is to be presumed that they preferred to continue the storage of the tobacco as it was, and to take the chances of its preservation. They must be held to have done so with full knowledge of the consequences; and they should be willing to bear the loss resulting from their adventure.

The learned counsel for the plaintiffs, in their petition for an appeal here, say that the State of Virginia insured against its own acts of omission and commission. It

insured against any loss by fire in consequence of its trotting itself off to Alexandria or Wheeling. It insured against any damage by fire in consequence of its abandonment, even if such a case were made out. All this might be true if the State had made a contract of insurance for any specific period beyond the first year of the storage, founded upon a valid consideration paid or stipulated to be paid for such risk. But I have already shown, or attempted to show, there was no such contract. The plaintiff's tobacco at the time of its destruction had been on deposit nearly three years. For all this they had only paid certain inspectors' fees at the date of the inspection. When they elected to continue the storage beyond the year, they well knew the government had been re-established at Wheeling. This fact was made known through its laws and its proclamations, through the recognition of the Federal Government, with which plaintiff's government was in friendly and constant communication.

But the position of the counsel is 48 not sound in other *respects. The insurance of the State, if such it be, only extended to losses by fire. It did not comprehend the damage or loss of the tobacco occasioned by floods, tempests, or captured by hostile armies or superior powers. With the single exception of the promise of indemnity in case of fire, the position of the State was that of any other bailee for hire. Such bailee is only liable for the use of ordinary care and common prudence in the preservation of the property intrusted to him; but he is not an insurer in any sense of that term. There is no foundation for the pretension that the State insured against its abandonment in the face of overwhelming numbers. It insured against fire, but not against capture. Even as against insurance companies, to which the most stringent rules are always applied, it is well settled, that if there be an insurance against fire, and an exception by the assured in favor of capture, and the vessel is captured, and before she is delivered from that peril she is afterwards destroyed by fire, the loss is properly attributable to the capture alone. In *Magoun v. New England Marine Ins. Co.*, 1 Story R. 157, 164, Mr. Justice Story said it would be an over refinement and metaphysical subtlety to hold otherwise. In the case of *Dale v. New England Mutual Marine Ins. Co.*, 6 Allen R. 373, 395, Bigelow, C. J. said, "there is no stipulation in the policy that the insurers were to remain liable after the ship had passed into the hands of her captors. * * * The cases in which it is held that where the insured is liable for capture, if followed by condemnation or detention for a prescribed period, and a subsequent abandonment, he is also liable for any supervening peril occurring during the intermediate period, are not applicable to cases like the present, where the risk of capture is not assumed by the underwriters. See, also,

Lewis v. Springfield Fire and Marine Ins. Co., 10 Gray R. 159.

These views are founded on good sense and upon sound reasoning. I do not perceive why they do not equally apply to this case. If the tobacco had been captured and appropriated by the Confederate government, or captured and destroyed by Federal soldiers, it will scarcely be maintained that the State is responsible for a loss occurring under such circumstances. As a general rule, it is true, where the property is destroyed by fire, the insurer is liable, though it were absolutely certain it would have been afterwards captured but for such destruction. But where the capture is made, and the damage from fire is the consequence of the capture, to impose the loss upon the bailee is to make him an insurer against both capture and fire. In this case the injustice is the more palpable because the owners, after the warehouse was taken by the Confederate government and appropriated by the Confederate authorities, might have taken possession of their property without the least difficulty.

The condition of the country at the time of the destruction of this tobacco, and indeed long before, is within the recollection of all. In the language of Mr. Justice Nelson, *Mauran v. Insurance Company*, 6 Wall. U. S. R. 14, a government in fact was erected greater in territory than many of the old governments of Europe, complete in the organization of all its parts, containing within its lines more than eleven millions of people, and of sufficient resources in men and money to carry on a civil war of unexampled dimensions; their vessels captured recognized as prizes of war, and dealt with accordingly; their property seized on land referred to the judicial tribunals for adjudication; their ports blockaded, and the blockade maintained by a suitable force, and duly notified to neutral powers, the same as in open and public war.

No one can for a moment entertain the opinion that either the plaintiffs or the State ever contemplated this state of things. The compensation agreed to be paid had no reference to such a risk. The State could hardly have been expected, for a charge of five cents per month on each hogshead of tobacco, to assume all the hazards of war, invasion, and conquest. It did not undertake, it was not asked to insure, against any peril except that of fire. But as the fire occurred long after the warehouse had been wrested from the possession of the insurer by overwhelming numbers, the loss must be regarded as attributable to the capture, and not by any reasonable indentment within the terms of the contract. For these reasons I am of opinion the judgment of the Circuit court should be affirmed.

The other judges concurred in the opinion of Staples, J.

Decree affirmed.

51 *Hodge's Ex'or v. First Nat. Bank, Richmond.

March Term, 1872. Richmond.

1. **Presidents of Corporations—How Far Agents Ex Officio.**—The president of a bank has no authority, *virtute officii*, to make any admissions which will release the maker of a note to the bank from his legal responsibility created by the note.

2. **Trial by Court without Jury—Appeal—Effect.**—In a case in which a jury is dispensed with, and the case is submitted for trial to the court, upon a bill of exceptions to the judgment, all the evidence is to be inserted in the bill, and in the appellate court it will be considered as on a demurrer to the evidence.

3. **Same—Same—Evidence.**—In such a case, when the judgment is for the plaintiff, and the defendant excepts, if it appears that a witness for the defendant, on his examination in chief, makes a statement of a fact in one way, and upon his cross-examination makes it in a materially different way, the first statement is to be rejected, and the last is to be taken as correct.

This case is sufficiently stated in the opinion of Moncure, P.

B. T. Johnson, and Page & Maury, for the appellant.

Johnson & Williams, for the appellee.

Moncure, P. This is a supersedeas to a judgment rendered by the Circuit court of the city of Richmond on the 11th day of May 1871, in an action of debt, in which the First National Bank of Richmond was plaintiff, and John L. Hodge, executor of William L. Hodge, defendant. The action was brought on two promissory notes, each of them payable on demand, and signed by William L. Hodge; one of them dated April 5th, 1867, payable to the order of "S. A. Glover, cash'r," for \$3,700, "for value, being for a check Mr. Fant, pres't, gave me on Lockwood & Co., New York;" and the other dated 27 July 1867, payable "to the order of S. A. Glover, cashier, at the First National Bank, Richmond," for \$2,037.74, "for value received." The case was tried on the general issue, and, neither party requiring a jury to be empaneled therein, the whole matter of law and fact was thereupon heard and determined, and judgment given by the court. The judgment was in favor of the plaintiff for the aggregate amount of the two notes, to wit: \$5,737.74, with interest on the

***Presidents of Corporations—How Far Agents Ex Officio.**—See this title under section 2 in the analysis of the monographic note on "Agencies" appended to *Silliman v. Fredericksburg*, etc., R. R. Co., 27 Gratt. 119. See also, *Smith v. Lawson*, 18 W. Va. 212.

†**Trial by Court without Jury—Appeal—Effect.**—See *Backhouse's Ex'x v. Seldon*, 29 Gratt. 581, and note for a collection of cases upon the subject. See also, *Western Union Telegraph Co. v. Powell*, 94 Va. 288, 26 S. E. Rep. 828, and *Ramsburg, Koogle & Co. v. Erb*, 16 W. Va. 785, citing the principal case and *Claffin v. Steenbock*, 18 Gratt. 842; *Wright v. Rambo*, 21 Gratt. 158; *Nutter v. Sydenstricker*, 11 W. Va. 535; *Wickes v. B. & O. R. R. Co.*, 14 W. Va. 157.

amount of each from its date till payment and costs.

Two exceptions were taken by the defendant in the progress of the case in the court below, and bills of exception were accordingly signed by the judge: one of them was to the judgment given by the court in the case, and sets out the evidence on both sides; the other was to the action of the court in overruling the defendant's motion to set aside the said judgment, and grant him a new trial upon the grounds of error in the said judgment, and of newly-discovered evidence, which is set out in the bill of exceptions. The defendant applied for and obtained from this court a supersedeas to the said judgment, and the errors assigned arise upon the two bills of exceptions aforesaid.

That arising upon the first bill presents the question, Was a right judgment given by the Circuit court upon the evidence certified in that bill?

On the trial of the cause, the plaintiffs, in support of the issue on their part joined, offered in evidence the two promissory notes aforesaid, called in the proceedings, or by the parties, "demand notes," or "call notes," which are set out in the bill "in haec verba;" and copies of the accounts of the defendant's testator with the plaintiff, being the same with the bill of particulars filed with the common court, which copies are also set out. And the plaintiffs then rested.

The plaintiffs thus clearly made out a good prima facie case; and, if the evidence had stopped here, the *judgment rendered by the court would certainly have been right. It was not pretended—indeed, it was conceded—by the defendant, that the said notes were in fact, as they purported to be, signed by his testator, Wm. L. Hodge. They are promissory notes in the ordinary form, and such as the plaintiffs had a right to take of their debtors. They expressly state on their face that they were given for value received, and one of them specifies the particular value received, which is evidence of the fact against the maker and his representatives.

But notwithstanding the form and nature of the notes, and the expressions which they contain, yet in a case between the original parties to the notes or their representatives, or between one of the original parties and the representative of the other, such as this case is, it is competent for the defendant to show in his defence a want or failure of consideration of the notes, or any other matter which would render them illegal or void in whole or in part.

Accordingly, the defendant contended that these notes were given by his testator on the mistaken idea that he was indebted in the amount of them to the Virginia Brick Company, of which he was a large stockholder, and out of transactions with which company the claim of the plaintiff originally arose; whereas, in truth and in fact, he was not, when he gave the said notes, indebted to the said company, but had previously

fully discharged his debt to the same; and he introduced evidence tending to show, and sufficient to show, that such was the fact.

Now, if these notes had been given to, and this action had been brought by, the brick company, instead of the plaintiff, no doubt the evidence introduced by the defendant as aforesaid would have defeated the action. But these notes having been given to, and this action having been brought by, the plaintiff, instead of the

brick company, whether said notes
54 were given in consideration *of a debt due to the plaintiff by the defendant's testator or by the brick company, the said evidence was not sufficient to defeat the action, unless it was coupled with proof that the said notes were given to the plaintiff by the defendant's testator on condition that he was indebted to the said company in the amount of said notes.

The only proof of that kind which we find in the record is a paper marked "Exhibit F," referred to in, and returned with, the deposition of H. G. Fant, a witness in behalf of the defendant, which paper was signed by said Fant and handed to said testator, and is in these words:

"Washington, 16th May, 1867.

"The demand note of Wm. L. Hodge, favor of S. A. Glover, dated April 1866, for thirty-seven hundred dollars, has been given merely as a voucher, until it is ascertained that he has paid the full amount due by him on stock in the brick company.

"H. G. Fant, President."

Reference is here made to one only of the two demand notes aforesaid, to wit, the one for \$3,700. In fact the other, for \$2,037.74, was not given until more than two months thereafter, to wit, the 27th of July 1867. It is not pretended that the latter was executed on any condition, or with any understanding, even with Fant, that the validity of the note should depend upon the maker's being indebted at that time to the brick company in the amount of the note, or in any amount.

But as to the note for \$3,700, what is the effect of the paper marked "Exhibit F," just set out?

If that debt had been due, and that note had been given to H. G. Fant individually, then "Exhibit F" would have been evidence against him, and, coupled with the other evidence in the cause tending to show that

the maker of the note had paid the full
55 amount due by him *on stock in the brick company, would, no doubt, have been sufficient to defeat the action as to that note.

But that debt was due, and that note was given to the First National Bank of Richmond. Though the note was payable to the order of S. A. Glover, cash'r, it was in effect payable to the said bank, of which he was cashier; that being the usual form of such transactions. The question is, how can the bank be effected by "Exhibit F?"

The bank can only be so effected upon the

ground that Exhibit F was signed by an agent of the bank duly authorized to sign it.

Was it signed by such an agent? It is not pretended that any special or express authority was conferred upon Fant by the bank to sign that paper; or that the bank confirmed the act after it was done. Fant being asked, on his examination in chief by the defendant: "At the time you signed the paper marked F, did you give it as president of the First National Bank, and as intending to bind that institution?" he answered: "It was presented to me by Mr. Hodge, and without much reflection, I signed it as it purports to be, by the president of the First National Bank of Richmond. The paper must speak for itself. If I had the power as president of the bank to make such a contract, I made it with Mr. Hodge in the hurried manner in which it was presented to me." Being asked on cross-examination the following question: "The demand note of Mr. Wm. L. Hodge for \$3,700 bears date April 5, 1867, the receipt given by you, and alluded to in your examination in chief as Exhibit F, is dated May 15th, (16th?) 1867. Will you explain why it is, if that receipt refers to the note of April 5th, 1867, that it bears a different date?" he answered: "It does refer to the note dated April 5th, 1867; it was given in a hurried way by me, over a month after the note for \$3,700 was executed by Mr. Hodge. He stated to me at the time, that he thought there was some mistake about his owing the Virginia Brick Com-
56 pany, *and asked me to sign the paper referred to, which I did." And being further asked, on cross-examination: "Was the board of directors of the First National Bank notified, at the time that you gave the receipts marked F, before referred to, of your doing so, and was it given by the authority of the board?" he answered: "Never, to my knowledge, nor by authority of the board." The evidence thus extracted from the examination in chief and cross-examination of the witness, Fant, appears to be in conflict, at least some portion of it, with another part of the evidence of the same witness in his examination in chief, where he says: "At the time Mr. Hodge gave the bank the note for \$3,700 of the \$5,700, he expressed to me the opinion or doubt whether he owed any thing to the Virginia Brick Company, and handed me at the time of signing said note of \$3,700 the paper marked F for my signature, which I signed." But in a case such as this, where the whole matter of law and fact is heard and determined, and judgment given by the court, and there is a bill of exceptions to such judgment setting out the evidence in the case, in an appellate court the bill of exceptions is regarded in the light of a demurrer to evidence, and where there is a conflict of evidence, the conflicting evidence in favor of the exceptant is disregarded by the court. According to that rule we must disregard the statement of the witness, that he signed Exhibit F at the time the note for \$3,700 was signed

by Hodge, and credit his statement that "it was given in a hurried way" by him, "over a month after the note for \$3,700 was executed by Mr. Hodge."

Then if Fant had any authority to bind the bank by the admission made in Exhibit F, he must have derived that authority from, and in virtue of his office of president of the bank. Did he derive any such authority from that source?

The First National Bank of Rich-
57 mond was created *under the act of Congress approved June 3, 1864, entitled "an act to provide currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof." 13 U. S. Stat. at large, p. 99. The fifth section of that act declares how banking associations may be formed. The eighth section declares when such an association shall become a body corporate, and what general powers it shall have; and among other things, that "it may elect or appoint directors, and by its board of directors appoint a president, vice-president, cashier and other officers, define their duties," &c., "and exercise under this act all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt," &c., "by loaning money on personal security," &c., "and its board of directors shall also have power to define and regulate, by by-laws not inconsistent with the provisions of this act, the manner in which," among other things, "its general business" may be "conducted," &c. "And its usual business shall be transacted at an office or banking house located in the place specified in its organization certificate." The ninth section declares "that the affairs of every association shall be managed by not less than five directors, one of whom shall be the president;" what shall be their qualification as to residence, &c.; how much of the capital stock of the association they must severally own, and what oath they shall take.

Thus it appears that the general management of the business of the bank, and the interest therein of the shareholders, are confided to the care of the board of directors, and there is in the act no specification of powers or duties to be exercised by the president or cashier. The election or appointment of such officers by the board is provided for by the act; which also provides that the board may define their duties.

58 But there is nothing in *the record to show whether such duties have ever been so defined. We must, therefore, regard the president and cashier of this bank as having only such powers as may be incident to their offices respectively, in their very nature, in the absence of anything in the act of incorporation to the contrary; and we must regard all other powers needful to the management of the concerns and business of the bank as residing alone in the directory.

Then, had Fant any inherent power as

president, to bind the bank by his admission made in "Exhibit F?" The president of a bank has, it seems, very little inherent power. He is generally, if not always, a member of the board of directors, and chosen by the board from their own number. It is his duty to preside at meetings of the board. "Ordinarily," we are told, "the position is one of dignity, and of indefinite general responsibility, rather than of any great and accurately known power. The president is usually expected to exercise a more constant, immediate, and personal supervision over the daily affairs of the bank than is required from any other director. Usage, or directorial votes, may confer upon him special functions, and may extend his authority to correspond with the increase of active duties. But the authority inherent in the office itself is very small; indeed, it is very difficult to say precisely how or where it is much in excess of that which can be exercised by any other single director." Morse on Banks and Banking, p. 128. "A careful collation of all the adjudicated cases, it must be confessed," continues the same author, "wears a striking and peculiar aspect which is not very favorable to the assumption of any species of executive power by a bank president without direct authorization." Id. 129. "Indeed, it is a singular fact," he further says, "that the entire collection of judicial authorities justifies the enunciation of only one act as falling within the properly inherent power of the president. This solitary function is to take charge of the

59 litigation of the bank. There is no question but that this matter belongs to him by virtue of his office. He may institute and carry on legal proceedings to collect demands or claims of the bank. He may appear, answer, and defend in suits against the bank. He may retain and employ counsel on behalf of the bank," &c. Id. The powers and duties of a cashier, in virtue of his office, are, on the other hand, much more numerous, though his office is strictly executive. Without attempting to enumerate them, it being unnecessary in this case to do so, it is sufficient to refer to what is said on the subject in the same book, p. 137, and seq.

But certainly, neither the president nor the cashier, nor both combined, could, *virtute officii*, give up a debt or liability to the bank, or bind the bank by such an admission as is contained in "Exhibit F" aforesaid. This, I think, plainly appears from the cases cited by the counsel for the bank. In *Bank of the United States v. Dunn*, 6 Peters U. S. R., 51, it was held, that "an agreement by the president and cashier of the Bank of the United States, that the endorser of a promissory note shall not be liable on his indorsement, does not bind the bank. It is not the duty of the cashier and president to make such contracts; nor have they the power to bind the bank, except in the discharge of their ordinary duties. All discounts are made under the authority of the directors, and it is for them to fix any

conditions which may be proper in loaning money." This is the reporter's heading of the decision, but it is fully sustained by what is said in, and is chiefly in the very words of, the opinion of the court as delivered by Mr. Justice McLean. In *United States v. City Bank of Columbus*, 21 How. U. S. R., 356, it was held, according to the reporter's marginal abstract of the case, which is no doubt correct, that "where the cashier of a bank wrote to the Secretary of the Treasury, saying that the bearer of the letter was authorized to contract for the transfer of money from New York to

60 New Orleans, and such a transaction was not within the scope of the powers of the cashier, nor authorized by the directors, the bank was not bound to reimburse the money which the Secretary of the Treasury advanced." The cashier signed the letter as such, and Miner, the bearer of it, was a director of the bank, which fact was stated in the letter. A by-law of the bank was put in proof to show that it might be inferred from it that Moodie, whose name was signed to the letter, had authority as cashier to empower Miner, as a director of the bank, to enter into such a contract as he had made with the Secretary of the treasury. The by-law was: "A committee of two shall be appointed every six months to advise with the president and cashier. In their absence all the ordinary business of the bank may be done by the president and cashier; and if either of them be not present, then by the other alone; but any discount, negotiation or contract, whether made by the board or committee, is to be done by the consent of all present." Notwithstanding the terms of this by-law, and the fact that the agent selected by the cashier was a director of the bank, it was held in this case that the bank was not bound by the act of the pretended agent; and Mr. Justice Wayne, in delivering the opinion of the court, cited and relied on the case of the *Bank of the United States v. Dunn*, *supra*, and other cases. After adverting to the fact that the release in that case was executed both by the president and cashier, and yet was held not to be binding on the bank, neither nor both having any authority to make contracts of that kind, the court proceeded to say: "The case before us is one in which a cashier acts alone, and in which he testifies that he did so without any consultation with the president or directors of the company, and of which they had no information from him of the transaction until after the failure of Miner to pay the money in New Orleans. The act under which the city bank of Columbus became a corporation does not, 61 in any part of it, give any power to a cashier to act independently of the directors," &c. These remarks apply to this case, only substituting the word president for that of cashier. In *Olney v. Chadsey*, 7 Rhode Island R. 225, it was held that the president of a bank has no authority, *virtute officii*, to surrender or release the claims of the bank against any one, and can

only derive such authority from the vote of the board of directors, or from their assent, express or implied. See also *Bank of the Metropolis v. Jones*, 8 Pet. U. S. R. 12; *Merchants Bank v. Marion Bank*, 3 Gill's R. 96; 1 Sandf. Sup. Ct. R. 158, *Brouwer v. Appleby*; *Hoyt v. Thompson*, 1 Selden's R. 320; *Spyker v. Spence*, 8 Alab. R. 333; 1 Metc. Ky. R. 550, *Mt. Sterling and Jeffersonville Turnpike Co. v. Looney*.

I think we may fairly conclude, from what has been said, that Fant had no authority, in virtue of his office of president, to bind the bank by his admission made in "exhibit F."

But the claim of the plaintiff in error to a discharge from liability of his testator's estate from the demand of the bank, seems to rest mainly upon the following grounds: First, that the debt of said testator to the bank was created in consideration of a debt supposed to be due by him to the brick company aforesaid. Secondly, that there was then, in point of fact, no debt due from him to that company, as the parties supposed. Thirdly, that there was such a connection between the brick company and the bank, or such a contract or understanding between the said testator and the bank, as made the validity of the debt from him to the bank dependent upon the existence of the debt from him to the said company, and as no such debt as the latter existed, the former was, therefore, invalid. And fourthly, that the said contract or understanding was had with Fant, as agent for the bank, and that he was so held out to the world by the bank as agent for such purposes, as that the bank is estopped from denying such agency in this
62 *case. I will briefly consider these grounds in the above order.

As to the first: There seems to be no doubt but that the debt from said testator to the bank had its origin in a debt from him to the brick company. On the 7th of July 1866, he being indebted to said company as a stockholder, and for assessments, in an amount exceeding \$5,700: that company, by the said Fant, their treasurer, on that day, drew two drafts on W. L. Hodge (the said testator), Washington, D. C., one of them for \$3,825, specified in the draft to be "\$3,750 and 4 months int., brick note," and the other for \$1,875, specified in the draft to be for "value received," with a direction therein "to charge to account of" the drawer, and amounting together to \$5,700. No time for payment was named in either of them. Both were payable "to the order of S. A. Glover, cashier," he being then cashier of the said bank. On the day of their date, it seems they were discounted by the said bank, and the proceeds were paid by it to the brick company. They were endorsed "credit my account—S. A. Glover, cashier"; and on the 13th of July 1866, they were enclosed in a letter from said Glover, cashier, to said W. L. Hodge, with a request that he would "please deposit to our credit with the First National Bank of Washington." This was the origin of the

debt claimed by the bank to be due from W. L. Hodge, which was, therefore, created in consideration of the debt supposed to be due by him to the brick company as aforesaid."

As to the second ground—"that there was then, in point of fact, no debt due by him to said company." There was certainly a debt due by him to said company at the time the said drafts were drawn, and at the time they were endorsed to and received by him, and in an amount about equal to the amount of the said two drafts. But it is said that these drafts were never accepted

by him; that he never became indebted
63 to the bank on that *account; that he supposed they were placed in the hands of the bank by the brick company for collection merely; that two drafts were afterwards drawn on him by the brick company for the same debt, one of them for \$1,884.37, drawn by "M. T. Jeffries, treasurer," dated 8th August 1866, accepted 9th August 1866, and payable 30 days after date; and the other for \$3,875, or \$3,825 with interest from date, drawn by "George B. Cadwallader, Treasurer Virginia Brick Company, dated September 5, 1866, accepted September 10, 1866, and payable 90 days after date; and that these two drafts were paid, at maturity, to Riggs & Co., bankers, at Washington City, to whose order they were endorsed "by S. A. Glover, cashier," having been deposited in said bank by the drawers for collection, and having been accordingly collected in that way. The letter of Glover, cashier, to W. L. Hodge, of the 13th of July 1866, and the two drafts of "H. G. Fant, treasurer," of the 7th of July 1866, amounting together to \$5,700 as aforesaid, seem to have been duly received by said Hodge, and were found to be in his possession at his death. It does not appear that he ever answered the said letter, and if so, in what way. He did not accept the drafts, unless his failure to refuse to accept or pay them, or to reply to the letter, can be considered as an implied acceptance. He certainly did not deposit the amount in the First National Bank of Washington, as requested in said letter, nor make payment in any other manner. It does not appear that the First National Bank of Richmond, or any of its officers or agents, ever enquired, by letter or otherwise, of W. L. Hodge about the payment of these drafts. Fant says there was some correspondence about them, but he does not recollect the facts. It appears that, after crediting him with the \$5,700 received by the brick company from the said bank for the amount of the said drafts, there was
64 nothing due from him to that company. Notwithstanding *which fact, shortly thereafter, to wit: in August and September 1866, the two drafts were drawn, one by M. T. Jeffries, treasurer, for \$1,884.37, and the other by George B. Cadwallader, treasurer of said company, for \$3,875, and were afterwards accepted and paid by said Hodge as aforesaid. Considering him as liable to the bank for the

amount of the said two drafts of the 7th of July 1866, amounting together to \$5,700, then his payment of the two drafts afterwards drawn on him by said company as aforesaid was an overpayment of his debt to that company, therefore, by the amount of these drafts. The bank claims that he was liable to it for the amount of the said two drafts of the 7th of July 1866, because it paid the said amount to the brick company for the drafts, and enclosed them to him for payment to its credit in the First National Bank of Washington, and he never returned the drafts, nor objected to their payment. It also claims that the said two drafts operated as an equitable assignment to it of the debt then due by him to the brick company. It does not appear that the bank ever set up any claim against the brick company to refund the money paid for the said drafts. Nor does it appear that the bank made any other demand, than as aforesaid, of the said W. L. Hodge, for the amount of the said drafts, until March 30th, 1867. On that day Fant drew on him, at one day's sight, for \$5,700 (precisely the amount of the principal of the two drafts aforesaid), payable to the order of S. A. Glover, cashier, which draft was accepted by Hodge on the 1st of April 1867, and was paid by him with means furnished by Fant, as will be presently mentioned. In a letter written by Fant to Hodge, dated on the same day with the said draft, which letter, being misplaced, was not found until after the trial, when it was produced on a motion for a new trial; and in support of such motion, the writer said: "We make up our

quarterly report to-day. I have drawn
65 on you to-day, *at one day's sight, for what appears to be due by you to the bank. Accept, and I will be with you in time to provide for it." In a postscript he said: "Your account and ours do not agree, but that can be fixed hereafter." Fant, in his deposition, which was taken by the defendant, being asked, "Do you know from whence Mr. Wm. L. Hodge obtained the money with which he paid this draft for \$5,700?" answered: "As president of said bank, I gave him a draft on Lockwood & Co., of New York, for \$3,700, and authorized him to make a check on the said First National Bank for \$2,000, for which he gave the said bank his obligations." These are the two notes on demand, called call-notes or loans, on which this action was brought, one of them for \$3,700, dated April 5, 1867, and the other for \$2,037.74, dated July 27, 1867, as aforesaid. Being asked to state for what the said draft for \$5,700 was drawn, the same witness said: "It was drawn for the indebtedness of Wm. L. Hodge to the First National Bank of Richmond, as advised by me of that date." And being further asked whether the said draft was on account of alleged indebtedness of Wm. L. Hodge to the brick company? he answered: "Originally it grew out of the indebtedness to the Virginia Brick Company; but at the time of payment was the property of the First National

Bank of Richmond. I mean the draft drawn March 30th, '67, for \$5,700." In a letter from the defendant, J. L. Hodge, executor of W. L. Hodge, to H. G. Fant, dated August 24th, 1868, and read as evidence in the cause, the writer, among other things, gives the following account of the drafts and demand notes aforesaid: "You, as treasurer," of the brick company "on 7th July 1866, drew two sight drafts on my father, favor of S. A. Glover, cashier, for \$3,825 and \$1,875, respectively, which drafts were credited by the First National Bank of Richmond to the Virginia Brick Company, and forwarded to my father.

66 They were not paid by him, but *stood in that shape till 30th March 1867, when you drew on him for \$5,700, at one day's sight, to cover these two former ones. He paid this \$5,700 by your official draft on Lockwood & Co., New York, for \$3,700, and his own check for \$2,000 on First National Bank of Richmond. For the draft on Lockwood & Co. he afterwards, in April, 1867, gave his demand note for \$3,700, taking in exchange your receipt, as president, that such note was a mere voucher, and not to be paid, except it appeared he had not paid for his stock in brick company. For his check for \$2,000 on First National Bank of Richmond he afterwards, in July 1867, gave his demand note for \$2,037.74, in answer to your request for same, stating, in his letter in which he forwarded it to you, that he did not know what it was for, but presumed it was in renewal of one for \$2,000 he had given in January previous, which he requested should be returned. These two demand notes for \$3,700 and \$2,037.74 are the two items now in question between the bank and my father's estate. From the statement above, you will see that they were a continuation of the two drafts of July 7, 1866, drawn by you as treasurer of brick company, and credited to the brick company. That company has, however, been paid in full by my father, independently of these drafts, and has, therefore, been over-credited to the extent of \$5,700." Such is the account given of this transaction in the said letter, and it is, no doubt, substantially correct. The over-credit referred to, of \$5,700 to the brick company, arose from the payment of the draft of M. T. Jefferies, treasurer, &c., of the 8th of August 1866, for \$1,884.37, and the draft of George B. Cadwallader, treasurer, &c., of the 5th of September, 1866, for \$3,825, which were paid by W. L. Hodge after he had received the two drafts of H. G. Fant, treasurer, of the 7th of July 1866, one for \$3,825, and the other for \$1,875, which were discounted by the bank, and enclosed by the cashier to said Hodge, in a letter dated
67 *July 13th, 1866, as aforesaid. At that time, certainly, Hodge was indebted to the brick company in an amount equal to the amount of the drafts.

As to the third ground—"that there was such a connection between the brick company and the bank, or such a contract or understanding between the said testator and

the bank, as made the validity of the debt from him to the bank dependent upon the existence of the debt from him to the said company; and as no such debt as the latter existed, the former was therefore invalid." It has been shown that the drafts of the 7th of July 1866, were received by W. L. Hodge as aforesaid. He was indebted to the brick company in an amount equal to the amount of them; and if said Hodge, by reason of his conduct in regard to said drafts, rendered himself liable for the amount of the same to the bank; or if the bank were entitled to enforce payment of said drafts against said Hodge, as equitable assignments of the debt due by him to the brick company at the time they were drawn; then, there is no foundation to sustain the point we are now considering. But let it be supposed, for the sake of argument, that Hodge did not so render himself liable for the amount of said drafts to the bank, and that the bank was not entitled to enforce them against him as equitable assignments of the said debt, then the question arises, was not the claim of the bank against him on those grounds, whether well or ill founded, a sufficient consideration for his assuming payment of the said claim, as he afterwards did by his acceptance of the said draft of March 30th, 1867, for \$5,700, and by his execution of the said demand notes on the 5th of April and 27th July 1867 as aforesaid? Certainly it was; unless the brick company and the bank can be regarded as one and the same institution, or as so connected with, or dependent on each other that a debt due by the one, is in effect a debt due by the other. It will not be pretended that there was any such connection between them as that. *Nor does it appear that there was in fact any connection between them tending to make them one institution, or bound for the acts or debts of each other. The only connection between them, if that can be called a connection, appears to have been, that some of the stockholders of the bank were also stockholders of the brick company. Certainly W. L. Hodge was a large stockholder of each. Fant was also, at the same time, president of the bank, and treasurer, or acting treasurer of the brick company; and the bank often discounted drafts of the company. But neither of these facts, nor all of them together, identified the two institutions, or made them responsible the one for the other. There were, no doubt, many stockholders of the one who were not, at the same time, stockholders of the other. Probably, most of the stockholders of the bank were not stockholders of the brick company, and so e converso. Then there is nothing in the third ground which can afford the defendant any aid. And now,

As to the fourth and last ground: "that the said contract or understanding was had with Fant as agent for the bank, and that he was so held out to the world by the bank as agent for such purposes, as that the bank is estopped from denying such agency in this case." This view is no doubt founded

on the evidence of the cashier, Glover, who was introduced as a witness by the defendant, and who testified, among other things, "that H. G. Fant was the president of the plaintiffs; that he, Fant, made a large majority of the loans himself; that Fant had the general charge and conduct of the financial negotiations of the plaintiffs; that the board of directors did not meet regularly; that the state of the bank was not laid before the directors generally; that he supposed it was known to the directors how Fant acted;" "that Fant made negotiations; that he controlled the credit of the bank, but that witness did not know if he did it irregularly; that Fant sometimes drew his own drafts as *president, and would sign checks if not convenient for the cashier to do so;" &c. The general management of a bank belongs to the board of directors; but it belongs to them as a trust for the benefit of the stockholders. Their power is not unlimited, but is confined within certain prescribed limits by the charter, and must be faithfully exercised for the purposes for which it is conferred. They cannot abandon their post of duty, and delegate their power to another. *Potestas delegata non potest delegari*. They must of necessity appoint ministerial agents to execute their judgments and orders. They are expressly empowered in this case to appoint a president and cashier, whose duties are not prescribed by the charter, nor, so far as appears from the record, by any by-laws. The duties and powers of these officers in this case, therefore, are only such as belong to their offices, *virtute officii*. The directors, no doubt, may empower a president or cashier to perform a special act not strictly embraced in the sphere of his duties and powers, *ex officio*, and they may sanction such an act after it is done, and thus give it the same effect as if it had been previously authorized. Their assent to such an act may, no doubt, also be sometimes inferred from circumstances. The directors of a bank cannot release without consideration a debt due to the bank; and a fortiori, they cannot empower the president to do so; and a multo fortiori, the president cannot do so *virtute officii*. The transactions of this bank with Mr. W. L. Hodge seem to have been conducted very loosely by the president, Mr. H. G. Fant. Probably the chief reason was that Mr. Hodge was not only a gentleman of wealth, but a very large stockholder in the bank. The semi-annual dividend on his stock seems, at one time, to have been as much as \$4,600. He was also a large stockholder in the brick company, out of his obligations to which his indebtedness to the bank originally arose. He seems, from his correspondence with Fant, to have had great confidence in him, *as Fant undoubtedly had in Hodge. Fant and Glover may both have owed their appointments, as president and cashier, to the influence of Hodge, which, from his great interest in the bank, must have been potential, if not controlling. It is not very

strange, therefore, though very irregular, that Fant's drafts of July 7, 1866, should have been enclosed by cashier Glover to Hodge himself, with a request to deposit the amount in the First National Bank of Washington: nor that the debt of Hodge on account of those drafts should have remained in that state for so long a time afterwards, Hodge not having returned the drafts, nor objected to his liability for them, so far as appears from the record: nor that Fant should have furnished the means of the bank to enable Hodge to take up the draft of March 30th, 1867, for \$5,700, and should have taken his demand notes for the amount: nor that those notes should have been held so long by the bank, without any proceeding being had to enforce their payment, or without even any demand of such payment. Why the draft of March 30th, 1867, was drawn by Fant, is fully explained in the record, and was well understood by Hodge. It was to prepare for the quarterly report of the condition of the bank, which Fant had to make on the 1st of April, and which was to be exhibited to the comptroller of the currency, and upon which might depend the important question, whether the bank should be any longer the depository and financial agent of the national government. It did not look well that this debt of Hodge was standing upon a mere unaccepted bill, drawn several months before, and ever since remaining in the hands of the drawee. And, therefore, Fant drew a bill at one day's sight, which Hodge accepted and paid out of means of the bank furnished him by Fant, who, after the emergency was over, took the demand notes of Hodge for the amount, which were held by the bank until after Hodge's death, and are the notes on which this action is founded. Hodge

71 never *denied that the debt now claimed by the bank was due to it by somebody: never denied that the bank had paid the amount of the drafts of July 7, 1866, to the brick company, and had never been repaid the amount, or any part of it, by the brick company, or anybody else: never denied that he duly received these drafts enclosed to him in cashier Glover's letter of July 13th, 1866: never pretended that he had returned them, or refused to accept or pay them: never pretended that he did not know the bank had paid the amount of them to the brick company, or that he believed they were placed in the hands of the bank for collection merely: never pretended that he did not know that, when the draft of March 30th, 1867, was drawn, the bank claimed to be his creditor for the amount of the two former drafts, and that the latter was drawn for that very debt. The only pretence he ever set up was, that after he had received the two drafts of July 7, 1866, and before he accepted the draft of March 30, 1867, he had paid two drafts of the brick company, which, together with what he had paid before the drafts of July 7, 1866, fully paid all that he owed to that company. Now, if the brick company and the bank were the

same corporations, or if Mr. Hodge had been the only stockholder in each of them, there might be some reason in this pretence. But as those corporations were not the same; as the stockholders in each were not the same; as there were other stockholders in the bank besides Mr. Hodge, whose interests are entitled to the protection which the act of incorporation was designed to afford, I think the pretence cannot be sustained. But it is said the bank ought not to have discounted or collected the two last drafts of the brick company on Hodge. But how could the bank know the state of accounts between Hodge and the brick company? And what had the bank to do with that matter? Mr. Hodge ought to have known all about that matter, and he had a 72 great deal to do with it. *His error was in paying these two last drafts, and this has been the cause of his loss. It is painful for the court to render judgment in such a case, in which a heavy loss must fall on one or other of the parties, to neither of whom is wilful wrong imputable. The law must determine the question on which of them the loss must fall. In this case, I think the law requires it to fall on the defendant, and the judgment must, therefore, be accordingly. That being the judgment of the court below, I think there is no error in it. Nor do I think the court below erred in overruling the motion of the defendant to set aside the verdict, and grant a new trial. I do not think the newly discovered evidence would or ought to have changed the result.

I am for affirming the judgment.

The other judges concurred in the opinion of Moncure, P.

Judgment affirmed.

73 *Griffith & al. v. Bird & als.

March Term, 1872, Richmond.

Parent as Guardian—Charging Wards with Maintenance.—G., who was the guardian of two of his children, maintained and educated them at his own expense, and made no charge against them. He died in February 1861; up to which time his estate was ample to pay his debts, but, by losses incurred since his death, it is not sufficient to pay them. In a question between creditors of G., his two children, for whom he was guardian, are not to be charged in the guardianship account with the expense of their maintenance or education.

The case is sufficiently stated by Judge Christian, delivering the opinion of the court.

Beale and Mayo, for the appellants:

A father, if of liability, is bound to maintain his infant children, even though

*Parent as Guardian—Charging Wards with Maintenance.—Cited and affirmed in *Stigler's Ex'x v. Stigler*, 77 Va. 171, where also is cited *Evans v. Pearce*, 15 Gratt. 515. Distinguished in *Hauser v. King*, 76 Va. 737. See also, *Windon v. Stewart*, 43 W. Va. 711, 28 S. E. Rep. 776.

they have property of their own. Judge Spencer, in *Edwards v. Davis*, 16 John. R. 281, and *Robertson*, J. 15 Gratt. 513.

The duty of educating them by natural and moral law, as binding, is not so clearly defined in our own English jurisprudence; though this, too, is recognized as a positive right by the courts of some of our sister States. *Stanton v. Wilson*, 3 Day's R. 37; *Parson's Cont.*, 3d ed., page 245, and note.

In *Myers v. Wade*, 6 Rand. 444, Judge Coalter said: "Had the widowed mother possessed an estate sufficient for their maintenance and education, although I am not prepared to say she would have been bound to expend it in that way, yet had she thought proper to do so, it would have been a voluntary donation, in no wise a bar to their future claim to their own estate." This dictum *fully endorses the moral right of the child; is sustained by reason, and we think affirms a legal principle, never contradicted, in asserting that voluntary expenditures for education by a parent is in no wise a bar to the future recovery of his separate estate by the child.

In *Evans v. Pearce*, 15 Gratt. 513, Judge Robertson further said, that courts would look with liberality to the circumstances of father and child, and in cases proper would authorize the income of the child to be applied to its support.

Is this such a case? Every witness who speaks of the pecuniary condition of the father places his fortune, after payment of debts, at forty or fifty thousand dollars. His ability to educate is beyond dispute; his insolvency, rather than of his estate, was caused by losses after his death. The English rule, as laid down by Lord Thurlow, was first an inquiry as to the father's ability; secondly, the ascertainment of the amount required to be taken from the child's income. 1 *Tucker's Com.*, Book 1, p. 129.

If of ability, the father was always bound to maintain and educate his infant child. See *Wood's Institutes*, p. 63; *Brodie v. Barry*, 2 Ves. & B. 36; *Darley v. Darley*, 3 Atk. R. 399; *Adams' Equ.* 531, and note; *Parson's Cont.*, 3d ed., p. 256; 1 *Thomas' Coke*, 109; *Evans v. Pearce*, 15 Gratt. 513.

The last authority recognizes the principle and the relaxation of the old rule. In but one case was retrospective allowance sanctioned. If the father be of ability to educate, there can be but one ground upon which an application to chancery, for the use of the child's income in aid of education, can be supported, and this is the refusal or neglect of the father so to expend his own means. And we affirm, both upon principle and authority, that the aid of equity has always been limited to remedy either the want of means by the father, or the refusal by him to use them, if

able, towards the maintenance *and education of the child. We further say, that all applications to those courts, upon the principles of their general jurisdiction, or under statutory enactment, for their sanction of expenditures of the income

of the child's separate estate, either made or to be made, rest upon the allegation that it is for the interest of the child that such sanction is asked. See 2 *Story's Eq.*, § 1346, p. 577.

The statute law of Virginia is silent as to the right of the father-guardian to expend his infant child's estate in any manner other than a stranger, as such may do, and does not at all affect the general doctrine of courts of equity as to his duty to maintain and educate out of his own means, if able. In the case of any guardian, the statute law, § 8, p. 588, Va. Code 1860, does expressly supersede the necessity of any precedent application to authorize a sale of personalty, "when deemed best for the ward," by declaring that any such sale, made to meet proper expenditures, may be sanctioned by the court whenever, upon authorizing the disbursement, the court would have ordered the sale.

Neither this, or any section of our Code, touches the question of the father's duty to educate, if able, but leaves that where the courts have placed it, an element in the consideration which they must weigh in reaching the conclusion "when deemed best for the ward." If able, social and moral duty requires the father to educate. If he does educate his child, in the absence of evidence the legal presumption is he does it in discharge of that duty; nor is there a word in the statute book, or dictum or decision in the reports, or deduction on principle of law or reason, which will justify the demand of a creditor, years after the death of the father, that this duty, voluntarily met, shall, in a court of chancery, be made, by implication, the foundation of equitable offset to the legal demands of the child.

*Lyons, for the appellee:

I submit that the rule, as now settled in its strongest form against the parent, is, that whenever what is called a special case is made, such as showing that the means of the father are inadequate to the maintenance and education of his children, who have a separate property, without neglect or injury to the other members of his family, the court of chancery will always make an allowance out of the income of the child for its maintenance.

By the common law, the child and the servant, under the feudal system, were put upon the same footing. The parent, being entitled to all the services of his child, and all the profits of his labor during infancy, was bound to maintain it; but never was bound, and is not now bound, to educate it. 1 *Black Com.*, ch. 16, p. 451. When, however, the child has a fortune independently of his father, if it appears that the father is not of ability to maintain the child according to its means, the court of chancery will order an appropriation from its income for its maintenance. *Hughes v. Hughes*, 1 Br. C. C. p. 387, notes 1 and 3.

The rule was subsequently varied so as

to allow the past maintenance, as well as the current maintenance, to the father. *Reeves v. Brymer*, 6 Ves. R. 425; *McPherson on Infants*, 41 Law Library, p. 141; *Ex parte Board*, 2 Myl. & K. 439, 8 Cond. Eng. Ch. R. 73; *Carmichael v. Hughes*, 6 Eng. L. & E. R. 71; *Newport v. Cook*, 2 Ashm. R. 332; *Evans v. Pierce*, 15 Gratt. 513. In the last case no authority is cited by either court or counsel, unfortunately, but still the court says, "the court will look with liberality to the circumstances of each particular case, and to the respective estates of father and children, and will authorize the income arising from the estates of infants to be applied to their support whenever, under all the circumstances, it appears to be proper."

The statute authorizes also, not only the appropriation of the ward's income to its maintenance and education, 77 *but empowers the courts to invade the principal for that purpose. Code ch. 128, p. 588, §§ 7, 8, 9.

Now, it is submitted that the rules thus expounded by the courts apply with conclusive force to this case.

If the father were alive, settling his account, and seeking to replenish himself by the charges for the maintenance and education of his children, he would be allowed both, upon proof of inadequate means of his own; but with the most adequate means he would be allowed the charges for education and the expenses unavoidably incident to it. How much stronger is the case when the children have been supported and educated, in the language of the British courts, "in a style suitable to their fortune," whereby the father has contracted a large debt, and the creditors, as I have said, who furnished the means, are to lose them, unless the children be made to do now what they would have been made by the court of chancery to do, if their father had asked for it: to abate their demand against the estate of the father by a fair allowance for their maintenance and education.

Will the court encourage a practice under which a parent may spend the income of his children upon their maintenance and education, and then not only turn his creditors adrift without satisfaction, but render his securities responsible for the very income which the children have enjoyed, and without which they could not have lived "in a manner suitable to their fortune"?

Instead of doing this, the court will adopt the more just and equitable rule, of considering that as done which ought to have been done, as there can be no doubt that if the father had applied to the court for an appropriation of the income to the maintenance and education of his children, it would have been made. This court will not now allow the false pride of the father to operate as an injury to the innocent creditors, but make the appropriation now which would have been made if it had been

78 *asked for earlier, and appropriate the income of the children to their education and maintenance.

There is still another consideration which ought, I think, to have its weight.

This is a controversy among creditors, in which, to say the most for the children, all are equally innocent, but in which, in reality, the children, under the circumstances, are entitled to the least favor. By the misfortune and fate of war a large portion of the fund out of which they would have been paid has been destroyed.

Will this high court, by a rigid enforcement of a technical rule and a mere form, throw the entire loss upon those creditors least obnoxious to favor.

CHRISTIAN, J. delivered the opinion of the court.

This is an appeal from a decree of the Circuit court of Westmoreland county. The bill was filed by the creditors of E. C. Griffith, who departed this life in the year 1861, seized and possessed of considerable estate, real and personal. The object of the bill was to have a settlement of the accounts of his administrator, to ascertain the amount of his indebtedness, and to effect a sale of his real estate for the payment of his debts.

The said Griffith in his lifetime had qualified as guardian of two of his children, to wit, Eleanor and Frederick, and received as such guardian certain real and personal estate derived by them from their grandmother.

An account, taken by the commissioner, of the outstanding debts against the estate, shows that Griffith was very largely indebted, and that, indeed, his whole estate, real and personal, was not sufficient to pay his debts. Among the debts reported by the commissioner were balances due from the said Griffith, as guardian of his two wards and children, Eleanor and Frederick, amounting to the sum of \$2,518.73 due to each, and which the commissioner reports among his fiduciary debts.

After the commissioner had returned 79 these accounts, *and after a decree had been entered directing a distribution of the fund in the hands of the administrator, and also directing a sale of the real estate of the decedent, Willoughby Newton, one of the general creditors, filed his petition, praying that the sale of said real estate of E. C. Griffith might be postponed until the further order of the court, and that the said commissioner should institute an inquiry into the circumstances of E. C. Griffith, and his expenditures in improving the real estate, and in the maintenance and education of his children, Frederick and Eleanor, and report the facts to the court.

Upon the coming in of this petition the decree of sale was set aside, and the inquiries suggested by the petition of Newton ordered to be made; and the report of said commissioner, together with the evidence taken by him, was returned to the court at the October term, 1869. Whereupon, a decree was entered, in which the said Circuit court declared that there was no

sufficient evidence that any permanent improvements had been made by Griffith in his lifetime on the real estate of his wards; but declared further, "that the defendants, Frederick Griffith and Eleanor Fairfax (who was Eleanor Griffith), are bound to account to the estate of their father and guardian for all the expenses of their education." Accordingly, the court decreed that "the report of commissioner Baker be referred to a commissioner of this court, with instructions to reform the guardianship account according to the principles herein declared, stating clearly and distinctly all the expenses of their education, including board, tuition, books, travelling and other necessary expenses of said infants, and make report to the court." From this decree Frederick Griffith, in his own right, and as trustee for his sister Eleanor Fairfax, has obtained an appeal from this court.

The court is of opinion that the decree of the said Circuit court was manifestly erroneous in affirming a liability on the part of Frederick and Eleanor, the infant
80 *children of E. C. Griffith, to his estate, for moneys by him voluntarily expended in their maintenance and education. It is a well settled principle of law, governing the relation of parent and child, that a father, if of ability, is bound to maintain his infant children, even though they may have property of their own. 1 Tuck., Book I, p. 129; Thomas's Coke on Litt. p. 159, Note A; Evans v. Pearce, 15 Gratt. 513.

It is true that, where the infant has separate estate, a court of chancery may, upon the application of the father or friend of the infant, direct the estate of the infant to be applied to its maintenance and education, whenever, under all the circumstances, it appears to be proper. But where the father, of unquestioned ability to maintain his infant children, does not petition the court to have any of the profits of their separate estate applied to their support, and makes no charge against them during his lifetime, his estate will not be allowed anything for their support, without the clearest proof that justice requires it. Evans v. Pearce, supra.

In the case before us, the ability of the father to afford his children a liberal education is beyond dispute. According to witnesses, whose relations to the deceased gave them opportunity of knowing his pecuniary condition, he was worth forty or fifty thousand dollars at the time of his death, after the payment of his debts. The insolvency of his estate was caused by losses after his death. He raised no charge against his children during his life; he left no note or memorandum from which such a charge could be raised by his personal representatives, who were his second wife and her brother; and the administrator de bonis non, who is a party to the suit, asserts no such demand in favor of the estate. But the claim is raised by one of the general creditors, who is seeking to swell the assets of the estate by depriving the wards and

children of the decedent of an acknowledged debt of the highest dignity due from
81 their father and *guardian. It is not to be tolerated that this creditor should be permitted to come into a court of equity, and put himself in the shoes of the father and his personal representative, to enforce a claim which neither the one in his lifetime, nor the other after the death of the decedent, ever thought of asserting.

We are therefore of opinion that the said decree of the Circuit court of the county of Westmoreland should be reversed.

The decree was as follows:

The court is of opinion, for reasons stated in writing, and filed with the record, that the decree of the said Circuit court is erroneous, in affirming a liability on the part of the defendants, Frederick Griffith and Eleanor Fairfax, to account to the estate of their father and guardian, E. C. Griffith, for the expenses of their education. It is therefore decreed and ordered, that the said decree to this extent be reversed and annulled, and that the appellants recover against the appellee, Willoughby Newton, their costs by them expended in the prosecution of their appeal here; and that the cause be remanded to the said Circuit court for further proceedings to be had therein, in accordance with the principles herein set forth.

Decree reversed.

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*Christian v. Cabell & als.

March Term, 1872, Richmond.

1. M conveys a house and lot to W in trust for B for life, remainder to her children. On the 30th of June 1870, B contracts in writing with C, to sell to him the property for \$10,000, on the terms of \$2,000 when he received a good deed for the property, and the balance in five years' equal annual payments; possession to be delivered on the 15th July. B to procure the approval of the contract by the proper court without cost to C. On the 9th of July, W files his bill against B and her children, to have the contract approved, and by a decree on the same day the contract is approved, and W is directed to convey the house and lot to C with special warranty. On the same day, W executes the deed, and hands it to C, who in a few days writes to W, stating various objections to the title, and saying he cannot have anything to do with the property in the state of the title. On the 15th July, W tenders C possession, saying, any objections which may be made to the title are erroneous or imaginary. And thereupon C refuses to take possession, and renounces the contract. **Held:**

1. **Judicial Distinguished from Private Sale.**—This was a private, and not a judicial sale, and C is not concluded by the decree from making objection to the title.

2. **Deeds.**—The undertaking to make "a good deed" is not confined to the form of the deed, but includes a good title.

3. **Objections to Title—Waiver.**—If C had taken possession, and performed the contract on his part,

by paying the cash payment and executing his bonds, he would thereby have waived his objections to the title.

2. In this case the house and lot had been owned by G, who sold and conveyed it to M. Whilst G owned it, she being a member of a Building Fund Association, borrowed from it \$2,000, and gave her bonds, in the penalty of \$4,000, and a deed of trust to K, to secure her liabilities to the association. She had paid up all dues until December 1863; but there was an uncertain amount for which the property was still liable; and this could only be ascertained by a suit in equity and an account; and this incumbrance was unknown to C at the time of the contract. The house had been consumed by fire before proceedings were instituted by W against C to enforce the contract.

Held:

- 83 *1. **Purchase of Fee Simple—Presumption as to Incumbrance.**—In a contract for the purchase of a fee simple estate, if no incumbrance is communicated to the purchaser, or be known to him, he must suppose himself to purchase an unincumbered estate.
2. **Same—Objections to Title—Extent.**—The objections which a purchaser may make is not entirely confined to a doubtful title. It applies to incumbrances of every description which may in any manner embarrass the purchaser in the full and quiet enjoyment of his purchase.
3. **Same—Same—Same—Undefined Incumbrances.**—There is a difference between a defined and admitted charge, to which the purchase money may, by consent, be applied when it becomes due, and a contested charge, which will involve the purchaser in an intricate and tedious lawsuit of uncertain duration.
4. **Same—Same—When Specific Performance Decreed.**—In some instances the court will decree specific performance if the vendor is prepared to comply with his covenants at the hearing; and the court will afford him a reasonable time to remove incumbrances, and perfect his title. But this is a matter of favor to the vendor, only to be granted in cases which admit of such relief without prejudice to the rights of the vendee.
5. **Same—Same—Same—When Denied.**—The court will not give time to the vendor when the defect to be remedied was known to the vendor or his attorney at the time of the contract, and was concealed from the purchaser.

***Specific Performance—Compensation.**—For a collection of cases where, in a suit for specific performance, compensation will be decreed, see *Hendricks v. Gillespie*, 26 Gratt. 181, and *note*.

†**Same—Defects in Title.**—The court, in *Broyles & Harry v. Bee et al.*, 18 W. Va. 580, says: "It is true, as they claim, that a contract to sell a fee simple estate implies in the absence of an express stipulation to the contrary, that the estate is unincumbered, and that the vendor has good title, and that there are no incumbrances on the land, that may in any manner embarrass the purchaser in the full and quiet enjoyment of his purchase. *Christian v. Cabbell et al.*, 22 Gratt. 82; *Garnett v. Macon*, 6 Call 300. But if the vendor does not affect to have a perfect title, and expressly sells such as he has with special warranty, he is entitled to specific execution without being first required to show a clear title. *Bailey v. James*, 11 Gratt. 408; *Goddin v. Vaughn*, 14 Gratt. 124; *Vall v. Nelson*, 4 Rand. 478;

6. **Same—Same—Same—Same.**—Especially will such indulgence be denied to the vendor when, besides a failure to disclose the existence of incumbrances, an account is necessary to ascertain the state of the title, the extent, nature, and amount of such incumbrances.

7. **Same—When Purchaser Becomes Owner.**—The purchaser of real estate is the owner from the date of the contract, when the vendor is in no default, and is prepared to convey a clear title. But he is not the owner till the vendor can make a title according to the contract.

8. **Same—Same—Loss Occurring Previously.**—Any loss occurring to the property before the vendor is in a condition to convey a clear unincumbered title must fall on him, and not on the purchaser.

9. **Same—Same—Same.**—The house having been consumed by fire, whilst the incumbrance on the property still existed, so that W could not make a good title to it, the loss must be borne by B and her children, and not by C.

By deed bearing date on the 18th of July 1860, Mayo Cabell and wife conveyed 84 to Wm. D. Cabell a certain *house and lot in the city of Lynchburg, known as the Lynchburg Female Seminary, and also furniture and other personal property, in trust—first, to secure certain notes which Mayo Cabell had given in part of the purchase money of the property, and second, for the sole and separate use of Mrs. Margaret B. Brown, wife of Robert L. Brown, and daughter of Mayo Cabell. The deed provided that the property might be sold for the payment of the debts, or if Mayo Cabell paid them, that he might direct a sale for repayment to himself of the amount he paid for this object.

By another deed, bearing date the 10th of March 1863, reciting that Mayo Cabell had paid the debts secured by the first deed, and that he desired to release the lien to secure said debts, and to give to his daughter, Margaret B. Brown, and her children, the debt thus due to him, he grants and releases the said debt due to Wm. D. Cabell, for the uses and purposes declared in the first deed, except as follows: that the said Wm. D. Cabell shall hold the said property to the extent of fourteen thousand dollars and interest, for the benefit of the said Margaret B. Brown during her life, free from the debts, liabilities or contracts of the said Margaret B. Brown, the said Wm. D. Cabell, her trustee, or any agent employed by either of them; and at her death, that sum to be equally divided among her children then living, and the descendants of such as may be dead, according to the act of descents and distributions of the State of Virginia. The purpose of this deed being to secure said sum of money to Mrs. Brown during her life, without liability to diminution from any cause or source, and for distribution among her descendants at her death.

Sutton v. Sutton, 7 Gratt. 234." As to waiver of objection to title, see *Fleming v. Holt*, 12 W. Va. 151. In *Clark v. Gordon*, 35 W. Va. 735, 14 S. E. Rep. 255, it was held that a purchaser entitled to a good title need not pay purchase money until he is tendered a good title.

On the 30th of June 1870, Robert L. Brown and Margaret B., his wife, by their attorneys, A. F. Robertson & Co., entered into a written agreement with J. E. Christian, by which they sold to Christian the 85 house and *lot known as the Lynchburg Female Seminary property, and the same conveyed by the deed of Mayo Cabell, on the following terms: Christian was to pay for said property the sum of \$10,000, of which \$2,000 was to be paid in cash on the delivery of a good deed to the property, and the residue in five equal annual instalments, dating from the delivery of the deed, bearing interest at the rate of six per cent. Bonds to be executed by him for the deferred payments, secured by a lien on the property reserved in the deed. Brown and wife were to give possession to Christian not later than the 15th of July 1870, and to procure the approval of the contract by the proper court, without cost or charge to Christian. And Christian agreed to deposit with Geo. M. Rucker the sum of \$500 as earnest money, in part of the cash payment of \$2,000.

On the 9th of July 1870, Wm. D. Cabell filed his bill in the Hustings court of the city of Lynchburg, in which he refers to the deed of March 17th, 1863, from Mayo Cabell to himself. He says that the use of the property as a boarding school for young ladies, contemplated in said deed, has proved a source of loss instead of profit to the cestuis que trust in the deed, who have no other means of support beside the said trust subject. He sets out the sale made to Christian, and says that the interest of all the beneficiaries in said trust will be promoted by the confirmation of the sale, and the investment of the net proceeds, under the direction of the court, in the purchase of a suitable home in the country. And making Brown and wife and their five children parties defendants, he asks that the said sale may be confirmed, and that the proceeds of sale may be reinvested, and for general relief.

On the same day Brown and wife answered, concurring in the prayer of the bill; a guardian was appointed for the infants, who filed his answer; and the eldest son, being over fourteen years of age, also 86 answered, concurring *in the object of the suit; depositions were filed, and the court being of opinion, from the depositions filed, that the sale to Christian was judicious and beneficial to the cestuis que trust, confirmed it, and decreed that upon the compliance by Christian with the terms of the sale, Wm. D. Cabell do execute to Christian a deed in fee simple for said lot, with special warranty of title; but reserving upon the face of said deed a lien on said lot, for the payment of the five deferred payments. But the said Cabell was not to deliver the deed to Christian until Christian produced to him the certificate of the clerk of the court, that the certificate of deposit of the cash payment and the five bonds were filed with the papers in the cause.

On the same day on which the decree was

made, Wm. D. Cabell, by virtue of the authority of that decree, made a deed to Christian, by which he conveyed, with special warranty, the house and lot, reserving a lien upon the property to secure the purchase money. This deed was submitted by Christian to his counsel, and on the 15th of July he wrote to Robert L. Brown, saying: "I learn from my lawyer that your property is very seriously encumbered by lien, deed of trust, irregularities in the dowry rights, &c. Again, were the property free from encumbrance, the deed which you tender contains omissions fatal to its validity." He concludes by saying: "I can have nothing to do with the property while the title is thus involved in uncertainty, and delay is fatal to my plans and purposes."

On the same day, Wm. D. Cabell, by his attorney, wrote to Christian. He says: "To-day being the day fixed in our contract, I respectfully inform you that I am ready, and that all the parties are ready, to give you possession of the 'Lynchburg Female Seminary' property, and do hereby tender you possession of it, in accordance with the terms of the contract. I am prepared to make you a 'good deed' to 87 the property as *agreed, and any objections which may be made to it are erroneous or imaginary."

In August 1870, Christian, by his counsel, wrote to Cabell, and says: "This is to notify you that I hereby refuse to receive the deed which you have executed to me for the property known as the Lynchburg Female Seminary, and that I decline and renounce the purchase of said property; said purchase having been made by me in ignorance of the fact that the title held by you to the property is bad; that the legal title thereto is outstanding in the hands of the trustees of the — Building Fund Association. The deed you tender me leaves the title thus embarrassed and the property encumbered with an uncertain and troublesome lien, and the legal title is in the hands of trustees to secure that lien. If I had been informed of the existing state of things, I should have declined the purchase of said property; and I now refuse to take it on any terms, and hereby request the contract with which you have failed, and are not now able to comply, may be cancelled and delivered up."

On the 12th of August 1870, on the petition of Brown and wife, and Cabell, the court made a rule upon Christian, in the case pending in the court, returnable to the 19th of the same month, to show cause why he should not proceed to execute the contract filed in the cause, and dated June 30th, 1870, and the decree of the court dated the 9th of July 1870, in conformity with said contract.

On the 15th of September Christian appeared and answered the rule. He objected to the proceeding by rule in this case, and objects to the validity of the contract, and to the sufficiency of the deed, insisting that by the contract he was to have a good title to the property; and he states several ob-

jections to the title, but it is only necessary to state two of them. One is that the legal title of said property never was at any time vested in Wm. D. Cabell; for on the 88 14th of March *1857, the Misses Gordon, then owners of said property, conveyed the same to C. T. Wills, R. G. H. Kean, and Samuel Tyree, in trust to secure a compliance by said Gordons with an executory undertaking and contract by said Gordon with the — Building Fund Association. The lien has never been discharged, and the property still remains bound to secure a compliance with said contract, the liabilities under which have not been ascertained. The other objection is, that the contract was to have been completed on the 15th of July. It was essential to the interest and purposes of the respondent that such should be the case, and the parties who dealt with him were thus informed; and hence the provision in the contract on that point. The property was purchased to be used for a large female boarding and day school; it was greatly out of repair, and unfit to be used for these purposes until important and expensive repairs were put upon it. The party selling having failed to comply with their contract on or before the 15th of July, respondent renounced it altogether, the element of time, by express provision and mutual understanding of all parties, being an essential one. Having failed in this respect, respondent was compelled to rent a house, and make other arrangements. And he says that the buildings on the ground were, on the night of the 1st of September, wholly consumed by fire.

Upon the filing of his answer Christian moved the court to discharge the rule; but the court overruled the motion for the present, and ordered one of the commissioners of the court to examine the state of the title to the property in controversy, and ascertain whether there is any defect in the same; and also whether there be any incumbrance thereon, and, if so, what is the character of said incumbrance, the amount, and by whom held; and make report of all these matters to the court.

On the 30th of September 1870, Commissioner Lewis returned his report. After 89 detailing the conveyances of *the property, he speaks of the incumbrances. He says: The questions, whether there be any incumbrance on the property, and its character and amount, present profound difficulties; and your commissioner, not without diffidence and hesitation, returns the result of his investigations. The debt of the Misses Gordon, their complex contract with the Lynchburg Building Fund Association, and the deeds of trust to Messrs. Wills, Kean, and Tyree, without doubt constitute an incumbrance of the property in litigation. The Misses Gordon, who had twenty-one shares in the Lynchburg Building Fund Association, took loans or advancements at different times, \$2,040, upon which they paid interest to December 31st, 1863. They also paid their periodical

dues and instalments to that date. Numbers of shareholders paid in all dues, and got nothing. There is evidently an indebtedness, which must enure to the benefit of that class, and it is easily traceable to those who borrowed.

To ascertain what is the debt due the association is utterly beyond the resources of your commissioner, because, while all the securities were originally good, many have been substituted by worthless collaterals, and the debtors have since become insolvent; and, moreover, part of the money paid in and loaned was Confederate currency, scalable at as many as twenty-four different values. To fix it, then, in this cause, is a compound impossibility. He makes calculations by which he says it may be that the debt of the Misses Gordon may not be more than \$108, with interest from the 1st of January 1864. This excludes all idea of the premium of fifty per cent. on \$2,044—\$1,020, the breach of the conditions of their bonds, to pay instalments and interest, to keep the houses insured, &c., &c.; and charges them with no loss superinduced by dealings in Confederate currency and securities otherwise. Introducing into the computation these varying and shifting elements, to be fixed only after protracted and uncertain litigation, it must be

90 *apparent that the indebtedness of the Gordons must very far exceed the sum of \$108, with interest from the 1st of January 1864, mentioned above. It may reach \$1,100, but cannot on any principle, it is apprehended, be swelled to a much higher figure. If he must state a precise sum for their indebtedness secured by deeds upon one-half of the property, he fixes it at \$800. This report, so far as it attempted to fix the amount of the debt of the Misses Gordon, as well as on other grounds, was excepted to by Christian.

The deposition of Camillus Christian, who had been the treasurer of the Lynchburg Building Fund Association during its whole existence, was filed in the cause. He states that the Misses Gordon held twenty-one shares of the stock of the association, and their debt was \$2,040, for which they gave their bonds and deeds of trust on the property known as the Lynchburg Female Seminary. He is unable to say what is the amount of their debt, by reason of the nature of their obligations; and the losses of the association being uncertain, as well as to who are to sustain those losses, he can make no estimate. The constitution and by-laws require the institution to continue till each share of stock is worth \$200. There is about \$28,000 of Confederate bonds on hand, as part of the assets, and some others were taken as collaterals; and large amounts secured to the association upon property, bonds, or other collaterals, are wholly worthless. The stock of the association consisted of one thousand shares, of which six hundred shares have been redeemed, leaving four hundred for redemption. There being no board of directors, a suit in chan-

cery has been brought to wind up the institution.

J. N. Gordon, the brother and agent of the Misses Gordon, states in his deposition, that the instalments and interest, as required by the institution, were paid up by them as long as any officer could be found to receive them.

91 *Mr. Brown, who was examined as a witness, says he did not, during the negotiation with Mr. Christian, inform him that there was any blot upon the title, because he did not at that time know that there was any. He did not know the lien of the Building Fund Association existed in 1860, when Mr. Cabell purchased the property. But the Gordons bound themselves by their deed to remove all incumbrances, and he had particular assurances from Mr. J. N. Gordon that this lien should be removed. He thinks Mr. Gordon told him it had been removed; at least, he thought it had been, when the last payment was made by Mr. Cabell. And being under the impression that the title was perfectly clear, so expressed himself to Mr. Christian, who he does not doubt signed the contract under that impression.

In the progress of the cause it was reported to the court that the building on the lot was burned, and an order was made appointing commissioners to sell the old bricks, and they had reported the net proceeds of the sale at \$410.88.

On the 7th day of March 1871, the court made a decree enforcing the contract, directing the cash payment to be deposited in the bank of Miller & Franklin, and the bonds to be executed within ninety days from the date of the decree. And if Christian failed to perform the decree, commissioners were appointed to sell the property. And leave was given the plaintiffs to amend their petition, and make the Lynchburg Building Fund Association, the Misses Gordon, and the trustees in their deeds, parties. From this decree Christian applied to this court for an appeal, which was allowed.

Kirkpatrick & Blackford, for the appellant:

1. This is not a contract of which specific performance will be decreed:—

(a) Because it was not mutual. The vendor, Brown, had no interest in the property sold, and had no authority *to sell. 1 Sug. on Vend. p. 281; 2 Lomax Dig. p. —; Dart on V. & P., 461; Fry on S. P., 198; Clarke v. Reins, 12 Gratt. 98; Hoover v. Calhoun, 16 Gratt. 109; Duvall v. Myers, 2 Mary. Ch. Dec. 401; Bodine v. Glading, 21 Pa. R. (9 Harris) 50. Mutuality must exist at the time of the contract. Fry on S. P. § 298; Moore's Adm'rs v. Fitz Randolph, &c., 6 Leigh, 175. Cabell, trustee, was not a party to the contract, and Christian not a party to the suit.

(b) Because the deed tendered with the possession was not a "good deed"—did not convey a good title. It did not convey

the title to the property, which vested in Cabell, trustee, not under the deed of March 1863, but under that of July 1860. The latter deed not referred to in Cabell's deed to Christian, and no where alluded to in the decree of 9 July 1870. 2 Lomax Dig. 104, § 45; Garnett v. Macon, 6 Call, 309; Bryan v. Loftus, 1 Rob. R. 19; Sug. V. & P., 271-4; Cooper v. Denne, 4 Bro. Ch. C. p. 80, and notes; Jackson v. Ligon, 3 Leigh, 161; Watts v. Kinney, Id. 272; Lechemere v. Brazier, 2 Jac. & Walk. R. 286. The legal title outstanding in trustees to secure obligations to the Lynchburg Building Fund Association, constituted an incumbrance, not exact or definite in its amount, and not removable at the pleasure of Cabell, trustee.

This incumbrance, when called to the attention of Cabell, trustee, was neither assumed nor acknowledged by him. This gave Christian the right to abandon the contract. Garnett v. Macon, supra; 1 Lom. Dig. supra.

(c) Before the vendor can enforce specific performance, he must show himself ready and able to convey a good title. He must have command of the full title and of all outstanding incumbrances. 3 Parsons on Contr., under head of Specif. Performance; Bank of Columbia v. Hagner, 1 Peters U. S. R. 455; Griffin's Adm'r v. Cunningham, 19 Gratt. 571.

(d) Before the contract was consummated, and while *vendee was not in default, the buildings were burned, and the value of the property seriously impaired. Sug. on V. & P., 334, § 13; Garnett v. Macon, 6 Call, 309.

2. But if the contract was perfected by the decree of July 9th, the vendee was never properly impleaded. The suit was not brought for specific performance. Christian was not a party to it, nor bound by any of the proceedings. He should have been made a party at first, or a new suit should have been instituted against him when Cabell had fully complied with the contract.

3. The proceeding by rule against an unwilling purchaser at a judicial sale is no precedent for the court's proceeding in this case. In such cases, the courts declare that the proceeding by rule nisi is based on the ground that the vendee has dealt with the court, and submitted himself to its jurisdiction in the case. Here there had been no suit; no authority from the court; no submission to its jurisdiction. Christian was neither an actual nor quasi party to the suit. He had dealt with one who had no shadow of title or authority from any source. The confirmation of his contract was without his knowledge. His contract had specified no court in which the suit should be brought, and did not fix the time when it should be instituted. He, therefore, had neither actual nor constructive notice of the proceedings till the contract had been approved and confirmed. In Garland v. Loving, 1 Rand. 396, this court held that the court might approve a sale already made; but in that case Loftus, the purchaser, was a party defendant, and con-

senting to the confirmation. For grounds on which the court may proceed against a delinquent purchaser under its decree, see *Clarkson v. Read*, 15 Gratt. 288; *Gross v. Percy*, 2 Pat. & Heath R. 483; *Daniel v. Leitch*, 13 Gratt. 195; *Cooper v. Hepburn*, 15 Gratt. 551.

4. No title should have been forced on the vendee, Christian, till the holders of the legal title, and all interested in outstanding incumbrances, had been made
94 *parties. Till that was done, the title was not under the control of the vendors, or of the court. If purchase money should be lost, the property still remained bound, and the vendee unprotected.

John Daniel, and Bouldin, for appellees:

1. This was a judicial sale. Christian knew that Brown and wife had no authority to make the sale, and the contract provides that it shall be confirmed by the court. This was done. The conveyance tendered by Cabell was not made by virtue of his power as trustee, for as such he had no power to make a deed but it was made by the authority of the court. The court may make a judicial sale as well by confirming a contract previously made by the parties interested, as by appointing a commissioner to sell. In either case the sale is the act of the court, not of the parties or the commissioner. *Garland v. Loving*, 1 Rand. 396; *Daniel v. Leitch*, 13 Gratt. 195, 213; *Goddin v. Vaughan*, 14 Gratt. 102; *Ex parte Minor*, 11 Ves. R. 559; *Cooper v. Hepburn*, 15 Gratt. 551.

2. Christian knew that the court was to be asked to confirm the contract; and if, as he insists, time, as to title, was of the essence of the contract, he knew that the application to the court must be immediate. If, then, he wished to investigate the title before the sale was confirmed, he knew he must do it before the application to the court was made. Having neglected to do this, he stands upon the footing of a purchaser at a judicial sale after it has been confirmed; and it is a matter of grace to him if he is permitted to show any objection to the completion of the sale. *Threlkeld v. Campbell*, 2 Gratt. 199; *McClung v. Young*, 9 Id. 336. And the only objections that can be made are irregularities in the proceedings. *Daniel v. Leitch*, 13 Gratt. 195, 213. Nor is it any objection that there was no time allowed
95 for the investigation of the title after the commencement of the *proceedings, and before the decree confirming the sale. In *Cooper v. Hepburn*, 15 Gratt. 551, the sale was by secret biddings, not opened until the court was in session, and the purchaser did not know that he was the purchaser until the moment the decree confirming the sale was entered; and yet he was not allowed to make objections to the title afterwards.

3. The mode of proceeding by rule was proper. Christian might have been made a party to the suit if he had chosen, as was done in *Garland v. Loving*; but it is obvious from his whole conduct that he did not ex-

pect or wish to be. He was to bear no part of the cost or expense. Certainly generally purchasers at a judicial sale are not parties as such in the cause. They become quasi parties, and thus submit themselves to the authority of the court for the enforcement of the contract; and when this becomes necessary they are brought in by a rule upon them to show cause why they shall not be compelled to execute the contract. On this point there can be no doubt since the decision of *Clarkson v. Read*, 15 Gratt. 288.

4. The only plausible objection to the title in this case is the lien of the Lynchburg Building Fund Association. The whole penalty of the bonds of the Misses Gordon is \$4,000, and it is impossible therefore that under any possible circumstances the lien on the property could exceed that sum. It is equally certain that it could not reach the half or the third of it. The commissioner reports that he had paid up everything until December 31st, 1863, showing, indeed, that they had paid \$92 on each share of their stock, whilst the whole sum borrowed by them was but \$2,040. And Mr. Gordon, their brother and agent, says he paid for them every due as long as an officer of the association could be found to receive it; and he believed the lien was paid off. Then in any case that could occur, here was a purchaser who would have eight thousand dol-
96 lars of the purchase money in his hands for one year, six thousand *dollars for two years, and at the end of five years he would have in his hands sixteen hundred dollars, and at the end of four years double that amount, to meet and discharge any debt that might be found due from the Misses Gordon to the Lynchburg Building Fund Association. Surely it will not require four years to wind up this concern, and ascertain the amount of this debt of the Misses Gordon; and as their stock in the association is first responsible, and they are personally bound, and Christian would have in his own hands the money to pay the debt, he might well leave the Misses Gordon and these appellees to contest that claim, and give himself no trouble about it. We say, then, that this incumbrance is no objection to the title. 1 *Parsons Sel. Equ. Cas.* 37; *Dalzel v. Crawford*, *Seymour v. Delancy*, 3 Cow. R. 246.

5. Time was not of the essence of the contract as to the title. The possession at an early day was important to Christian, and that is provided for in the contract; and the record shows that we were ready on the day, and so informed Mr. Christian, to deliver to him full possession of the property. The contract certainly does not fix a day for the making of the deed; but shows on its face, that the court was to be asked to approve the sale and direct a conveyance before it could be done. Nor was it at all important to him whether the deed was made in July 1870 or July 1871. He did not purchase for speculation, but for his own use; and so he got a good title in any reasonable time it was the same to him. In

fact we tendered to him a deed before the 15th of July. He says there are omissions in it which render it fatally defective. So far as form is concerned, he had only to point them out to have them corrected; and if we have been successful in showing that the incumbrance to the Lynchburg Building Fund Association is not a valid objection to the execution of the contract, then there was

no substantial objection to the deed
97 which we tendered. *But to make time of the essence of the contract it must be so expressed and fixed at the time of the contract. *Hipwell v. Knight*, 1 Young & Col. R. 401; *Hepburn v. Auld*, 5 Cranch R. 262; *Roberts v. Berry*, 3 De Gex, McN. & Gord. R. 284.

6. If, as we insist, the sale stood confirmed by the decree of the 9th of July, then Christian must bear the loss occasioned by the destruction of the property. Or if, as we have endeavored to show, the incumbrance on the property was not sufficient to forbid an execution of the contract, then the appellees were in no default, and the destruction of the property is not a sufficient ground to defeat the contract. *Low v. Treadwell*, 3 Fairf. R. 441; *Paine v. Meller*, 6 Ves. R. 349.

STAPLES, J. As a general rule the purchaser at a judicial sale is required to pay the consideration for the estate, although it be destroyed or taken from him by superior title before a conveyance is executed. For the purposes of this case, it is unnecessary to state either the modifications or exceptions to this rule. The question to be considered is, whether the sale here is of that character. The written agreement is filed as an exhibit in the cause. It purports to be a memorandum of a contract between R. L. Brown and wife of the one part, and the appellant, as purchaser, of the second part. It recites that the parties of the first part had sold the property upon certain terms therein mentioned; that the purchaser was to make a payment of two thousand dollars upon the delivery of a "good deed," and to execute his bonds for the deferred instalments; and that said Brown and wife had agreed to give possession of said property to the vendee not later than the 15th July 1870, and also to procure the approval of the proper court to the contract without charge or cost to the purchaser.

It is impossible to regard this in any other light than a private contract of sale
98 and purchase. The court was *not asked or expected to make, but to confirm a sale already made. Its aid was invoked to ratify what had already been done, to sanction terms already agreed by the parties. The vendors believed that they, and others in whose behalf they acted, had a perfect title to the property, and they undertook with the aid of the court to convey such title. The evidence in the record establishes that fact. The agreement to make "a good deed" is not simply a covenant to execute a deed in legal form with proper warranty, but to convey a good title. This

was conceded in the argument, and is well settled upon authority. *Fry on Specific Performance*, and cases cited in note, page 347; *Fletcher v. Bulton*, 4 Com. 397.

It would be most unjust to apply to a contract of this character the principles governing judicial sales. The purchaser at such sale perfectly understands that the court does not undertake to convey a good title, and that it is his duty to make all necessary inquiries in regard to the estate he is purchasing. But when the purchaser has stipulated for a good title, is he to be compelled to take a defective one because the court had rendered a decree approving the sale? It is idle to say that a conveyance under the decree satisfies the covenant for good title, when in fact there is no good title.

When a person purchases at a judicial sale, he thereby becomes in a certain sense a party to the cause, and submits himself to the jurisdiction of the court. In this case the appellant was no party to the suit for confirmation in any sense. It does not appear that he was even apprized of the court in which it was pending until after the decree was rendered. The contract was entered into on the 30th of June 1870. The suit was instituted without process on the 9th of July; the bill and answers filed, decree obtained, and deed prepared on that day. Shortly thereafter, within four or five days, the appellant was first informed of the difficulties in respect to the title. Im-

mediately, without an hour's delay,
99 orally *and in writing, he communicated these difficulties to the appellees, and informed them of his determination not to have anything to do with the property in the confusion and uncertainty attending the title. The trustee replied through his counsel, that he was prepared to deliver the possession and to make a good deed, and any objections made to it "were erroneous or imaginary." If, under these circumstances, the appellant had accepted the deed and the possession, made the payment as agreed, and executed his bonds for the deferred instalments, it is clear he would have thereby waived every objection to the title, and effectually precluded himself from any valid claim to relief or indemnity. If authority were necessary in support of this proposition, it may be found in *Daniel et als. v. Leitch*, 13 Gratt. 195, 212. In 1 Sugden on Vendors, the rule is thus expressed: "Where difficulties occur in making out a good title, the purchaser should not take possession until every obstacle is removed." The reason is that such a measure will generally be regarded as an acceptance of the title. *Fry on Specific Performance*, 868.

It seems to me, therefore, that the appellant is not precluded by the decree of the court, nor by anything that has occurred, from abandoning the contract. It only remains to consider whether he was justified in so doing. And this brings me to the question whether the vendors, at the date of the sale, or at any other time, were able

to make a good title according to the terms of their covenant; if not, what effect this had upon the rights and obligations of the parties.

The appellant suggests various objections to the title. I propose merely to consider those which relate to the incumbrances upon the property.

It appears that the Misses Gordon, under whom the vendors claim, in the years 1856 and 1857, received from the Lynchburg Building Fund Association an advance of \$2,040, for the redemption of their 100 twenty-one shares of *stock in said association; that they executed their bonds with condition to pay all monthly dues, interest, fines, and charges for which they might be liable according to the constitution and by-laws of the association. They also gave two deeds of trust upon the property in controversy, containing various clauses and covenants not necessary to be particularly mentioned. They are such as are usually found in mortgages and trust deeds executed to these associations in this State. It further appears that the Misses Gordon punctually paid all their dues prior to the 31st December, 1863; but have been in arrear since that time.

Subsequent to the 1st January 1863, all dues and instalments were paid by the members in Confederate treasury notes; and the association has sustained heavy losses by investments in that currency, having now on hand about \$28,000 in Confederate bonds. Since 1864 it has ceased active operations, although the constitution and by-laws require its continuance until each share is of the value of two hundred dollars.

The first question suggested by these facts is, whether the holders of the four hundred unredeemed shares, who have received nothing, may not require that the association shall resume and continue its business until their shares attain their par value; and further, whether the property in controversy may not at any time be sold, under these trust deeds, for all the arrears and delinquencies of the Misses Gordon since 1863, including monthly instalments, fines and interest, and other dues.

And secondly, if such sale shall be made, will not the trustees be required also to receive and set apart a sum sufficient, with other contributions, to give to the shares the value agreed upon in the constitution and by-laws; and how is the necessary amount to be ascertained—upon what principle is the calculation to be made? Thirdly, whether the debtors to the association—they whose shares have been redeemed—may
101 insist that the association *shall be at once dissolved, and their estates released from the liens thereon; and if so, upon what terms are they to be released?—how is the account of losses to be stated and adjusted, and how apportioned between those who have received all the available funds and those who have received nothing?

These are perplexing and difficult questions, which, in the language of the commissioner, can only be settled "after

protracted and uncertain litigation." No subject has created more embarrassment and difficulty with the courts and the profession than that which relates to the rights, powers and duties of these building associations. At the present term a number of cases have been argued before us, involving questions of a complex character, and occasioning almost endless diversity of opinion. It is understood that many others are pending in the courts below, presenting the identical questions suggested by this record. The whole matter is confessedly involved in doubt and obscurity, justifying the remark of an English chancellor, that their "articles are, to a considerable extent, unintelligible, and not very consistent;" so that it is now generally agreed the rights and duties of these associations, the proper construction of their charters, and the liabilities of the several stockholders, the nature, operation and effect of the bonds and mortgages can only be settled by the courts. In the present case the treasurer states that by reason of the nature of the obligations of the Misses Gordon, and the losses of the association being wholly uncertain, it is impossible to make an estimate of the amount of their indebtedness. In the language of Chief Justice Marshall, in *Garnett v. Macon*, 6 Call, 309, 367, "It cannot be doubted that these difficulties, if presented to the mind of a prudent man, contemplating the purchase of an estate, and desirous of performing his contract according to its terms, might have serious influence on his conduct, and might deter him from
102 making the purchase. *If informed of them after making the contract, but before its execution by the paying of the purchase money and receiving a conveyance, he would have such strong motives for stopping entirely, or, at least, for pausing until the impediments could be removed, as would, I think, justify him for so doing, in the opinion of any reasonable man." These observations apply with peculiar force in this case. The object of the appellant in making the purchase was to open a large female school in the building at an early day. The property demanded repairs of an extensive character. The establishment of the school required a considerable outlay of money in the beginning. Under these circumstances, the appellant might well refuse to complete the purchase of property liable at any time to be sold, subject to incumbrances of unknown amount, and the very possession of which might expose him to expensive and vexatious litigation. No one supposes, for a moment, that the appellant would have made the purchase had he been apprized of the condition of the title. Why was he not informed of it? Mr. Brown admits that he knew of the existence of the incumbrances shortly after the property was purchased from the Misses Gordon. His apology for failing to communicate the fact to the appellant is, that he had particular assurances from Mr. J. N. Gordon the liens should be removed, and he thinks Mr. Gordon told him it had been done. No one

attributes to Mr. Brown any fraudulent intent, but it was his duty to inform himself accurately before undertaking to represent to the purchaser the state of the title.

In the case of *Garnett v. Macon*, before cited, Chief-Justice Marshall said: "In a contract for the purchase of a fee simple estate, if no incumbrance be communicated to the purchaser, or be known to him to exist, he must suppose himself to purchase an unincumbered estate." In answer to the argument made at the bar, that the decisions were confined to cases where

103 the title was *doubtful, and not where there was a mere money charge upon the estate, he said: "The objection is not entirely confined to cases of doubtful title. It applies to incumbrances of every description which may in any manner embarrass the purchaser in the full and quiet enjoyment of his purchase. There is certainly a difference between a defined and admitted charge, to which the purchase money may by consent be applied when it becomes due, and a contested charge, which will involve the purchaser in an intricate and tedious law suit of uncertain duration."

I do not deem it necessary to quote any other authority in support of this doctrine. It is fully sustained by the cases of *Freer v. Hessee*, 21 Eng. L. & E. R. 82; *Salisbury v. Hatcher*, 6 Jurist, 1051; 1 Sugden on Vendors, 7th Am. ed., p. 84; *Hunt v. Saunders*, 1 Monr. 219; *Sturtevant v. Jacques*, 14 Allen R. 523. See also cases cited in 2 Dan. Ch. Prac. 989, note.

It is true that specific performance will be decreed in some instances where the vendor is prepared to comply with his covenants at the hearing, and the court will afford him a reasonable time to remove incumbrances and perfect his title. But this is a matter of favor to the vendor, only to be granted in cases which admit of such relief without prejudice to the rights of the vendee. This indulgence will not be granted where the defect to be remedied was known to the vendor of his attorney at the time of the contract, and was concealed from the purchaser. In *Dalby v. Pullen*, 3 Sim. R. 29, a defect in the title, though known to the vendor's solicitor, was not communicated to the purchaser. "The vice-chancellor said that the parties by such conduct had precluded themselves from the benefit of the rule which prevails in the court, as to the time allowed to vendors to remove objections to the title. And accordingly, a motion by the purchaser to be discharged from the purchase was granted, though the vendors

104 had removed the defect before the motion *was made. See also *Lechmere v. Brasier*, 2 Jac. & Walk. R. 287, *Fildes v. Hooker*, 3 Mad., 1 Sugd. Vend. 350. And more especially will such indulgence be denied where, besides a failure to disclose the existence of incumbrances, an account is necessary to ascertain the state of the title, the extent, nature, and amount of such incumbrances."

I have seen no case in which it has been held that a purchaser has been required to

await the institution of a suit, and the settlement of contested accounts between third persons, to afford the vendor an opportunity of removing incumbrances and perfecting his title. Dart on Vendors, 70; *Sidebotham v. Barrington*, 3 Beav. R. 528; *Fosters v. Hoggart*, 14 Jurist, 757; *Arnot v. Briscoe*, 1 Ves. Sr., 94.

It is very questionable whether, under these circumstances, a court of equity would decree in favor of the vendors, even if no change had taken place in the condition of the estate. Inasmuch, however, as the property which was the sole inducement to the purchase, has been destroyed by fire, without the fault of the vendee, before the vendors were in a condition to remove the cloud upon the title, it would seem very clear it is not a case for specific performance. Where an event happens which determines the existence of the subject matter of the contract, the important inquiry is, was the contract at the time so concluded as to change the right of property, and to vest it in the purchaser? One of the earliest cases on this subject is that of *Wyvill v. Bishop of Exeter*, 1 Price Exch. R. 294. *McDonald, Ch. B.*, said a court of equity will enforce specific performance without regarding which party may be benefited or prejudiced by the accident of unforeseen events, where the purchaser has actually accepted a title after a contract of sale; but where the purchaser has not accepted the title, the court refuses to decree performance. In *Paine v. Mellor*, 6 Ves. R. 349, Lord Rosslyn did not consider such acceptance necessary, and he accordingly

105 directed an inquiry *whether a good title could be made. In that case objections were made to the freehold title; the premises were also subject to a charge for certain annuities, but a trust stock had been declared for their payment. The purchaser, however, waived his objections to the title, and agreed that he would complete the purchase upon receiving an indemnity against the annuities. Before the indemnity was given the premises were destroyed by fire. Lord Eldon said, it is clear the objection was given up as to the freehold title, and the only difference was as to the indemnity against the annuities affecting these with other premises. Notwithstanding, he refused to decree a specific performance unless it appeared the purchaser had actually accepted the title; and accordingly a special reference was directed as to the fact of the acceptance. He further said: "As to the mere effect of the accident itself, no solid objection could be founded upon that simply, for if the party, by the contract, has become in equity the owner of the premises, they are his to all intents and purposes. It therefore becomes important, in cases of this sort, to ascertain the period at which the purchaser is to be regarded as the owner. He certainly must be so considered from the date of the bargain, where the vendor is in no default, and is prepared to convey a clear title. But if, according to the cases, a court of equity will not com-

pel the purchaser to accept a title which the vendor cannot make out to be clearly good and free from incumbrance, how is the purchaser to be regarded as the owner till these objects are effected, and the vendor is prepared to make the title according to the contract. In *Carrodus v. Sharp*, 20 Beav. R. 56, a bill was filed for the specific execution of an agreement to purchase a mill, and a decree was made in September 1854, but a good title was not shown until the following December. A question arose as to who was to bear the expense and outgoings belonging to the mill, and to the repairs and sustentation of the premises and the machinery. *Sir John

Romilly decided that these must be borne by the vendor up to the time at which a purchaser could prudently take possession, which is the time at which a good title is shown; and after that by the purchaser. It is perfectly clear that the same principle would have thrown upon the vendors a loss resulting from an entire destruction of the property. See also *Monro v. Taylor*, 3 McN. & Gor. 713; *Fry on Specific Performance*, § 895; *Steut v. Bailis*, 2 P. Wms. R. 220; 1 Sugd. Vend. 39, 389; *Cass v. Rudele*, 2 Vern. R. 280; *Ex parte Minor*, 11 Ves. R. 559.

I have had occasion already to quote from the opinion of Chief Justice Marshall in *Garnett v. Macon*. It must be borne in mind, that the purchaser there resisted a specific execution of the contract, upon the ground of a charge upon the property for the payment of debts created by a previous owner. In the progress of the suit, however, the encumbrance had been removed. Judge Marshall said: All the parties are now before the court, and if a specific performance should be decreed, the title which can be made to Macon will, undoubtedly, stand clear of Campbell's lien. The question, therefore, is whether the contract ought now to be enforced. He then proceeds to consider how far time is the essence of a contract for the sale of real estate, declaring the rule to be, if a bill for a specific performance be brought by a party who is himself in fault, the court will consider all the circumstances of the case, and decree according to these circumstances. He then concludes by saying: "As I think Campbell's claim was a cloud hovering over the title Garnett could convey to a purchaser with notice, which justified Macon in refusing to go on with the purchase, which cloud could not be dissipated but by the decree of a court of chancery; and as before such decree was attainable the value of the article has greatly changed, that circumstance creates a strong objection to specific performance."

107 *It is obvious Judge Marshall was of opinion that any loss occurring to the property before the vendor was in a condition to convey a clear, unincumbered title, must fall on him, and not on the purchaser. And this is the result of all the cases. In the present case the incumbrances were subsisting at the hearing, nor does it appear

that they have yet been removed. Under the decree of 7th March, 1871, leave was given to the plaintiffs and appellees here to amend their petition, and make the association and the trustees under the deeds of trust executed by the Misses Gordon, parties defendant to the suit, in order to settle and adjust what balance may be due, if any, to said association. It is also stated, that because of the difficulties arising out of the perplexing condition of the association, a suit has been instituted to wind up its affairs. The purchaser must, therefore, await the settlement of the various questions arising in this suit, and the termination of a protracted controversy, before the character, nature, and extent of his liabilities can be ascertained.

It was argued that the purchaser cannot complain, because no day was fixed for the conveyance of the title. The articles of agreement unmistakably show the understanding of the parties, that the deed should be made so soon as the approval of the court could be obtained. And such clearly was the view of the parties making the sale. They did not ask for delay that the cloud upon the title might be removed. They tendered a deed with special warranty shortly after the decree as a literal performance of their covenants. Was this a compliance with the contract?—was the title offered the appellant the title he had agreed to accept? Unless it can be so held, the tender imposed no obligation upon him. He was bound to take a conveyance only when a good title was offered. Conceding that he could not object, if they asked for delay, still he had the right to insist they should perform all they had engaged to perform, *before he could be required to accept the title, or the ownership of the property. Not having done so, the loss must fall upon them and not on him. *Foster v. Hoggart & als.*, 14 Jurist, Part 1, 757; *Counter v. McPherson*, 5 Moore, Privy Council Cases, 83. This is a hard case upon the appellees, and deeply to be lamented. It would be equally hard upon the appellant, who is in no default, to compel him to pay the consideration for property no longer in existence. With the greatest possible respect for the learning and the ability of the judge in the court below, I think the decree rendered by him must be reversed for the reasons stated.

The other judges concurred in the opinion of Staples, J.

Decree reversed.

109 **Tunis v. Grandy & al.*

March Term, 1872, Richmond.

Towns a warehouse, and also a lumber yard, with office and shed attached to it, adjoining the warehouse, both fronting on a wharf owned by her, which runs the whole length between them and Elizabeth river, at Norfolk. In December 1865, she leases to H. for five years, the lumber yard.

See 2 Min. Inst. (4th Ed.) 751, 750, 760.

and office, and shed, together with the use of the wharf in front of the lumber yard, for purposes required in carrying on the lumber business, &c. But H is not to have the privilege of collecting wharfage, either on vessels or goods landing, or shipping for other parties.

In September 1867, T. by deed, demises to G the warehouse, with the appurtenances thereto belonging, for the year 1868, for a rent of \$1,525, payable quarterly; and in a separate clause it is agreed that G is to have the entire privilege and control of the entire wharf to said warehouse and the lumber yard, except that H shall have permission to use the wharf in front of the lumber yard in carrying on his business in landing and loading with lumber, &c.; but on no account shall H be allowed to let anything whatever remain on the wharf; but it is to be taken away as soon as put upon it; otherwise, G will charge the usual wharfage on all such merchandise, lumber, &c.

G is put into possession of the warehouse and wharf, but H uses the wharf in front of the lumber yard for his business, sometimes piling his lumber thereon, so that G cannot make much use of it, and H refuses to pay wharfage; but G gives no notice of this to T, and when three quarters of his rent is due, refuses to pay anything, on the ground that he has been ousted of a part of the demised premises by T's use of the wharf. **HOLD:**

1. **Deprivation of Tenant by Landlord of Leased Premises.**—If a tenant be at any time deprived of the leased premises by the landlord's agency, the obligation to pay rent ceases.

2. **Recovery by Third Person.**—If the land be recovered by a third person, by title superior to that of the lessor, the tenant is discharged from the payment of rent after eviction by such recovery.

110 *3. **Same—Partial Eviction—Apportionment of Rent.**—If part only of the land is recovered, such an eviction is a discharge of so much of the rent as is in proportion to the value of the part evicted. But if the lessor himself wrongfully deprives the tenant of the whole or any part of the premises, the tenant is discharged from the payment of the whole rent until such possession is restored.

4. **Demised Premises—What Included.**—Under the demise to G of the warehouse and the appurtenances thereto belonging, the wharf did not pass.

5. **Same—Covenants.**—The provision in the lease to G in relation to the wharf is not a demise of the wharf, but a covenant.

6. **Same—Same—Construction.**—If the provision as to the wharf makes it a demise of the wharf to G, the interest thus vested in G is in entire accord with the previous lease to H; and the interest previously vested in H was not demised to G.

7. **Same—Eviction.**—If T intended to make a covenant with G in regard to the extent to which the wharf might be used by H, then a breach of that covenant, supposing it to have been broken, would not amount to an eviction.

8. **What will constitute an eviction?** See the opinion.

9. **Second Lease—Eviction by First Lessee.**—If a tenant, under a second lease, is put into possession of the whole of the demised premises, and is afterwards evicted from a part thereof, by the lessee under the first lease, then the rent will be apportioned, and the lessor may distrain for it;

but if the lessee under the first lease is in possession, so that the lessee under the second lease cannot get possession of a part of the premises demised to him, then the second lease, as to this part, is void, and the lessor cannot distrain for a proportion of the rent, though he may recover the fair value of the balance of the premises, in an action for use and occupation.

10. **Eviction—What Constitutes.**—The abandonment of the use of the wharf by G cannot amount to an eviction, whatever may have been the extent of H's right to the use of the wharf under his lease, or however that right may have conflicted with the right of G to its use under his.

This was an appeal from the judgment of the Corporation court of Norfolk, rendered on the 14th of January 1869, in a cause in which Rebecca B. Tunis was plaintiff, and C. W. Grandy, Jr., and D. D. Simmons were defendants. The judgment was in favor of the defendants, and the plaintiffs having taken two exceptions to decisions of the court, applied to this court for 111 a supersedeas *to the judgment, which was awarded. The facts are so fully stated in the opinion, that any other statement is unnecessary.

The case was argued by J. Alfred Jones for the appellant, and Scarborough, Duffield & Sharp for the appellees.

MONCURE, P. delivered the opinion of the court.

This is a supersedeas to a judgment of the court of the corporation of the city of Norfolk, rendered on the 14th day of January, 1869, on a motion on a bond for the forthcoming of property distrained for rent, claimed by the plaintiff, Rebecca B. Tunis to be due to her by her tenants, C. W. Grandy & Sons, for a certain messuage and tenement situated in the said city. It was agreed between the parties that the defendants might, in making their defence to said motion, give in evidence, without any pleading filed by them, any matter which could be given in evidence under any special plea in bar good in law; and that the plaintiff might give in evidence, by way of rebuttal, any matter which could be given in evidence under any replication that might be made to such special plea in bar as aforesaid. And thereupon the said parties, by consent entered of record, waived their right to have a jury, and submitted that the whole matter of law and fact might be heard and determined, and judgment given by the court. The trial was very protracted, having commenced on the 29th of December, 1868, and ended on the 14th of January, 1869, when judgment was rendered for the defendants. The plaintiff excepted to the judgment of the court, and filed a bill of exceptions, which was made a part of the record, and in which is set out all the evidence in the case. The claim was for \$1,143.75, being rent for three-quarters of the year 1868. The defence of the tenants was, that they were evicted by the lessor of a portion of the demised premises, and were, therefore, discharged

112 from their obligation to pay *the rent, or any part of it. The said portion of which they claimed to have been evicted was a part of a wharf, which they insisted was appurtenant to, and parcel of, the demised premises; and the eviction consisted in the use and occupation of the said part of the wharf by Murdock Howell, claiming to be entitled to such use and occupation under a lease from the plaintiff, prior in time to that under which the defendants claimed. The question in controversy depends almost entirely, if not entirely, on the true construction of these two leases.

On the trial of the cause, the plaintiff introduced as evidence:

Firstly, The warrant of distress and the return thereon.

Secondly, The forthcoming bond taken under the said warrant, with the indorsement thereon.

Thirdly, The deed of lease from the plaintiff to C. W. Grandy & Sons, bearing date the 25th day of September 1867. As this is a most important part of the evidence in the case, it is proper to set out the same substantially. It states that the said Rebecca B. Tunis, in consideration of the rents, provisions, and agreements therein-after mentioned, had rented to the said Grandy & Sons, the warehouse situated on Tunis's wharf, in the city of Norfolk, formerly occupied by William Swain, together with the appurtenances thereto belonging, to have and to hold the said warehouse and appurtenances, for the year 1868, commencing January 1st, and ending December 31st, 1868, inclusive, for the sum of \$1,525, payable in quarterly instalments, the first to be paid on the 1st day of April 1868, and the others at the end of each quarter as they might become due, except in case of destruction of said property by fire, or unavoidable accident, in which event the rent was to cease. And in default of the payment of said rents as before appointed, it was agreed that the said R. B. Tunis, at the end of the quarter at which such failure of the payment of the rent might occur,

113 after giving ten days' notice in writing *to the said Grandy & Sons, might take possession of the said warehouse and appurtenances, and re-rent the same for the unexpired term; and that the said Grandy & Sons would pay to her all costs and damages which she might sustain on account of the failure of the payment of the rent as before specified. The deed then proceeded in the following words:

"It is farther agreed and understood between the parties to this indenture, that the property herein rented does not include the lumber yard or the brick office, but only includes the warehouse and old wood shed, now standing in rear of the warehouse, on a line with the street, and which the said C. W. Grandy & Sons wish to use as a stable, or whatever else they may see fit. The said C. W. Grandy & Sons are to have the entire privilege and control of the entire wharf to said warehouse and lumber yard, which wharf runs from lumber yard now occupied

by Santos & Brother, to warehouse now occupied by C. W. Grandy & Sons, except that the party or parties who may occupy lumber yard and sheds shall have permission to use the wharf in front of lumber yard in carrying on their business, in landing and loading with lumber, &c., but on no account shall the party or parties occupying lumber yard and sheds be allowed to let anything whatever remain on the wharf, but it is to be taken away as soon as put upon it, otherwise C. W. Grandy & Sons will charge the usual wharfage on all such merchandise, lumber, &c.

Fourthly, The deed of lease from the plaintiff to Murdock Howell, bearing date the 1st day of December 1865. By that deed, she rented to the said Howell "the lumber yard, with the office, lime shed and wooden sheds thereto attached, which yard is adjoining the warehouse on Tunis's wharf, generally called the Kader Biggs warehouse, together with the use of the wharf in front of the said lumber yard, for the purposes

114 required for his carrying on the lumber business, &c., (but the *said Murdock Howell is not to have the privilege of collecting wharfage, either on vessels or goods, landing or shipping for other parties), for the term of one year, beginning the first day of January 1866, for the sum of \$600 per annum, payable quarterly; and the said Rebecca B. Tunis consents that the said Murdock Howell shall have the privilege of renting the said property yearly for four additional years, from the 1st day of January 1867, at an annual rent of \$700, subject in all respects to the conditions above described." Other agreements are contained in this lease, but it is not material to state them.

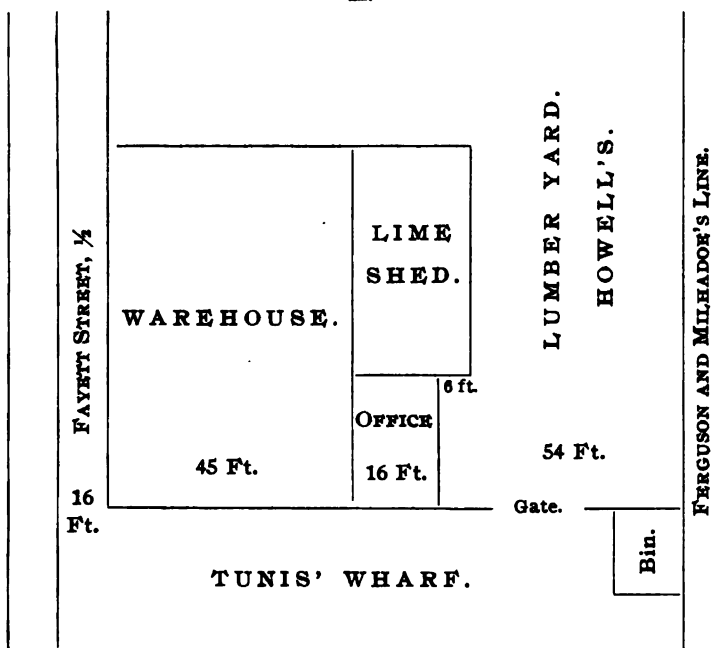
Fifthly, A diagram of the property embraced by these leases respectively, which is marked "H," and is as follows: (See next page.)

115 *The defendants then introduced C. W. Grandy, Jr., as a witness, who testified, in substance, that he was a member of the firm of C. W. Grandy & Sons, who were, at the making of the lease by the plaintiff, dealers in grain, cotton, lumber, and naval stores, but chiefly in shingles and pine lumber; that the principal object of said firm in leasing from the plaintiff the premises mentioned in the lease, was to get the use of the wharf therein mentioned, their business being such as to require the constant and indispensable use of a wharf; that the said firm entered into possession of the warehouse and the wharf in front thereof, under the plaintiff, on the 1st day of January 1868; that they were never in possession of that part of the wharf in front of the lumber yard leased by the plaintiff to M. Howell, or had the use and enjoyment of the same; that the said firm had use for a wharf in their business, much more than they had for a warehouse; that their business was impaired, and their revenue diminished by not having the use of the wharf in front of the lumber yard leased to Howell; that the wharfage which

they would have received from the wharf, if they could have used the whole of it according to the lease to them, would have about paid the rent to the plaintiff reserved by said lease for the whole property therein named; that when they rented from the plaintiff, they did not know of the provisions of the lease to M. Howell; that the whole wharf front was about one hundred and twenty feet; that the said firm used about one-third, and Howell the balance, or about two-thirds of said wharf; that at the time the said firm moved into the warehouse under the lease to them, the said Howell had shingles upon that part of the wharf in front of his said lumber yard, and some bricks in the bin, which was also in front

wharf occupied by Howell, but did not get an interview with her; that in consequence of not being able to use that part of the wharf in front of Howell's lumber yard, Grandy & Sons were obliged to rent another wharf, and now have two cargoes of shingles stored on the latter, all of which could have been stored on the wharf rented to them by the plaintiff, if they could have used the whole of it; that lumber yards generally require the use of a wharf, and that Howell sometimes occupied that part of the wharf in front of his lumber yard, so that a person could scarcely walk on the wharf. The witness then exhibited a paper stating the rates of wharfage charged in the city, which need not be set out here; and further testi-

"H."



ELIZABETH RIVER.

of said lumber yard, some of which bricks have remained there till the present time; that the said Howell so used and occupied that part of the said wharf in front of the said lumber yard, that the said Grandy & Sons could not, and did not, use it during the year 1868; that the said bin containing bricks occupied fourteen or fifteen feet of the wharf in front of said lumber yard; that said firm demanded wharfage of Howell in April 1868, which he refused to pay, and claimed the right to use the wharf as he did, under his lease from the plaintiff; that said witness then went to the house of the plaintiff, to see her about not being able to use that part of the

fied that the said C. W. Grandy & Sons occupied, during the year 1867, the premises immediately adjoining, on the west, those leased from the plaintiff; that they never made any complaint to the plaintiff of Howell's use of the wharf until after the 1st of April 1868; and that they had, during the whole of the year 1868, the uninterrupted use of all that portion of the wharf lying west of the lumber yard leased to Howell, as shown by the diagram.

The defendants then introduced C. H. Drummond as a witness, who testified that he had been in the employment of C. W. Grandy & Sons for the last two years; that they were never in possession of that part

of the wharf in front of Howell's lumber yard, which was occupied by lumber and bricks when C. W. Grandy & Sons moved into the warehouse, about January 1st, 117 1868; *and that he collected wharfage four times prior to April of that year, from vessels not belonging to or employed by Howell, but upon that portion of the wharf claimed by him, not exceeding \$25 in amount.

The defendants then introduced M. Howell as a witness, who testified that he was lessee of the premises mentioned in the deed of lease from the plaintiff to him as aforesaid; that he used and occupied the said premises as required for the purpose of carrying on his lumber business, &c.; that he used the whole of the said wharf in front of his lumber yard for his said business, in the aggregate, about one month; that though he did not use the whole of said wharf, in the aggregate, more than one-twelfth of the year, he had parts of said wharf in front of said lumber yard in use all the time, sometimes using one part and sometimes another; that the purposes of his said business required him so to use it, and that he did so use it, as to make it impracticable for Grandy & Sons to use it in their business much of the time; that they could have occupied parts of said wharf in front of said lumber yard, when not used by him; but he had his lumber, shingles, &c., so scattered as much to interfere with and prevent its use by Grandy & Sons in their business, and that it would be almost useless to them; that his use of said wharf was a necessity to his business; that he could have put bricks and other merchandise in the lumber yard, but it would have caused considerable additional expense; that lumber could not be removed from the said wharf as fast as it was put there; that it could not be moved till inspected; that it often took two or three days to get it inspected, and sometimes several days more to have it hauled off the wharf; that he occupied the wharf only in his business; that when he was receiving heavy articles to be reshipped immediately, he could not haul them away without much inconvenience; that he had lumber, &c., landed and kept on that part of the said wharf in 118 front *of his lumber yard during the whole of the year 1868, sometimes in large and sometimes in small quantities; that a paper, which was exhibited by the witness, and is part of the record, but need not be set out here, contained a statement of all the lumber and bricks landed on the said wharf for the witness, which would have been chargeable with wharfage, if he was chargeable therewith, and if it had remained on the wharf for a period of twenty-four hours; the wharfage would have been about \$161, at the usual rates.

The said witness also testified, on cross-examination, that he had abundant room in his lumber yard for all the merchandise received by him, if he had chosen to store it there, but that such storage in the yard would have been expensive and inconven-

ient to him; and, therefore, he considered the use of the wharf, as he did use it, necessary to his business; that he, Howell, did not know that the defendants ever suffered, in any respect, by his occupation of the wharf, and that they could have occupied it when he did not; that the bin referred to was put up by Swaine, the tenant of the warehouse for the year 1867, prior to its occupation by Grandy & Sons; and that the distance across the wharf from the lumber yard gate to the water is about thirty feet.

The plaintiff then introduced H. M. Bowden, who testified that C. W. Grandy & Sons took possession of the property leased to them as aforesaid on the 1st day of January 1868, or a day or two anterior thereto, as successors of the said Swaine, at which time there was no obstruction or storage of merchandise of any kind upon any part of the wharf in question, except the bin referred to, constructed of plank, about twelve or fourteen feet square, containing bricks, and situated at the extreme eastern end of the wharf, as shown by the said diagram; that the extreme length of the wharf is one hundred and thirty-one feet, that portion 119 of it in front of the warehouse being sixty-one feet, and that in front *of the lumber yard seventy feet; that the said C. W. Grandy & Sons never made any complaint, or gave information of their not having been put in possession of the whole property leased to them, or of being obstructed in the use of any part of it, by Howell, or any other person, until sometime after the 1st of April 1868; and that they had made no effort either to collect wharfage from Howell, or to dispossess him of the right of storage on the wharf, as claimed by him.

The plaintiff then moved the court to allow her to introduce testimony to prove—

1st, That the term "use of the wharf in front of the said lumber yard for the purpose of carrying on the lumber business," as employed in her lease to Howell, was intended and understood by the parties to give the lessee the right only of shipping his produce from the wharf, and receiving it at the wharf, and not the right of storing anything thereon; and that, by the custom of the merchants of the city, such is the only manner in which wharves thus situated are ever used.

2d, That the last clause in the lease to Grandy & Sons, by which it is stipulated, that if the tenant of the lumber yard, or others, should allow his or their merchandise to remain on the wharf, Grandy & Sons should charge the usual wharfage on such merchandise, was designed and understood by both parties to give Grandy & Sons the privilege of charging such wharfage, as against the parties thus leaving the merchandise on the wharf, and of looking to them only therefor, and not to the plaintiff; and that such privilege was agreed upon by the parties as the only remedy and redress to which Grandy & Sons were to be entitled in the event referred to; and

3d, What were the precise premises un-

derstood and agreed by the parties to be leased by them respectively, both under the lease to Howell and the lease to Grandy & Sons?

But the court overruled the said 120 motion, and refused *to hear the said evidence; to which decision of the court the plaintiff excepted. And the court being of opinion, upon all the evidence in the case, that Grandy & Sons had been evicted by the plaintiff from a part of the leased premises, rendered judgment for the defendants; to which also the plaintiff excepted. And this is the judgment to which the supersedeas was awarded, which is the case we now have to dispose of.

The following principles of law in regard to the eviction of a tenant from the demised premises, or a part thereof, are laid down in Taylor's Landlord and Tenant, § 378: "The quiet enjoyment of the premises, without any molestation on the part of the landlord, is an implied condition, on which the tenant is bound to pay rent." "If, therefore, the tenant be at any time deprived of the premises by the landlord's agency, the obligation to pay rent ceases, because his obligation has force only from the consideration which is the enjoyment of the premises. From this principle it also follows, that if the land be recovered by a third person, by a title superior to that of the lessor, the tenant is discharged from the payment of rent, after eviction by such recovery. If part only of the land is recovered, such an eviction is a discharge of so much of the rent as is in proportion to the value of the land evicted. But if the lessor himself wrongfully deprives the tenant of the whole or any part of the premises, the tenant is discharged from the payment of the whole rent until the possession is restored. And the reason why there should be no apportionment of the rent in the latter case is, that it is done by the wrongful act of the landlord himself, and no man should be encouraged to disturb a tenant in the possession of that which, by the policy of the feudal law, he ought to protect and defend." These principles, which seem to have had their origin, in part at least, in the feudal law, are well settled, not only in England, but in many, if not most, of the states of this Union, and have 121 certainly *received the emphatic sanction of this court in *Briggs v. Hall*, 4 Leigh, 484. Without making inquiry, therefore, into the reason on which they are founded, or as to the justness of their operation, we will proceed to the more pertinent inquiry, do they apply to this case; and if so, to what extent? Upon the result of that inquiry depends the decision of the case.

It is not pretended that the lessees, C. W. Grandy & Sons, did not possess, use and enjoy the warehouse leased to them during the whole year 1868, for which it was leased; nor that they did not possess, use and enjoy, during the same period, that part of the wharf which was opposite the warehouse, being nearly one-half of the wharf; nor that they did not possess, use and enjoy, to

some extent, at least for some portion of that period, that portion of the wharf which was opposite the lumber yard and sheds adjoining the warehouse, and leased to Murdock Howell. The only complaint is, that they were prevented, by the use made of the latter portion of said wharf by Howell, according to his rights under the lease to him, from using and enjoying that portion of the wharf as fully as was stipulated for in the lease to them. For this alleged disturbance in the enjoyment of their rights, they claim to be discharged from all liability for any rent, and the court below sustained their claim, and rendered judgment for the defendants. Is that judgment right or wrong?

Whether it be so or not, depends upon: Firstly, Whether that part of the wharf in front of the lumber yard was a part of the premises demised to C. W. Grandy & Sons, at least to the extent to which it was claimed by them; and if so, Secondly, Whether they were evicted of that part by the plaintiff, or through her agency, or were so disturbed, by the same means, in their enjoyment of the said part, as to be entitled to be discharged from the payment of any rent.

Before entering upon the consideration of these two *inquiries, it may be proper to make one or two preliminary remarks. It appears from the record that the plaintiff or her agent, Henry M. Bowden, in making the lease to C. W. Grandy & Sons was guilty of no fraud, misrepresentation, nor concealment, but acted in perfectly good faith. It is true the witness Grandy, one of the firm of C. W. Grandy & Sons, says, "they did not know of the provisions of the plaintiff's lease to M. Howell;" but certainly they might have known of them if they had chosen to make inquiry; and the presumption is, they would have made inquiry if they had desired to know anything more than they did on that subject. They might have made inquiry of the plaintiff or her agent, who would, undoubtedly, have shown them the lease, or a duplicate of it, or fully informed them of its contents. Or they might have made inquiry of Howell, and gotten from him the same information. These sources of full and accurate information were just at hand; and yet it is not pretended that Grandy & Sons resorted to either of them, or made any inquiry on the subject, of any person. They chose to remain satisfied with the information which their lease gave, and which they already otherwise possessed.

They had, it seems, the preceding year, occupied a warehouse adjoining the warehouse leased to them by the plaintiff for the year 1868; and during that same preceding year, Howell had occupied the lumber yard under his lease from the plaintiff, and used that part of the wharf opposite the lumber yard, in the same way in which he continued to use it during the year 1868. Grandy & Sons must have seen and known how he was using the wharf when they took their lease, which recognized his right to use it to some extent; and yet they asked for no

further information, which could, as we have seen, have been so readily obtained; but accepted their lease, entered into possession of the warehouse, and that part of the wharf opposite thereto, and enjoyed the same without interruption for
 123 *three-quarters of a year, without paying any rent therefor; and when rent is claimed of them by the plaintiff, they get rid of the claim altogether, (so far as the judgment of the court below can rid them of it,) upon the alleged ground that they were not permitted, by reason of the lease to Howell, to use and enjoy that portion of the wharf opposite the lumber yard leased to him, as fully as they were entitled to do according to the terms of the lease to them.

We will now proceed to consider the two inquiries aforesaid; and First, Whether that part of the wharf in front of the lumber yard was a part of the premises demised to C. W. Grandy & Sons, at least to the extent to which it was claimed by them?

By reference to the lease to them, it will be seen, that the first part of it is a perfect lease of "the warehouse situated on Tunis' wharf," &c., "together with the appurtenances thereto belonging; to have and to hold the said warehouse and appurtenances thereto for the year 1868," for the sum of \$1,525, payable in quarterly instalments, &c. Now, certainly, neither the wharf nor any part of it, nor any interest in it, is embraced in that part of the lease, unless it be embraced in the word "appurtenances;" and we do not think it is so embraced. The "warehouse" demised is described as being "on Tunis' wharf," which seems to exclude the idea that Tunis' wharf itself was considered as a part of the subject conveyed. "The appurtenances" referred to are expressly described as appurtenances to the warehouse; and we cannot suppose that the word was intended to embrace so substantial a subject as the wharf, which the witness Grandy says was worth much more, even in the way of tolls, over and above the use of it by Grandy & Sons in their own business, than all the other property together. but this construction is rendered perfectly certain when we look to the latter clause of

the lease, which refers expressly to the
 124 wharf, and defines *the interest which the lessees were to have therein. After concluding the granting part, the lease proceeds, in a separate and distinct clause, to set out the understanding of the parties as to what the lease does and does not include, and to state the interest the lessees are to have in the wharf. Thus: "It is farther agreed and understood between the parties to this indenture, that the property herein rented does not include the lumber yard or the brick office, but only includes the warehouse and old wood shed, now standing in rear of the warehouse, on a line with the street, and which the said C. W. Grandy & Sons wish to use as a stable, or whatever else they may see fit." Then comes, in the same clause, what relates to the wharf, in these words: "The said C.

W. Grandy & Sons are to have the entire privilege and control of the entire wharf to said warehouse and lumber yard, which wharf runs from lumber yard now occupied by Santos & Brother to warehouse now occupied by C. W. Grandy & Sons, except that the party or parties who may occupy lumber yard and sheds shall have permission to use the wharf in front of lumber yard in carrying on their business, in landing and loading with lumber, &c.; but on no account shall the party or parties occupying lumber yard and sheds be allowed to let anything whatever remain on the wharf; but it is to be taken away as soon as put upon it, otherwise C. W. Grandy & Sons will charge the usual wharfage on all such merchandise, lumber, &c."

It is argued, with great ingenuity, by the learned counsel for the defendants, that "although the usual words of a demise are, 'demise, lease, and to farm-let,' yet any other words which are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it for a determinate time, whether such words run in the form of a license, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease

125 *for years as effectually as if the more proper and pertinent words had been used for the purpose." "Therefore the words 'the said C. W. Grandy & Sons are to have the entire [privilege and control of the entire] wharf,' may very properly be held to be just as effectual as if they were 'demise, lease, and to farm-let to the said C. W. Grandy & Sons the said wharf.'" Now, undoubtedly, if the words used sufficiently express the meaning of the parties, effect will be given to their intention just as much as if it were ever so technically expressed; and if there had been no lease of the warehouse and appurtenances, but a mere lease of the wharf, the intention would no doubt have been sufficiently expressed by the words, "are to have the entire privilege and control of the entire wharf," &c. But there being a distinct and separate lease of the warehouse and appurtenances by formal words in the first part of the indenture, the fair presumption is, that if the wharf had been intended to be a part of the demised premises, it would have been expressly embraced in the first part in connection with the warehouse. Instead of that, we find it embraced in a separate and subsequent part of the indenture, and expressed in language more appropriate to a case of privilege, license, or covenant, than to a demise. It is reasonable to presume, therefore, that as to the wharf it was intended by the parties to be made a subject of covenant, and not of demise. No doubt, if Howell had had no interest in the wharf, or any part of it, it would have been made a subject of express demise to Grandy & Sons. But as he had an interest in part of it, and the whole wharf could not be put in the exclusive possession of Grandy & Sons, it was deemed best to make it a subject of

covenant only in the lease to them. Even if there was a demise to them of that part of the wharf which was in front of the warehouse, there was none of that part which was in front of the lumber yard in which Howell had an interest under 126 the lease to him; and certainly *there was none in regard to that interest, whatever it might be. In regard to that interest, the plain intention of the parties was to make it a subject, not of demise, but of covenant only, if anything. The intention was that Grandy & Sons should "have the entire privilege and control of the entire wharf," subject only to Howell's interest therein under the lease to him, but should in no degree encroach upon that interest. The lessor construed that interest to be merely the right to use the wharf in front of the lumber yard in carrying on his business in landing and loading with lumber, and not to let anything whatever remain on the wharf as a place of storage. But she did not mean even to covenant with Grandy & Sons that Howell should not use the wharf as a place of storage. All she meant to do in that regard was, to place Grandy & Sons in her shoes, and to give the right, which she would or might have had but for the lease to them, to charge the usual wharfage on all such merchandise, lumber, &c., as might be allowed by Howell, or his assigns, to remain on the wharf as a place of storage. This is the plain import of the words used: "On no account shall the party or parties occupying lumber yard and sheds be allowed to let anything whatever remain on the wharf, but it is to be taken away as soon as put upon it, otherwise"—not that the lessor will pay to the lessees all damages arising therefrom, but that—"C. W. Grandy & Sons will charge the usual wharfage on all such merchandise, lumber, &c." Now, this looks much more like a covenant by Grandy & Sons with Mrs. Tunis, that they would charge the usual wharfage in all such cases, than a covenant by her with them that she would pay damages as aforesaid. It was no doubt to her interest that the wharf should not be made a place of storage, but should be used only as a wharf; and therefore, having transferred her control over the subject for a year to Grandy & Sons, she stipulated with them that they would charge the usual wharf-

127 age on all such merchandise, *lumber, &c., as might be permitted to remain on the wharf as aforesaid. But even if she intended to covenant with them that such things should not be permitted to remain on the wharf that would not of itself make the wharf a part of the demised premises.

But suppose we consider the latter clause of the indenture as part of the demise to Grandy & Sons, and the interest in the wharf thereby intended to be vested in them as part of the demised premises, is there anything in that demise inconsistent with the lease to Howell? Is any part of the interest previously leased to Howell embraced in the demise to Grandy & Sons? We have put in *italics* the words in the lease to them

which express the exception of the interest of Howell in the wharf. Those words are, "except that the party or parties who may occupy lumber yard and sheds shall have permission to use the wharf in front of lumber yard in carrying on their business, in landing and loading with lumber, &c." That is all. Now let us look to the lease to Howell, and see what interest it gives to him in the wharf, and in what words such interest is described. It leases to him the lumber yard, "together with the use of the wharf in front of the said lumber yard, for the purposes required for his carrying on the lumber business, &c." Here we have almost the same language in the two leases in reference to the interest of Howell in the wharf. There is no substantial difference between them in this respect. But to make the matter certain, the lease to Howell, after describing the interest he was to have in the wharf, proceeds thus: "But the said Murdoch Howell is not to have the privilege of collecting wharfage, either on vessels or goods landing or shipping for other parties;" thus showing that Howell was only to use the wharf in front of the lumber yard in carrying on his business in landing and loading with lumber, &c., and that for all other purposes the wharf was to belong to, and be used by, the lessor and

128 her assigns, who might *charge the usual wharfage to all other persons and for all other purposes. It was not intended that Howell should use the wharf as a place of storage, which would prevent its being used by the lessor or her assigns as aforesaid, or impair such right of user. There was no necessity for its being so used by Howell. He had a lumber yard in thirty feet of the water, more than capacious enough for the storage of all his lumber, &c. It could not have been very inconvenient to have stored his lumber in that yard instead of on the wharf. Of course it was more convenient, and less expensive, to let it remain, occasionally, on the wharf; but that would have been a perversion of the wharf from the peculiar purposes for which it was designed, and a violation of the rights expressly reserved to the lessor in the lease.

If, under peculiar circumstances, it should be desired by Howell at any time to store lumber on the wharf for a short period, he could do so by paying wharfage on that account. If "in carrying on his business, in landing and loading with lumber, &c.," it was necessary for him to use the wharf as he did, according to his own testimony, if not that of Grandy also, then, the lease to Grandy & Sons reserved to him the right to do so, and they had full notice of his right, and saw how he was using the wharf when they received their lease.

Now, whatever may have been the rights of the lessor, and the rights and obligations of the lessee in the lease to Howell in this respect, it was intended in the lease to Grandy & Sons to place them in the shoes of the lessor in regard to the wharf. We may, therefore, fairly conclude that the in-

terest to which Howell was entitled in the wharf, whatever it may have been, was not, in whole or in part, included in or interfered with by the lease to Grandy & Sons, and that the first inquiry we have just been considering, "whether that part of the wharf in front of the lumber yard was a part of the premises demised to them, at least to the extent to which it was
129 *claimed by them," must be answered in the negative; and if so, that is an end of the case. But suppose it ought to be answered in the affirmative; then let us inquire,

Secondly, Whether they were evicted of that part of the wharf by the plaintiff, or through her agency, or were so disturbed, by the same means, in their enjoyment of the said part as to be entitled to be discharged from the payment of any rent?

Certainly, if the plaintiff intended, at most, to make a covenant only with Grandy & Sons, in regard to the extent to which the wharf might be used by Howell, then, a breach of that covenant, supposing it to have been broken, would not amount to an eviction, as is shown by the case of *Etheridge v. Osborn*, 12 Wend. R. 529, cited by the counsel for the plaintiff. In that case it was held by the Supreme Court of New York, Savage, Chief Justice, delivering the opinion of the court, that the failure of a lessor to perform certain covenants contained in the lease, which if performed would render the demised premises more valuable, is no bar to the lessor's claim for rent; the remedy for the lessee is, by action to recover damages for the breach of the covenants.

But whatever may have been the interest in the wharf vested by the lease in Grandy & Sons, were they evicted of that interest, or any part of it, during the term by the plaintiff, or through her agency? There must be an eviction in such a case to discharge the tenant from his liability for the payment of rent. But what is an eviction, within the meaning of the principle, is a question which has been the subject of much contrariety of opinion and decision. Formerly, it was considered that there must be a disseisin, or tortious entry, to constitute an eviction in such a case. *Gilbert on Rents*, p. 178. Sergeant Williams says, that to occasion a suspension of the rent, the plea must state an eviction or expulsion of the lessee by the lessor, and a keeping him
130 *out of possession until after the rent became due; otherwise it will be bad. *Salmon v. Smith*, 1 Wms. Saund. 204, and note (2). In *Pendleton v. Dyett*, 4 Cow. R. 581, it was held by the Supreme Court of New York, Sutherland, judge, delivering the opinion of the court, that to sustain a plea of eviction in bar of an action for rent, the tenant must show an actual expulsion before, and that it continued till after, the rent was due. In later times, a tortious entry, or actual expulsion, has not been considered necessary to constitute an eviction. In *Upton v. Townsend* and *Upton v. Greenlees*, 17 C. B. 30, 84 Eng. C. L. R.,

cited by the counsel for the defendants in error, the court had great difficulty in determining what an eviction is, in the meaning of the rule. But the court held that alterations made with the consent of the lessor on the subject matter of the demise, so as materially to change the character of the premises, amounted to an eviction, in the meaning of the rule. Jervis, Chief Justice, said: "It is extremely difficult at the present day to define with technical accuracy what is an eviction. Latterly, the word has been used to denote that which formerly it was intended to express. In the language of pleading, the party evicted was said to be expelled, moved, and put out. The word eviction—from *evincere*, to evict, to dispossess by a judicial course—was formerly used to denote an expulsion by the assertion of a title paramount, and by process of law. But that sort of eviction is not necessary to constitute a suspension of the rent; because it is now well settled, that if the tenant loses the benefit of the enjoyment of any portion of the demised premises by the act of the landlord, the rent is thereby suspended. The term 'eviction' is now popularly applied to every class of expulsion or amotion. Getting rid thus of the old notion of eviction, I think it may now be taken to mean this: not a mere

trespass and nothing more, but some-
131 thing of a grave and permanent *character done by the landlord, with the intention of depriving the tenant of the enjoyment of the demised premises." This case was decided in 1855. In *Dyett v. Pendleton*, 8 Cow. R. 727, it was held by the Court of Errors of New York, reversing the decision of the Supreme court of that State in *Pendleton v. Dyett*, cited *supra*, that where the lessor was guilty of habitually bringing lewd women under the same roof with the demised premises, though in an apartment not demised, by which nocturnal noise and disturbance were made, and in consequence the lessee quitted the premises, and remained away with his family; this was evidence to go to the jury, under a plea of eviction by the landlord, in answer to a declaration for the rent; and that the jury might, upon such evidence, find the plea true; and the lessor would thereby be barred of his rent, the same as on an actual or physical entry and expulsion of the tenant, and that the usual plea in bar, of entry and eviction, would be sustained by such evidence. This case seems to have carried the law of constructive eviction to its utmost verge.

It is well settled that a mere trespass, however aggravated, does not amount to an eviction. And where a part of the demised premises is recovered by a person claiming under a prior lease from the landlord, it seems that the eviction in such case is by title paramount, so as to be ground for an apportionment of the rent, and not for its entire forfeiture. *Neale v. Mackenzie*, 2 Crompt. Mees. & Ros. Exch. R. p. 84.

The judgment in that case, to be sure, was reversed by the Court of Exchequer

Chamber, 1 Mees. & Welsh, 746. But that court did not differ from the Court of Exchequer in the same case, upon the question, whether an eviction in such a case would be an eviction by title paramount, but reversed the judgment of the latter court upon the ground that the lessor, at the time of the execution of the second lease, was not in possession of a part of the

132 *demised premises which was included in the prior lease; and, therefore, the latter demise was wholly void as to such part, and the rent was not apportionable, and the lessor was not entitled to distrain for the whole rent, or any part of it. When it was argued in the Court of Exchequer Chamber that the lessee is evicted in the meaning of the rule, whenever, by any act of the lessor, he is deprived of his title to the land, Lord Denman, Chief Justice, inquired: "How can he be evicted from that which he never had? He must be evicted from his possession." The case of *Lawrence v. French*, 25 Wend. R. 443, cited and relied on by the counsel of the defendants, may be sustained on the same ground on which the case of *Neale v. Mackenzie* was decided by the Court of Exchequer Chamber. In the former case, as in the latter, the tenant was prevented from obtaining the whole of the premises by a person holding a part under a prior lease executed by the landlord; and it was held that the landlord had no right to distrain for a proportionate part of the rent reserved; though the court thought that the worth of the premises actually enjoyed by the tenant could be recovered in an action for use and occupation. This distinction, then, seems to exist in cases in which the lessor has made a prior lease of part of the demised premises; where the latter lessee does not receive possession of such part of the premises, because of the adversary possession thereof by the former lessee, then the second lease, as to such part, is void, and the lessor cannot distrain for a proportion of the rent, though he may recover the fair value of the balance of the premises, in an action for use and occupation. But where the second lessee receives possession under the lease to him of the whole demised premises, and a part thereof is afterwards recovered of him by the first lessee, or his assigns, it will be considered as recovered under title paramount, and the rent will be apportioned, and the portion due for the balance of the premises remaining

133 *in the occupancy of the second lessee may be distrained for.

If the case now under consideration were one of the cases above mentioned, it would fall under the second of the said two categories; as *Grandy & Sons* received possession of the whole wharf under the lease to them, subject to the exception made in that lease, of the right of *Howell* to use that part of the wharf in front of the lumber yard, in carrying on his business in landing and loading with lumber, &c. So that if *Grandy & Sons* abandoned the use of that part of the wharf after the 1st of April 1868,

in consequence of the use of it by *Howell* under the lease to him, and such abandonment can be considered as equivalent to an eviction, then it was an eviction by title paramount, and the rent was apportionable.

But such an abandonment cannot amount to an eviction, whatever may have been the extent of *Howell's* right to the use of the wharf under the lease to him, and however that right may have conflicted with the right of *Grandy & Sons* to the use of the wharf under the lease to them. We have been referred to no case, and we have found none, which affords the slightest warrant for saying that such a state of facts would amount to an eviction. The terms of the lease to *Grandy & Sons* plainly show that it was not intended to confer on them the right to abandon at pleasure the use of that part of the wharf in which *Howell* had an interest, and thus get rid of the payment of the whole rent of the entire property. Whatever their right and remedies may have been, they certainly were not authorized by law to perpetrate so great an injustice. By the express terms of the two leases, *Howell* and *Grandy & Sons* were each to have the right to use the wharf in front of the lumber yard, *Howell* to a limited, though indefinite extent, and *Grandy & Sons* to the entire use of it, subject to *Howell's* right. In this

134 state of things it was to be expected that *there might be some conflict between them; and such conflict was accordingly provided for in the lease to *Grandy & Sons*, who were to look to *Howell* for compensation if he transcended his rights and encroached on theirs. *Grandy & Sons* have no pretext even for an apportionment of the rent for the first quarter. Until April, at least, they had possession of the wharf, received wharfage, and made no complaint of any interference with their rights. Upon every principle, therefore, they were bound for the rent of that quarter. If what occurred afterwards amounted to a constructive eviction of their interest in the wharf in front of the lumber yard, it was cause only for an apportionment of the rent for the residue of the term, and not for its total forfeiture. But even if they had a right, at their election, to make the alleged interference with their rights by *Howell* a cause for withdrawing from the use of that part of the wharf, and thus to produce a constructive eviction of it, surely they ought to have given very distinct notice of their intention to do so to the plaintiff, and released to her their interest in that part of the wharf, in order that she might indemnify herself by restricting *Howell* to his rights, and by making the best use she could of the wharf, subject to those rights. Instead of that, they made no demand of *Howell* for wharfage until sometime in April 1868; and when he refused to pay the demand, they took no legal step to compel him to do so, but went to the house of the plaintiff to see her on the subject, but did not get an interview with her. It does not appear that they ever after obtained or sought an interview with her, or gave her

notice, in any way, of their intention to abandon altogether the use of that part of the wharf, and claim an apportionment of the rent on account thereof, much less an entire forfeiture of the whole rent. Under these circumstances, it surely cannot be said that there was any eviction, actual or constructive.

135 *In every view of the case, therefore, and without considering the question raised by the second bill of exceptions, we are of opinion that the judgment of the court below is erroneous, and are for reversing it, and rendering judgment in favor of the plaintiff.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the said judgment is erroneous. Therefore, it is considered that the same be reversed and annulled, and that the plaintiff recover against the defendants her costs by her expended in the prosecution of her writ of supersedeas aforesaid here. And this court proceeding to give such judgment as the said court of the corporation of the city of Norfolk ought to have given, it is further considered that the plaintiff recover against the defendant two thousand three hundred and sixty-three dollars and eighteen cents, the penalty of the said bond, and her costs by her in the said court of the corporation aforesaid expended. But this judgment is to be discharged by the payment of one thousand one hundred and eighty-one dollars and fifty-nine cents, with interest thereon, to be computed after the rate of six per centum per annum, from the 2nd day of October 1868, till payment, and the costs. Which is ordered to be certified to the said court of the corporation of the city of Norfolk.

Judgment reversed.

136 *Holland and Wife v. Trotter.

March Term, 1872, Richmond.

1. **Defects in Bills—Amendments.**—As a general rule, the court will at any time before the hearing grant leave to amend where the bill is defective as to parties, or in the mistake or omission of any fact or circumstance connected with the substance of the bill, or not repugnant thereto. The amendment may be made by common order before answer or demurrer, and afterwards by leave of the court.
2. **Equitable Relief.**—For the grounds on which a court of equity will or will not relieve against a judgment at law, see the opinion of the court.
3. **Same—Fraud—Surprise.**—Where the defendant at law has been prevented from making his defence, by the assurances or promises of the counsel of the plaintiff, the court will relieve him.
4. For the authority of counsel in a cause, see opinion.

***Defects in Bills—Amendments.**—See monographic note on "Amended Bills" appended to *Belton v. Aperson*, 26 Gratt. 207.

***Equitable Relief—Fraud—Surprise.**—In *Knapp v.*

This was an appeal from the decree of the Circuit court of Pittsylvania county, rendered on the 10th day of November 1869, in a cause in which Joseph H. Trotter was plaintiff, and Stephen Holland and his wife were defendants, by which decree the defendants were perpetually enjoined from enforcing a judgment recovered by them against Trotter. The facts as they appear to the court are sufficiently stated in the opinion.

The case was argued by Grattan for the appellants, and Dabney and Gordon for the appellee.

CHRISTIAN, J. delivered the opinion of the court.

This is an appeal from a decree of the Circuit court of Pittsylvania county.

137 *The transcript of the record shows the following case:

At the November term of said court, in the year 1867, a judgment was recovered against J. J. and C. C. Tinsley, late merchants, trading under the firm and style of J. J. and C. C. Tinsley, and J. J. Tinsley and C. C. Tinsley and J. H. Trotter, surviving partners, of themselves and Joseph D. Dabbs, late merchants and partners, trading under the firm of Tinsley, Trotter & Co., for the sum of \$485, with six per cent. interest thereon, from the 22d day of June 1861.

This judgment was founded on a note signed by J. J. and C. C. Tinsley, and Tinsley, Trotter & Co., payable to N. S. E. Dullas, who intermarried with the appellant Holland.

In June 1868, Joseph H. Trotter filed his bill in the Circuit court of Pittsylvania county, against Holland and wife, the two Tinsleys and A. G. Dullas, who was the guardian of Mrs. Holland before her marriage, in which bill he seeks to enjoin the judgment at law.

In this bill the only ground on which he seeks this injunction against the judgment, is that the debt was a debt of the firm of J. J. and C. C. Tinsley, and that J. J. Tinsley, who was the acting and managing

Snyder, 15 W. Va. 484, the court says, "A court of equity will not grant relief merely because injustice has been done. The party seeking the relief must show that he has been guilty of no laches, but that he has done everything that could have been reasonably required of him under the circumstances of the case. But courts of equity have always granted relief in such cases when it is shown that the reason why the defense was not made at law was founded in fraud, accident, surprise, or some adventitious circumstance beyond the control of the party," citing the principal case, and *Mosby v. Haskins*, 4 H. & M. 427; *Degraffenreid v. Donald & Co.*, 2 H. & M. 10; *Hord v. Dishman*, 5 Call 579; *Faulkner v. Harwood*, 6 Rand. 125; *Mason v. Nelson*, 11 Leigh 227; *Polindexter v. Waddy*, 6 Munf. 418; *Smith v. McLain*, 11 W. Va. 655; *Shields v. McClung*, 6 W. Va. 79. See also *Moore v. Lipscombe*, 82 Va. 549. For a collection of cases where it was held that no relief could be granted in equity, see *Wallace v. Richmond*, 26 Gratt. 67, and note.

partner of the firm of Tinsley, Trotter & Co., had signed the name of that firm, as security on the note, without authority. In this bill he gives no excuse whatever for his failure to defend the action at law.

Holland and wife answered this bill, and insisted that J. J. Tinsley, as the acting manager of both firms, had authority to sign the note for Tinsley, Trotter & Co.; and insisted further, that the plaintiff was entitled to no relief in a court of equity, because he had made no defence in the action at law, and had alleged no excuse for failing to make his defence at law to the action upon the note. In May 1869, the plaintiff, Trotter, filed, by leave of the court, his amended bill, in which he alleges, in addition

138 *to the matters set forth in his original bill, that he was prevented from making his defence to the action at law in consequence of certain representations and assurances made and given by the plaintiff's attorney in the action at law; and in consequence of the promises and representations so made, he was led to believe, and did believe, that it was unnecessary for him to take any further steps to defend said suit.

This amended bill was answered by Holland and wife (the appellants), who deny the allegations of the amended bill, and call for proof of the same. Depositions were taken to sustain the allegations both of the original and amended bills; and the case came on to be heard at the November term, 1869, upon the bill and answers and examination of witnesses, when the court, being of opinion that the plaintiff (Trotter) was entitled to the relief prayed for, entered its decree perpetuating the injunction, declaring that the defendants, Holland and wife, and those claiming under them, should be forever enjoined and restrained from taking any steps to compel the collection of the judgment against Trotter in the bill and proceedings mentioned.

From this decree an appeal was allowed by this court.

The following errors are assigned by the appellant in his petition of appeal, and insisted upon in the argument of his counsel here:

1st, J. J. Tinsley, having been the acting manager of both firms, and using the names of each firm for the benefit of the other, the acquiescence of Trotter is to be inferred in the use of the name upon the note in this case.

2nd, It was error to permit the plaintiff to amend his bill, to introduce facts within his knowledge at the time the original bill was filed, and especially without the payment of costs; the defendants, Holland and wife, having previously filed their answers.

3rd, The facts stated as excuse for 139 not defending the *suit at law are not sustained by the evidence; and neither the bill nor the evidence makes out a sufficient excuse for not making this defence at law.

4th, It was error to decree costs against the defendants, Holland and wife, who had recovered a judgment at law.

As to the first assignment of error, it is sufficient to observe that the proof is clear and distinct upon the concurrent testimony of all the witnesses in the cause, including J. J. Tinsley himself, that the said Tinsley signed the note in controversy with the name of the firm of Tinsley, Trotter & Co., without any authority whatever. And it is manifest that, if the evidence in the record had been heard in the action at law, there must have been a judgment in favor of the defendant Trotter.

As to the second assignment of error, it is the well settled practice of courts of equity, that where the plaintiff is advised that his original bill does not contain such material facts, or make such parties as may be necessary to enable the court to do complete justice, he may amend his bill by inserting new matter, or adding new parties. 1 Dan. Ch. Pr. new edition, 401-2, and notes.

As a general rule, the court will, at any time before the hearing, grant leave to amend where the bill is defective as to parties, or in the mistake or omission of any fact or circumstance connected with the substance of the bill, or not repugnant thereto. This amendment may be made by common order, before answer or demurrer, and afterwards by leave of the court. 1 Dan. Ch. Pr. 407-8. See also, *Mason v. Nelson*, 11 Leigh, 227; *Parrill v. McKinley*, 9 Gratt. 1; *Stephenson v. Taverners*, 9 Gratt. 398; *Id.* 372; *Smith v. Smith*, 4 Rand. 95; *Boykin's Devises v. Smith*, 3 Munf. 102.

In the case before us no objection was taken by the defendants in the court below to filing the amended bill, and it was filed,

by leave of the court, before the 140 *hearing. The new matter alleged in the amended bill was in no wise repugnant to the original bill, but was in addition thereto, and connected with the allegations of the original bill, and naturally grew out of the substance of that bill, and is fairly within the rule of Chancery courts governing this question. Such an objection ought not to be sustained, except in a clear case, especially where the objection is made for the first time in the appellate court. If sustained, it would be no bar to another injunction. It would not conclude the rights of the parties, or adjudicate the matters in controversy between them. It is the policy of courts of equity not to multiply, but to put an end to litigation. Where the record shews the proper parties and the substantial case, no court, and least of all an appellate court, will render such a decision as to leave the matter in controversy still a subject of litigation. We are, therefore, of opinion, that the second assignment of error is not well taken.

The third assignment of errors presents a question of more difficulty, and requires more careful and extended examination. It is insisted by the learned counsel for the appellants, that the facts stated as excuse for not defending the suit at law are not sustained by the evidence, and that neither the bill nor the evidence makes out a suffi-

cient excuse for not making this defence at law.

Numerous decisions of this court were cited by the learned counsel for the appellants to sustain these positions. Without noticing these cases in detail, it will be sufficient to extract from them the general principles settled by them.

The grounds upon which a court of equity will interfere to grant relief against a judgment at law, are well defined and firmly established.

That a court of chancery will not entertain a party seeking relief against a judgment which has been rendered against him in a court of law, in consequence of

141 *his default upon grounds which might have been successfully taken in the court of law, unless some reason founded in fraud, accident, surprise, or some adventitious circumstances beyond the control of the party, be shown, why the defence was not made in that court, is a proposition which has been so repeatedly affirmed, that it has become a principle and maxim of equity, as well settled as any other whatever. It has been acted upon and recognized in very numerous cases in this court, as well of ancient as of recent date, so numerous are they, and so familiar, that it is deemed entirely unnecessary to cite them here.

This rule has its foundation in wisdom and sound policy. It springs out of the positive necessity for prescribing some period at which litigation must cease. A court of equity will not grant relief merely because injustice has been done. To entitle himself to relief, the party must show that he has been guilty of no laches, but that he has done every thing that could reasonably be required of him to render his defence effectual at law. A court of equity will never, whatever the hardship, relieve a party from the consequences of their own negligence, and inexcusable laches. To do so, would be to hold out direct encouragement to such conduct. Diligence and vigilance would cease to be the rule, and we should destroy all certainty in the results of judicial proceedings. The cases in which courts of equity have refused relief, have been cases where the failure to make defence in a court of law has resulted from the laches or negligence of the party setting up his demands in a court of equity.

They have always granted relief, however, when it is shown that the reason why the defence was not made, was founded in fraud, accident, surprise, or some adventitious circumstance beyond the control of the party. *Mason v. Nelson*, 11 Leigh 227; *Mosby v. Haskins*, 4 Hen. & Mun. 427;

2 Hen. & Mun. 10. Applying these 142 *well settled principles to the case before us, we are constrained to say, that this case is not within the rule of the decisions relied upon by the learned counsel for the appellant. We think it must be conceded, that if the facts stated in the amended bill be true, the appellee, Trotter, was not guilty of any negligence, or want

of diligence, in failing to make his defence in the action at law, and that he is entitled to the relief prayed for. So far from being negligent in protecting his interest, he alleges that immediately after receiving the summons he spoke to William M. Treadway, Jr., of the firm of Treadway & Son, (who had been his regular counsel for years) to defend the suit, and stated to him the grounds of his defence; that Treadway then informed him that his firm had brought the suit for Holland and wife, but that he was so well satisfied of the truth and justice of his defence, that he would take no judgment against him; and that when he, Trotter, said that he would employ other counsel, Treadway assured him it was entirely unnecessary, as that he would see no judgment should be entered against him. That in consequence of these promises and representations, made to him by the attorney for the plaintiff, he was induced to believe, and did believe, that it would be unnecessary for him to defend the suit; that he was not aware of the existence of said judgment until some time after its rendition, and when apprised of the fact, was completely surprised, and soon afterwards applied to counsel to file his bill for an injunction. If these allegations are sustained by the proof, it is a clear case for relief in a court of equity. It was manifestly a case of complete surprise. Trotter having a valid and substantial defence, immediately upon the bringing of the suit applied to counsel who had usually represented him. He, however, happened to be the plaintiff's counsel, and of course, could not defend the suit for Trotter; but gave him the assurance that he would take no judgment against him.

143 Treadway being *the agent and attorney of Holland and wife, had the undoubted right, if in his discretion he thought fit to do so, to release one of the defendants to that action, and take judgment against the others; and Trotter had the same right to rely upon the assurance given by Treadway, as if it had been given by Holland and wife. After receiving such assurance, it surely cannot be said that he was guilty of inexcusable laches because he did not defend the suit.

The allegations of the amended bill are substantially, if not literally, sustained by the evidence of Treadway. He said in his deposition, "I am not sure there was a conversation between us on the subject; but if there was not, I received a letter from Trotter about the case shortly after the suit was brought; either there, in his conversation, or in his letter, he stated his defence, and I informed him that I considered it a good one, and that if pleaded, I would not contend for a judgment against him, believing that I could not successfully contest the defence, and that a judgment against him under such a defence would be unjust and improper. Trotter asked, or wrote me, to attend to his interest if I could; I replied, either in person or by letter, that I could not represent him, but promised that I would state the grounds of his defence to Messrs. G. H. and J. Gil-

mer, or some other attorney, and get them to represent him. This he authorized me to do. From some cause not now remembered, I failed to mention the matter to other counsel, and it escaped my attention. I heard no more of it, and my attention was not called to it until judgment had been entered by default against Trotter, along with the other defendants. I have no doubt that a pressure of business and forgetfulness on my part was the only reason why I failed to mention the defence to other counsel to represent Trotter."

A letter is also filed with this deposition, and was read in connection with it 144 by consent, from the said *William M.

Treadway, Jr., in which he says: "I examined the office to ascertain how the judgments were entered up in the Holland and Thornton cases. To my surprise, that of Holland is entered against each member of the firm, the other not so. This must have occurred from inadvertence on the part of the clerk in his entries, as no judgment was asked for except against the Tinsleys in that case. I think I can have it set right, and will certainly make an effort to do so."

It is to be observed that in his deposition Treadway does not say that he agreed that there should be no judgment against Trotter; but it is manifest that he did give him such assurance, for in the letter filed with his deposition, which was written shortly after the transaction, and when the facts were fresh in his recollection, he says: "To my surprise, that (the judgment) of Holland is entered against each member of the firm. This must have occurred from inadvertence on the part of the clerk in his entries, as no judgment was asked for except against the Tinsleys in that case. This evidence sustains the allegation of the plaintiff's bill, and makes out a clear case for the equitable interference of a court of chancery. It was manifestly a case of complete surprise; and the appellee, Trotter, having been misled and prevented from making his defence, which would unquestionably have defeated the plaintiffs' demand in the action at law, by the representations and assurances of the plaintiffs' agent and attorney, it would be a fraud upon him, and the grossest injustice, if that judgment should now be enforced against him. The case of *Hill v. Bowyer*, 18 Gratt. 364, confidently relied upon by the counsel for the appellant, is not at all similar to this case. It is true the allegation of the bill in that case was that Hill had written to an attorney to defend his interest in that suit, and that, through some misapprehension, the case went undefended as to Hill; but Judge Joyner, in his opinion 145 in that case, lays stress upon the fact that the deposition of the attorney was not taken, nor the letter produced. Nor in that case was there any proof of the allegations of the bill in this respect.

And, indeed, in all the cases relied upon by the counsel for the appellant it will be found that the parties seeking relief were either guilty of inexcusable laches, or at least of a want of that diligence, and vigilance re-

quired by courts of equity of all those who seek its aid. No such laches, or want of diligence, can be imputed to the appellee in this case; and the court below was not in error in perpetually enjoining a judgment which at the time was a surprise, and to be enforced now would amount to a fraud.

Decree affirmed.

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*Day v. Hale & als.

Hale v. Hare & als.

March Term, 1872, Richmond.

Absent. STAPLES, J.*

1. **Depositions—Omission to Refer to Them in Decree.**†—

When depositions are taken and filed in a cause, both parties having been present when they were taken, and the decree is obviously based upon them, the omission to refer to them in the decree will be considered a clerical mistake, and the cause will be considered as having been heard upon them, as well as upon the other papers.

2. **Conveyances—Lien.**—I sold land to G, but made no conveyance; G sold the same land to E, and E sold it to J, taking his bonds for the purchase money; and J sold it to D, the purchase money due to E being unpaid, of which D had notice, but was informed that any lien that E had upon the land had been released in consideration of J's giving additional personal security to the lands; and under that belief I conveyed the land to D. E has a lien upon the land, in the hands of D, for the unpaid purchase money due to him from J, and this though E assigned to J the title bond for the land which he received from G.

This case was argued at Wytheville at the June term, 1871, and was held for consideration until the March term at Richmond.

In November 1865, Beatrice A. Hale, in her own right, and as guardian of her two infant children, instituted a suit in equity in the Circuit court of Giles county, against James F. Hare, Joseph Hare, Elisha G. Duncan, Daniel P. Hale, Isaac Hale, Isaac H. Day, and James D. Johnston, in his own right and as executor of Edward Hale. In her bill she alleged that, at the October term of the court,

*He had been counsel in the cause in the Circuit court.

See monographic note on "Depositions" appended to *Fleld v. Crown*, 24 Gratt. 74.

†**Depositions—Omission to Refer to Them in Decree.**—See *Turnbull v. Clifton Coal Co.*, 19 W. Va. 299, where after an exhaustive review of the cases the principal case is affirmed and the cases of *Shumate v. Dunbar*, 6 Munf. 481, and *Nelson v. Cornwell*, 11 Gratt. 741, which seem to be *contra* are distinguished. See also, *Renick v. Ludington*, 20 W. Va. 533, where the principal case is approved, and *Camden v. Haymond*, 9 W. Va. 600 is distinguished. In *Ramsburg, Koogle & Co. v. Erb*, 16 W. Va. 778, the headnote reads as follows: "The fact, that depositions taken prior to the hearing and decision of the court below in such case, to be read as evidence at the trial, are found among the papers of the cause, and copied into the record by the clerk, is not sufficient to authorize the appellate court to consider such depositions as having been given in evidence before the court below."

a judgment was rendered for her
 147 *benefit against the Hares, the Hales,
 and Duncan, upon seven bonds of \$200
 each, with interest, &c.; and at the same
 term two judgments were rendered for her
 benefit as guardian of her children: one
 against Isaac Hale for \$335.34, with interest,
 &c., and the other against Isaac Hale and
 Daniel P. Hale, for \$754.27 with interest,
 &c. And she exhibited copies of the judg-
 ments. She alleged that James F. Hare
 was wholly insolvent, and that Joseph Hare,
 Duncan, and Daniel P. Hale were in very
 doubtful circumstances. She alleges that,
 a short time before said judgments were
 recovered, Isaac Hale conveyed to his son-
 in-law, Isaac H. Day, his tract of land lying
 on Wolf creek, in the county of Giles, upon
 which he then and still lives; and she
 charges that this deed was made with intent
 to hinder and delay his creditors, and that
 Day had notice of such fraudulent intent.
 She alleges that the land thus sold by Isaac
 Hale to Day was worth \$4,000, and that for
 it Day gave to said Hale a tract of land in
 Mercer county, West Virginia, at \$1,000,
 which was more than its value, and his
 bonds for \$700 at three, four and five, or
 four, five and six, years, without interest.
 And she exhibits the deed. She insists that
 the inadequacy of price, the relation of the
 parties, and the avowed purpose of Hale
 to defeat the collection of her said claims
 against him, are evidence of fraud; and she
 is advised that a court of equity will declare
 by its decree that the deed from Hale to
 Day was made in fraud of her right, and
 will subject the said land to be sold to sat-
 isfy her judgments. She states further,
 that at the same term of the court James
 D. Johnston obtained a judgment against
 Isaac and Daniel P. Hale for \$484.02, and,
 if he desires, he may be allowed to partici-
 pate in the fund arising from a sale of
 the land.

She further represents that Joseph Hare,
 E. G. Duncan, and D. P. Hale have some
 equitable, perhaps legal, claims to lands in
 said county, of the situations of which,
 or the incumbrances on it, complain-
 148 ant is not informed, *but which she is
 advised is liable to the payment of
 her judgments. And she prays that the
 deed from Isaac Hale to Day may be decreed
 to have been made to delay, hinder, and
 defraud his creditors, and is therefore void,
 and that it may be sold to satisfy complain-
 ant's judgments; that any interest the said
 James and Joseph Hare, Duncan, and D.
 P. Hale may have in real estate, legal or
 equitable, may be also sold to satisfy said
 judgments, and for general relief.

Isaac Hale, Day, Daniel P. Hale, and
 Johnston, answered separately. Isaac Hale,
 admitting the judgments and his sale to
 Day, denies that the sale was made to hin-
 der and delay his creditors, or was in any
 way tainted with fraud; and he denies
 that the land was sold at a price greatly
 below its value. He denies that the land
 in Mercer county, which he received from
 Day, was estimated at more than its value.

On the contrary, he sold it on the same day
 to his son, Daniel P. Hale, for \$1,000, in
 payment of a debt of that amount which he
 owed him; and that Daniel P. Hale had since
 sold the said land for \$1,000.

He further says that the \$1,700 agreed to
 be paid for said land was for his interest
 only, the said Day having contracted in
 writing, which he exhibits, to support the
 wife of the respondent for her life, in con-
 sideration of her relinquishment of her
 right of dower in the land.

Day says that he has been informed, and
 believes, that the plaintiff's judgment for
 \$1,400 is really the debt of James F. Hare,
 and is the purchase money due for a tract
 of land purchased by said Hare of Edward
 Hale in his lifetime, and that Isaac Hale,
 with others, became security for the pay-
 ment.

The respondent cannot say certainly with
 what intent Isaac Hale conveyed the land
 in the bill mentioned; but he does say that
 the charge in the bill, that Isaac Hale con-
 veyed the said lands to respondent in fraud
 of his creditors, and with intent to
 149 hinder, delay and defraud *them, and
 that respondent had notice of such
 fraudulent intent, is wholly false; and that
 the charge that the land was worth \$4,000
 at the time of the conveyance, is also false,
 the said land not being worth more than
 half that sum, as respondent verily believes.
 Nor is it true that the land in Mercer county,
 given to said Isaac Hale in exchange for
 said lands, were estimated greatly above
 their value; indeed, respondent believes the
 land in Mercer is, intrinsically, worth
 nearly or quite as much as the land conveyed
 by Isaac Hale to respondent, and he was
 induced to give the difference he did give
 more in consideration of the locality than in
 consideration of the intrinsic value of the
 lands. He considers the price he gave to
 Isaac Hale, and the undertaking to support
 his wife for her life, as fully equal to \$2,000,
 which he regards as the full value of the
 land. He therefore denies all knowledge or
 suspicion of fraud on the part of said Hale,
 and calls for full proof of the same.

Daniel P. Hale says that the seven bonds
 which are the foundation of the judgment
 for \$1,400, together with three others on
 which suit has not been brought, were exe-
 cuted by the defendant, James F. Hare, as
 principal to Edward Hale, deceased, with
 the other parties thereto as his sureties, for
 a tract of land on Wolf creek, in Giles
 county, now in the possession of and claimed
 by Andrew J. Hare. That Edward Hale
 retained a lien on said land for said pur-
 chase money, which should be applied to
 the payment of said judgment, before it is
 collected from the sureties in said bonds, of
 whom he is one; which he asks may be
 done.

James D. Johnston says that he, as exec-
 utor of Edward Hale, deceased, by direction
 of his will, passed over to the complainant, in
 her own right, the seven bonds upon which
 her judgment for \$1,400 was based, and also
 three others on which suit has not been

brought. He also says, that at the November term, 1865, of the County court of Giles, he recovered a judgment against 150 *Isaac Hale and Daniel P. Hale for \$484.02, with interest and costs, and also a judgment against Daniel P. Hale for \$316.62, with interest and costs; and he asks that in any decrees that may be rendered against said parties, provision may be made for the payment of his debts.

In September 1866, the plaintiff filed an amended bill in this case, in which she alleged that the seven bonds on which her judgment for \$1,400 was founded, as well as three other bonds held by her against the same parties, were executed to her late husband, Edward Hale, by the said James F. Hare, as principal, and the other obligors therein as his securities, and that they were executed for a tract of land sold by Edward Hale to James F. Hare, lying on Wolf creek, in Giles county. That Edward Hale had purchased the said land, but had not acquired the title, which was still in Isaac Hare, his vendor; and that Edward Hale made no conveyance for said land in his lifetime, and that none had been made by his heirs or legal representatives. That after the death of Edward Hale, James F. Hare sold the said land to Daniel Hale (since dead), trustee of Mrs. Wilmoth Hare, wife of Andrew J. Hare; and that shortly thereafter the said trustee procured a conveyance to be made to him by Isaac Hare, with the consent of the said James F. Hare. She is advised that Edward Hale retained a lien on the land for the purchase money, and that the same is a subsisting lien in her favor, as the assignee of Edward Hale, unless she had deprived herself of it. She admits that, for the purpose of greater security to said debt, she did, after the assignment to her, procure two additional securities upon said bonds; but she avers that she did not then, and has never, relinquished her said lien, and that it never was her intention to do so.

The plaintiff further alleges, that at the date of her said judgment, the defendant, 151 Elisha G. Duncan, owned *a tract of land on Wolf creek, in the county of Giles, the legal title to which had been conveyed to him by Isaac Hare: and she exhibits the deed. She insists that her judgment is a lien upon this land. Notwithstanding which, since the rendition of said judgment, and with full knowledge of the same by all the parties, the said Isaac Hare, with the consent of the said Duncan, has conveyed the said land to James H. French, as trustee for Mrs. Phoebe Duncan, wife of said Elisha. She is advised that this land is also liable to satisfy her said judgment. And making Andrew J. Hare and Wilmoth, his wife, and her present trustee, Eustace Gibson, Isaac Hare, Daniel Hale's executors, James H. French and Mrs. Phoebe Duncan, as well as the original defendants, parties to her amended bill, she prays that her vendor's lien upon said lands may be enforced, and her judgments satis-

fied by the sale thereof, and for general relief.

The defendants brought in by the amended bill answered separately. James F. Hare says, that he executed his ten bonds, of \$200 each, to Edward Hale, for the purchase money of a tract of land sold by Hale to him. This land was originally a part of the homestead of Joseph Hale, deceased, which was sold under his will by Manilius Chapman, the executor, and bought by Isaac Hare, who sold the same to George D. Hoge, and Hoge sold the same to Edward Hale, the late husband of the complainant, and he sold it to the respondent. He avers that at the time of his purchase from Edward Hale, respondent proposed to him to retain his vendor's lien on said land, as security for the purchase money; but he positively refused, and said he wanted nothing further to do with the land; but if respondent would give him Daniel P. Hale as security, he would release the land from all liability. Respondent thereupon assented to said proposition, and executed to Edward Hale 152 ten several bonds of \$200 each, with Daniel P. Hale *as security therefor, which are the bonds above mentioned.

The respondent further says, that some time after the death of Edward Hale, about the time he was negotiating for a sale of the land with Andrew J. Hare and his wife, through their trustee, Daniel Hale, respondent went to Giles courthouse and applied to James D. Johnston, executor of Edward Hale deceased; and told him that he was about selling the said land, and could not do so unless he would release it from all liability for the purchase money. Johnston replied, that acting as executor, as he was, he did not consider that he had the power to release the land, but that he would immediately consult Mrs. Hale, and let respondent know the result. At the same time, respondent offered to give additional security to said notes, in consideration that the land should be released from all liability. In a few minutes, Mr. Johnston returned to respondent, and told him that he had had an interview with Mrs. Hale, who consented to the arrangement proposed; and thereupon, respondent procured three additional securities to said bonds, viz: Isaac Hale, Elisha G. Duncan, and Joseph Hare, all of whom signed the said bonds as additional securities for the same. Respondent thereupon proceeded to perfect the sale to the said Daniel Hale, trustee for Wilmoth Hare, in the full confidence that the said tract of land was released from all liability for the purchase money thereof. The obligors in said bond were at that time worth at least \$15,000.

Respondent further says, that at the time he bought the land of Edward Hale, said Hale directed George D. Hoge, his immediate vendor, to make the title, or have it made to the respondent; but respondent neglected to call for the title until after the death of said Hale, and then supposing that, as he had no writing releasing said

vendor's lien, it would be necessary to get a release from the executor, he went 153 to Johnston, and proposed to *give him additional security, which was accepted as hereinbefore stated.

The executors of Daniel Hale, and Andrew J. Hare and wife, rely upon the facts stated in the answer of James F. Hare, and insist that the lien on the land for the purchase money was released; and Hare and wife aver, that at the time of their purchase they were informed and fully assured, and still believe, that Edward Hale, in his lifetime, and the plaintiff, had released said lien; and with this understanding they became the purchasers.

These parties say further, that the land was purchased at the price of \$2,500; of this sum, \$1,000 was paid by a tract of land near the Grey Sulphur Springs, which was held by Daniel Hale in trust for Wilmoth Hare, and the balance of the purchase money was paid by William Hale, who held the money in trust for the said Wilmoth Hare. Isaac Hare says that he did convey to Daniel Hale as trustee for Wilmoth Hare, the tract of land referred to, and that this conveyance was made by the consent of James F. Hare, Daniel Hale, trustee as aforesaid, and as he understood and believed by the consent of Edward Hale, in his lifetime, as well as by his representatives after his death.

Respondent further says, as to the conveyance made by him to Elisha G. Duncan for land lying on Wolf creek, he has no recollection whatever; and if he ever made such a deed he is not aware of it, and was not at the time of making it; and he is not now aware, except upon examination of the clerk's office, where he finds such a deed, purporting to have been made by him on the same day he made the deed to Daniel Hale, trustee, &c., as above stated. He is certain that no such deed was ever demanded of him by Duncan, and it was not his intention to make such a deed, and he can only account for it in the following manner: at the time he made the deed to Daniel

154 Hale, trustee, &c., the deed and certificates *were prepared by Albert G. Pendleton, and respondent signed and acknowledged such papers as were presented to him by said Pendleton, at that time, as he understood that he was acting as counsel for Andrew J. Hare and wife, in that matter, and at that time, the deed to Duncan must have been signed and acknowledged by respondent under the impression that it was part and parcel of the other deed. Respondent was not aware until a very few days since, and not until some time subsequent to the conveyance set forth in the amended bill from him to James H. French, trustee for Mrs. Phoebe Duncan, and at the time of making this last deed to French, he was not aware that he had made the first conveyance, and therefore made the deed to French in good faith, in pursuance of an understanding had between Duncan and his wife in reference to said land.

Duncan and his wife, in their answer,

deny that the tract of land set forth in the amended bill as belonging to Duncan, is wholly his property, and say that it belongs to Mrs. Duncan in her separate right. The facts are as follows: on the 15th of September 1847, Joseph Hare, the grandfather of Mrs. Duncan, made a deed of gift to her and her two brothers, James F. and Andrew J. Hare, to a tract of land lying near Giles courthouse, containing five hundred and fifty-seven acres; and Duncan and wife removed to the land, and lived there for two or three years: and they exhibit the deed. In the meantime, Joseph Hale died, and by his will directed his executor, Manilius Chapman, to sell his home place on Wolf creek; and said Chapman did sell it, and it was purchased by Isaac Hare at the price of \$3,000. Isaac Hare and Duncan agreed to pay for the land jointly, and executed their bonds to Chapman jointly. Subsequently, the land was divided between them, Duncan agreeing to pay Isaac Hare \$500 difference in the division.

155 Shortly after the purchase, Duncan and wife removed to the land, and Duncan being unable to pay for the land *without a sale of the land near Giles courthouse, Mrs. Duncan consented to the sale of that land, with the right reserved by her, to have conveyed to her just such interest in the Wolf creek land as she possessed in the land at Giles courthouse; and with that understanding, the land at the courthouse was sold and conveyed to Watts and Mahood for \$3,000.

In order to carry out this agreement, Duncan, in 1866, procured the conveyance from Isaac Hare to French; Chapman having previously conveyed the whole tract to said Hare; Duncan considering that, looking to the values of the two tracts, that was but a just equivalent for Mrs. Duncan's interest in the land near Giles courthouse.

The respondents aver that they had no knowledge of any deed made by Isaac Hare to Duncan, and they are certain that no direction, express or implied, was ever given by them or either of them, for the said conveyance to be made; but the same was wholly without their knowledge or consent; and Duncan avers that he never accepted or agreed to accept said conveyance, and knew nothing of its existence, until he saw it in the clerk's office a short time before. Under these circumstances, Duncan says his interest in the Wolf creek land cannot, in any event, be more than that of tenant by the courtesy, and that is more than he would be justly entitled to under the contract with his wife.

A great many witnesses were examined by both the plaintiff and the defendant, Day, as to the value of the land sold by Isaac Hale to Day, and that conveyed by Day to him; and as is usual in such cases, the witnesses for the respective parties differed widely as to the values of both tracts. The witnesses for the plaintiff estimated the land sold by Hale to Day at \$3,500, and one of them at \$4,000; whilst Day's witnesses put it at from \$2,000 to

\$2,500. So the plaintiff's witnesses estimated the land in Mercer county at from \$600 to \$1,000; and Day's witnesses put it at from \$1,000 to \$2,000. It was
156 *sold by Daniel P. Hale, to whom Isaac Hale conveyed it at \$1,000.

The only witnesses who spoke of any declaration of Isaac Hale's intention in making the conveyance was the defendant, Johnston, and Lorenzo D. Hale. Johnston, having recovered the judgment mentioned in the bill and his answer against Isaac Hale, went to see him, accompanied by L. D. Hale, in order to secure some arrangement for its payment. He says, that after he had told him the object he had in view in coming to see him, Hale said he intended to pay all his own debts, but that he was overwhelmed with security debts, and that he made this deed to prevent paying these security debts. After seeing Isaac Hale, he went on to see Day, and after detailing some conversation between them, by which Hale seems to have been offended, and told him he supposed he brought L. D. Hale as a witness; witness told him no: he was there to represent Mrs. Hale's debts, but that he could be a witness if necessary. Witness then says: "In the first part of the conversation I told him that Mr. Isaac Hale had told me that he had made the deed to him to prevent his having to pay security debts, to which he made no reply; and before I left I asked him if Mr. Hale did not tell him, at the time of making the deed, that he made it to prevent paying debts in which he was security. He hesitated or paused a moment, and asked me to repeat the question, or asked me what it was I asked. I repeated the question to him, and his reply was, I'll not answer that question now.

Lorenzo D. Hale says he was with Johnston on the occasion referred to by him, and he concurred with Mr. Johnston in his statement of what occurred during those conversations.

Day, who gave evidence in the case, says Mr. Johnston said, if I am not mistaken, that Mr. Hale owed him a debt, and if he saw an opportunity, he intended to

157 *make it. After that Mr. Johnston asked me two questions that I did not answer. He asked me if I ever heard Mr. Hale say that he would not pay a security debt. After he had threatened to sue the land and make the money, I thought it proper not to answer the question, and I told him I would not answer the question. His reason for not answering was, that Johnston and Hale had come there, and he thought it was done to take advantage of him. He says, if Isaac Hale had any intention of delaying or defrauding his creditors he never revealed it to me.

The evidence shows very clearly that the land conveyed in trust for Mrs. Andrew J. Hare was paid for in the mode stated in their answer, by the proceeds of the sale of her land, and by money in the hands of her trustee, Wm. H. Hale, bequeathed to her by her grandfather, Isaac Hale. The dif-

ferent sales of the land, and the state of the title, are correctly stated by James F. Hare, except as to the plaintiff's lien.

A. J. Pendleton, who was consulted by A. J. Hare as to his rights, states that he prepared the deed. As to the debts due the plaintiff, about the time, perhaps the day, on which the additional securities of Isaac Hale and E. G. Duncan were added to the notes, he had an interview with the plaintiff, and he advised her that, if her vendor's lien then existed, the taking of additional securities would not impair it. Johnston says Mr. Pendleton applied to him, as executor of Edward Hale, to release the security, but he declined to do it. Lorenzo D. Hale, who acted as the agent of the plaintiff, says that at the time James F. Hare proposed to give additional securities on the bonds, witness informed him that Mrs. Hale would not release her lien on the land for any security he might offer. Witness also informed Mr. Pendleton at that time that Mrs. Hale would not release her right to the land. After Mr. Pendleton returned from seeing Mrs. Hale, witness went over
158 to her house *to get the bonds. He got them from Mrs. Hale, with the instruction from her that she would not release her lien on the land for any security, but they could give the security or not.

As to the land conveyed to French in trust for Mrs. Duncan, it was paid for by the proceeds of the sale of her land, which was sold under an agreement with her, that she should have the same interest in the land purchased; and the first deed seems to have been executed by Isaac Hare, as stated in his answer, and without the knowledge of Duncan.

The cause came on to be heard on the 17th of October 1867, upon the bills taken for confessed as to some of the defendants, the answers of the others and exhibits filed (but nothing is said of replications to the answers, or the depositions), and the court made a decree declaring the deed from Isaac Hale to Day fraudulent and void, and setting it aside; and commissioners named were directed to sell the land upon terms stated in the decree. The bill was dismissed as to Andrew J. Hare and Wilmoth, his wife, and her trustee, Gibson. And the court being unable, in the present condition of the case, to determine what interest Elisha G. Duncan has in the land conveyed to him by Isaac Hare, or what the same is worth, ordered that a commissioner should take an account of the interest of said Duncan in said land, and its value, and make report to the court at its next term.

From so much of this decree as set aside the deed from Isaac Hale to Day, and directed a sale of the land, Day applied to a judge of the District court at Abingdon for an appeal; and from so much of the said decree as dismissed the bill as to A. J. Hare and wife, and her trustee, Mrs. Hale applied for an appeal: and both appeals were allowed.

The case was argued for the appel-
159 lants by Wade and *John W. Johnston,

and for the appellees, Andrew J. Hare and wife, by the Attorney-General and Mahood.

ANDERSON, J. delivered the opinion of the court.

The original bill in this cause was exhibited for the purpose of setting aside the deed of conveyance made by Isaac Hale and Nancy his wife, to their son-in-law, Isaac H. Day, as fraudulent and void as to creditors; and to subject the lands so conveyed to satisfy the plaintiffs' judgments. The consideration mentioned in the deed for said conveyance is \$1,700. But there is a paper filed as an exhibit with the answer of Isaac Hale, which purports to be an obligation of Isaac H. Day, in consideration that Nancy Hale, the wife of Isaac Hale, had relinquished to the said Day, her dower in the said lands, to maintain and support her in comfort for her natural life, in addition to the consideration of \$1,700 mentioned in the deed; and it is assigned as an error in the decree here for the first time, that Mrs. Hale was not made a party in the suit.

In general, all persons materially interested in the subject, ought to be made parties to the suit, either as plaintiffs or defendants; whether those whose rights are concurrent with the party instituting the suit, or those who are interested in resisting the plaintiffs' claim. We are of opinion that Mrs. Hale is not shown to have any such interest. She has certainly no interest concurrent with the plaintiff; and the bill not seeking to subject her contingent interest of dower, she is not interested in resisting the plaintiffs' claim. Her right of dower in the lands, should she survive her husband, or the agreement of Day for her maintenance and support, in consideration of her relinquishment, is not a matter necessarily, nor properly, a subject of litigation in this suit; and we are, therefore, of opinion that there is no error in the decree of the Circuit court upon this ground.

The next assignment of error we shall notice is, that *the decree not stating that the cause was heard upon depositions, they should be excluded from consideration; and the answers being responsive to the bill, and denying its material allegations, it should have been dismissed. The record shows that depositions were taken by both parties, and that both parties were present at the taking of the depositions, and cross-examined each others witnesses; and it appearing from the entry of the clerk, that the depositions were filed in the cause before the hearing, and the decree being evidently founded upon the evidence, it is fair to presume that it was a clerical omission in drawing the decree, and that the cause was heard upon the depositions.

The case of *Shumate v. Dunbar*, 6 Munf. 430, is not very fully reported. But it was a suit against an absent defendant, and it was incumbent on the court to see that the proceedings against him were all regular

and proper; and it not appearing in the record that any notice had been given to him of the time and place of taking the depositions, either by publication or otherwise, the court would not look into them. If this were an error, it might have been corrected in the court below on motion. A decree cannot be reversed now even for want of a replication to the answer, when the defendant has taken depositions, as if there had been a replication. Nor shall a decree be reversed at the instance of a party who has taken depositions, for an informality in the proceedings, when it appears that there was a full and fair hearing upon the merits, and that substantial justice has been done. Code, ch. 181, § 4, p. 743. We are therefore of opinion that this objection should be overruled.

The material and important question in this branch of the case is, Is the deed from Isaac Hale to Isaac H. Day fraudulent and void as to creditors? We deem it unnecessary to go into a review and analysis of the testimony. But, after a careful examination, we are of opinion that there is no error in the decree on this point. We think
161 *that the said deed, was made with intent to hinder, delay, and defraud creditors, and that the grantee was cognizant of such intention.

We are also of opinion, that the Circuit court did not err, in directing a reference to a master, to ascertain and report what is the interest of Elisha G. Duncan, in the property conveyed by Isaac Hale to James H. French, in trust for the wife of said Duncan; for the interest of said Duncan, whatever it may be, is liable to the plaintiffs' judgment against him.

It now only remains to consider the question raised by the plaintiffs' appeal. And here we have more difficulty. James F. Hare, in his answer, says that when he purchased from Edward Hale, he proposed that he would retain a lien upon the land for the purchase money; but Hale refused, and agreed to release the land, if he would give him personal security; and that he gave the personal security he required. That after the death of Edward Hale, he was negotiating the sale of the land to the trustees of Mrs. Wilmoth Hare, and in order to consummate the sale, he went to Giles Courthouse, and applied to James D. Johnston, executor of Edward Hale, to release the lien, and proposed to give additional security if he would do so; that Johnston as executor refused, but said he would consult Mrs. Hale; and that he soon returned, and said he had had an interview with her, and that she assented. This conduct of this defendant is remarkably incompatible with his alleged agreement with Hale. He afterwards attempts to explain it, by saying that the release of Edward Hale being only verbal, and there being no witness, he thought he would be unable to establish it after his death. But almost in the same breath he says, that Edward Hale directed George D. Hoge to have the conveyance made directly to him. Such proof would

have tended strongly to prove his allegation, that Hale had agreed to release the land; but it was not produced, and no attempt is made *to account for its non-production. But if there had been such an agreement, and such proof to establish it, it is really surprising that he should have gone to the executor, and, without even mentioning such an agreement, and insisting upon it, have proposed to him to release the lien upon an entirely new consideration.

But the statement of this defendant, as to the result of the interview with the executor, and the assurances which he gave him of the consent of Mrs. Hale to release the land upon his giving the additional personal security he proposed, is wholly irreconcilable with the depositions of James D. Johnston, Albert G. Pendleton, Lorenzo Hale, and Mrs. Beatrice A. Hale; so that, if his answer positively negated the allegations of the bill, and was directly responsive, and not merely affirmative matter which it was incumbent on him to prove, unsupported as it is by any evidence in the cause, it could not weigh as a feather against such a weight of testimony.

It does not appear, therefore, that Edward Hale agreed to release his recourse upon the land. And we think it is proved beyond all question, that Mrs. Hale did not, but that she positively refused to release the land; though she consented that additional personal security might be given, provided it should not prejudice her recourse upon the land, which she was not willing to surrender for any personal security. And, indeed, she agreed with Mr. Pendleton, who appears in this matter to have acted as the counsel and agent of A. J. Hare and his wife, and their trustee, to allow the additional security to be given, only upon his assurance, that it would not prejudice her lien upon the land, if she had any, but would rather strengthen it.

At the same time, it is very evident that Andrew J. Hare and wife, and their trustee, finally concluded the contract, accepted the conveyance which was made, and paid the purchase money, with perfect reliance upon the *information and assurances they had received, that the deed would invest them with a good title, and that they were entirely safe in accepting it. And yet it is a plain inference, from the evidence, that they must have known that Mrs. Hale held James F. Hare's bonds for the purchase money, and that she claimed a lien upon the land for their payment, which she was not willing to surrender. What was the ground of their reliance, unless it was the opinion of their counsel, which he intimated to Mrs. Hale, that she had no lien upon the land, there is nothing in the record to show. Nor is there anything in the record to show that Isaac Hare, in executing the deed of conveyance, did not act in perfect good faith, or that any culpability attaches to Mrs. Hale. If she had such a lien, or right of recourse upon the land, it is very evident that she did nothing to surrender it.

It is contended by the appellees, in the cross appeal, that no such lien existed. That is the only remaining question.

Before our statute, ch. 119, § 1, p. 567 of Code, it was well settled, that a vendor who conveyed the land to the vendee had a lien upon it for the unpaid purchase money in the hands of the vendee, or a volunteer claiming under him, or purchasers for valuable consideration with notice. Where a conveyance is made now, by the statute, the lien is abolished, unless expressly reserved on the face of the conveyance. But when no conveyance is made, the case is not within the purview of the statute, and the law is the same as it was before the statute was enacted.

And in such case it is well settled that the vendor has recourse upon the land, notwithstanding the vendee gave personal or other security for the purchase money, and notwithstanding the subsequent purchaser, or incumbrancer, had no notice that the purchase money, or any part of it, was unpaid. *Yancy v. Mauck & als.*, 15 Gratt. 300; citing *Hatcher's adm'r v. Hatcher's ex'ors*, 1 Rand. 53; and *Lewis v. Caperton's ex'or*, 8 Gratt. 148.

164 *In *Beirne's ex'ors v. Campbell*, 4 Gratt. 125, Campbell had but an equitable title, which he sold to Burke, and which Burke conveyed, with other lands, to trustees for the benefit of creditors. At the time of Burke's conveyance the legal title was in Estill, which was afterwards conveyed, by the direction of Campbell, to Burke. At the sale by the trustees, Beirne became the purchaser of this tract. This court held that the land was chargeable in the hands of Beirne for the balance of purchase money due from Burke to Campbell, though he had obtained the legal title, and had no notice that purchase money was due to a previous vendor. That case, we think, goes very far in support of the lien of the vendor of an equitable title—much farther than it is necessary to go in this case, to enforce the lien of Edward Hale against the purchasers from his vendee, having notice of the purchase money due him, and that his representative insisted upon her lien, and refused to surrender it for any personal security, unless the mode of transferring the equitable title, by an assignment of the title bond, makes a difference. In this case it is not averred in the pleadings, nor proved in the cause, except by recital in one of the deeds, to which the appellee, Beatrice A. Hale, was not a party, that the equitable title of Edward Hale was transferred to James F. Hare, by the assignment to him of the title bond of Isaac Hare, under which Edward Hale, by assignment, held the equitable title to the land in question. But assuming that to be the fact, has the assignor a lien upon the land for the purchase money? It seems to be well settled, that one who sells an equitable right to land, retains a lien upon it for the consideration, when, under the same circumstances, the vendor of the legal title would have an equitable lien. The lien is

recognized to the same extent in case of a sale of an equitable title as of a legal one.
1 Lead. Cases in Eq. side p. 270, top 363;

Steward v. Hulton, 3 J. J. Marsh. R. 165 178. If the vendor had *sold the legal title, but had not conveyed, the land would have been charged with the purchase money, as we have seen, in the hands of a subsequent purchaser or incumbrancer, even without notice, and notwithstanding the vendor had taken personal security.

In Ligon v. Alexander, &c., 7 J. J. Marsh. R. 288, the case was this: Ogden, having title, executed a title bond for a piece of land to Ligon, who, having paid therefor, assigned the bond to Morgan, who assigned it to Alexander, with notice of the non-payment of the purchase money due from Morgan to Ligon, and of the lien asserted by the latter on the land for its payment. The court held that the land in the hands of Alexander was bound for the purchase money due Ligon. The court says: "Before any assignor can have such a lien, he must show himself to have been the beneficial owner of the property by payment of the purchase money to his vendor. With this borne in mind, there can be no difficulty in recognizing any number of distinct liens, from the first assignor to the last assignee of the bond." This decision is recognized in Gallway v. Hamilton's heirs, &c., 1 Dana R. 576, (see also Stewart v. Hulton, 3 J. J. Marsh. R. 178,) in the following language: "This court has decided that the assignor of a bond for title to a tract of land is entitled to a lien on the land to secure the purchase money, notwithstanding the assignee has parted with the bond by transfer to another, provided he had notice of such lien."

The case of Ligon v. Alexander strikingly resembles the case in hand; and it is supported by the well settled principle that the lien in case of a sale of an equitable title is recognized to the same extent as in the sale of the legal title, and is in harmony, except that it does not go as far, with Campbell v. Beirne, supra, decided by this court.

We are therefore of opinion that the decree of the Circuit court is erroneous in 166 holding that there is no lien *upon the land sold by Edward Hale to James F. Hare, and by him to Daniel Hale, trustee of Wilmoth Hare, for the purchase money due from James F. Hare to Beatrice A. Hale, widow and legatee of Edward Hale, deceased; and in dismissing the suit as to the defendants, Andrew J. Hare and wife, and her trustee, Eustace Gibson.

The court is also of opinion that the said tract of land is primarily liable to the payment of the said purchase money; and that, although the decree is right in setting aside the deed from Isaac Hale to Isaac H. Day, as fraudulent and void as to creditors, the said land can only be subjected to the payment of the purchase money which was due from James F. Hare to Edward Hale for the land he sold him, and upon which he retained a lien for its payment, in case the

same should be insufficient to satisfy the same, and then only for the deficiency. But inasmuch as there were other judgments against the said Isaac Hale, which charged the land, the decree is right in directing the same to be sold.

We are of opinion, therefore, that the decree of the Circuit court should be reversed so far as it is herein declared to be erroneous, and in all other respects affirmed. The decree was as follows:

The court, for reasons stated in writing and filed with the record, is of opinion that the decree of the Circuit court is erroneous in holding that the tract of land sold by Edward Hale to James F. Hare, and by him to Daniel Hale, trustee of Wilmoth Hare, is not chargeable with the purchase money due from James F. Hare to Beatrice A. Hale, the widow and legatee of Edward Hale, deceased; and in dismissing the suit as to the defendants, Andrew J. Hare and his wife, Wilmoth Hare, by her trustee, Eustace Gibson, with costs; and that

167 *there is no other error in said decree.

It is therefore decreed and ordered, that said decree of the Circuit court be reversed and annulled, so far as it is herein declared to be erroneous, and in all other respects affirmed; and Beatrice A. Hale, appellee in the appeal of Isaac H. Day, and the appellant in the cross appeal, recover her costs in this court: which is ordered to be certified to the Circuit court of Giles county, for further proceedings to be had therein.

Decree upon Day's appeal affirmed. Decree upon B. A. Hale's, reversed.

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*Carr v. Carr.

March Term, 1872, Richmond.

1. The construction of § 7, ch. 109, Code of 1860, in relation to divorces *a mensa et thoro*, given in *Bailey v. Bailey*, 31 Gratt. 43, approved and acted on.

2. **Husband and Wife—Legal Grounds for Wife's Desertion.**—That a husband is rude and dictatorial in his speech to his wife, exacting in his demands upon her, and sometimes unkind and negligent in his treatment of her, even when she was sick, and worn and weary, in watching and nursing their sick child, is no legal grounds for her leaving him.

3. **Same—Same—Alimony.**—A wife having left her husband without good legal grounds is not entitled to alimony.

***Husband and Wife—Legal Grounds for Wife's Desertion.**—Desertion is a breach of matrimonial duty, and is composed, first, of the breaking off of matrimonial co-habitation; and, secondly, an intent to desert in the mind of the offender. Both must combine to make the desertion complete, and a mere separation by mutual consent is not a desertion by either party. *Latham v. Latham*, 30 Gratt. 307, and *note*. In *Harris v. Harris*, 31 Gratt. 13, it was held that the circumstances must be very peculiar indeed, if any such case there could be, which justifying a decree for an absolute divorce in behalf of the husband for wilful desertion of the wife, would at the same time warrant a decree in her behalf. See also, *Throckmorton v. Throckmorton*, 86 Va. 768, 11 S. E. Rep. 289.

4. *Same—Same—Custody of Children.*—A wife having left her husband without good legal grounds, and taken their child with her, though there is no other imputation upon her conduct, upon a decree for a divorce *a mensa et thoro* at the suit of the husband, on the ground of desertion, the child will be restored to the husband, though it is a female and but three years old; and though the husband's treatment of his wife has been coarse, rude, petulant, close, exacting, and penurious, leaving her to bear alone burdens and trials which it should have been his highest pleasure to share and to relieve.

This was a suit in equity, brought in July 1869, in the Circuit court of Loudoun county, by Thomas E. Carr, against his wife, Ascenith Ann Carr, for a divorce *a mensa et thoro*, and the recovery of the child of the marriage. The only ground on which the divorce was asked was desertion. This was admitted in the answer, and proved in the cause. The defendant insisted that she went with his consent. The parties, who seem to have been raised within a half mile of each other, were married on the 20th of May 1867. A female child was born *to them on the 7th of April 1868; and on the 12th of July she left her husband, taking her child with her, and went to her father's house, where she has since lived.

Thomas E. Carr was the only son of his mother, and she was a widow, and he had three sisters. At the time of his marriage he lived with his mother, and, probably,

**Same—Same—Custody of Children.*—As to the custody of the children when the wife has deserted the husband without good legal grounds, see Latham v. Latham, 30 Gratt. 307, and note.

ALIMONY.

Definition.—Alimony is an allowance made to the wife out of the husband's estate or income upon a decree of separation. Latham v. Latham, 30 Gratt. 328.

Origin of Alimony.—"Alimony had its origin in the legal obligation of the husband, incident to the marriage state, to maintain his wife in a manner suited to his means and social position." Harris v. Harris, 31 Gratt. 17.

Amount of Alimony—Discretion of Court—General Rule.—Says the court, in *Bailey v. Bailey*, 21 Gratt. 57. "In regard to allotment for alimony, there is no fixed rule. It is a matter within the discretion of the court. Yet, it is not an arbitrary but a judicial discretion, to be exercised in reference to established principles of law relating to the subject, and upon an equitable view of all the circumstances of the particular case. The general rule in respect to alimony is, that the wife is entitled to a support corresponding to her condition in life and the fortune of her husband. And in the language of NELSON, C. J., in *Burr v. Burr*, 7 Hill (N. Y.) 207: 'When the delinquency of the husband has been established, and the wife is the injured party driven by his cruelty or other wrongful conduct, from the comfort of domestic enjoyments, she should be liberally supported.'

"But while alimony is commonly defined a proportion of the husband's estate, yet the duty of a

husband to maintain his wife does not depend alone upon his having visible tangible property. While the parties are living together, they are bound to contribute by their several personal exertions to a common fund, which in law is the husband's, but from which the wife may claim support. If she is compelled to seek a divorce on account of his misconduct, she loses none of her rights in this respect, only she is to draw her maintenance in a different way: that is under a decree for alimony, based, if he has no property, upon his earnings or ability to earn money." Cited and approved in *Miller v. Miller*, 92 Va. 200, 23 S. E. Rep. 232; *Harris v. Harris*, 31 Gratt. 17; *Cralle v. Cralle*, 84 Va. 202, 6 S. E. Rep. 12.

Thomas E. Carr was honest, industrious, sober, and correct in his dealings; but he was penurious, selfish, illtempered, and unsocial. His wife, who seems to have been quite young, was virtuous, correct, of affectionate temper, fond of her friends, social in her nature, and withal spirited, and quick to feel. It is easy to imagine that the lives of two persons so unlike in disposition, and yet so closely united, would not glide on without a ripple. Their collisions seem to have been frequent. He was sometimes rude and dictatorial in his speech to her, and exacting in his demands, and sometimes unkind and negligent in his treatment of her, even when she was sick, or worn and weary with watching and nursing their sick child. She, on the other hand, was quick to feel his treatment, not very patient to bear it, nor with the self-denial to endeavor to accommodate herself to his disposition and wishes. The consequence of these disagreements was, that she twice left him. The first time she returned after a day or two, upon his request. The second time she has remained away.

There are letters from the husband to the wife, filed by him, urging her to return to him, and assuring her of his continued

husband to maintain his wife does not depend alone upon his having visible tangible property. While the parties are living together, they are bound to contribute by their several personal exertions to a common fund, which in law is the husband's, but from which the wife may claim support. If she is compelled to seek a divorce on account of his misconduct, she loses none of her rights in this respect, only she is to draw her maintenance in a different way: that is under a decree for alimony, based, if he has no property, upon his earnings or ability to earn money." Cited and approved in *Miller v. Miller*, 92 Va. 200, 23 S. E. Rep. 232; *Harris v. Harris*, 31 Gratt. 17; *Cralle v. Cralle*, 84 Va. 202, 6 S. E. Rep. 12.

Income of Husband, the Fund from Which Alimony is Granted.—In respect to alimony the general rule is that the income of the husband, however derived or derivable, is the fund from which the allowance is made. *Heninger v. Heninger*, 90 Va. 274, 18 S. E. Rep. 193, citing *Bailey v. Bailey*, 21 Gratt. 43; *Cralle v. Cralle*, 84 Va. 196, 6 S. E. Rep. 12.

"The general rule undoubtedly is, that the income of the husband, whether derived or to be derived from his personal exertions or from permanent property, or from both, is the fund from which alimony is decreed, and the amount, as already said, will depend upon the particular circumstances of each case." The court, in *Cralle v. Cralle*, 84 Va. 202, 6 S. E. Rep. 12, citing *Harris v. Harris*, 31 Gratt. 13; *Carr v. Carr*, 22 Gratt. 168; *Myers v. Myers*, 83 Va. 806, 6 S. E. Rep. 680.

Instances of Amount Allowed.—Twenty dollars a month is not too much, where husband owns a farm of the value of \$2,500, personality of \$500 value, is

affection. The first is dated November 3d, 1868, and to this he received no answer. The second is dated March 25th, 1869, and to this he received a reply, with a very decided refusal to return, *and which evinces that she was still smarting under the ill treatment she at least considered she had received. The third is dated March 20th, '71. In this he tells her that from the day she left him—then nearly three years—to the present time, there had been no hour in which he would not gladly have taken her back to his home and his heart. He says the time is near at hand for the hearing of their case, and he beseeches her to come back and let him prove to her that he can and will be her loving and devoted husband.

The cause came on to be heard on the 24th of April 1871, when the court made a decree giving to the plaintiff a divorce *a mensa et thoro* from the defendant, and giving to him the custody of the child, and refusing alimony to the wife. And leave was granted to either party to come into the court and apply for any further relief in the cause. From this decree Mrs. Carr obtained an appeal to this court.

Harrison, for the appellants.

Hunton, for the appellee.

BOULDIN, J., delivered the opinion of the court:

This is an appeal from a decree of the Circuit court of Loudoun county, at its

strong and in good health, between 40 and 45 years of age, and the wife is delicate with five young children. *Owens v. Owens*, 96 Va. 191, 31 S. E. Rep. 72.

One hundred and fifty dollars per annum is reasonable alimony, where it is shown that the husband is of good business habits and owns property of \$3,500 value. *Cralle v. Cralle*, 84 Va. 198, 6 S. E. Rep. 12.

Six dollars a month to the wife who has an infant child is little enough, where the husband owns a farm of the value of about \$1,250, two horses, and other personal property of no great value, and is an able-bodied man of 35 years. *Trimble v. Trimble*, 97 Va. 217, 33 S. E. Rep. 531.

Alimony May Be Granted Independently of a Suit for Divorce.—"In Virginia the statutes allow alimony as incident to a decree for a divorce. But this court has gone farther, and held that equity has jurisdiction in an independent suit to decree in favor of the wife in proper cases—as, for example, when she has been abandoned by the husband, or driven from his house by ill treatment, and compelled to seek an asylum elsewhere." The court, in *Latham v. Latham*, 30 Gratt. 338.

Alimony may be granted independently of any divorce or application for one, as where the misconduct of the husband drives the wife from her home, or he turns her out of doors, or perhaps for any cause for which a divorce *a mensa* would be granted if asked for. 1 Minor's Inst. (4th Ed.) 308; *Purcell v. Purcell*, 4 H. & M. 507; *Almond v. Almond*, 4 Rand. 662; *Spencer v. Ford*, 1 Rob. 648.

In *Almond v. Almond*, 4 Rand. 662, JUDGE CARR, delivering the opinion of the court, said: "Suppose the husband turns his wife out of doors, or treats her so cruelly that she cannot live with him; suppose

April term, 1871, in a chancery suit instituted in said court by Thomas E. Carr, against Ascenith A. Carr, his wife, seeking a divorce *a mensa et thoro*, on the ground of abandonment or desertion by the wife; and seeking also to obtain the custody of his infant daughter, the only child of the marriage, who had been taken from her father's home by the mother.

The divorce as prayed for was granted by the court; the child was remanded to the custody of the father, and alimony was denied to the wife.

From this decree an appeal was allowed to this court, and the following errors are assigned by the appellant:

"1st, It was error to grant a divorce *a mensa et thoro* *upon the pleadings and proofs in this cause, it appearing therefrom that the petitioner had cause for leaving, and that she left her husband with his consent and concurrence.

"2nd, It was error not to grant something for maintenance to the petitioner, under the circumstance of the case.

"3rd, It was error to take from the petitioner, and give to the complainant, the custody of the child.

"4th, There was no provision for the mother to have access to her child."

The questions thus presented for our consideration have been discussed with much learning and ability by counsel on both sides, and numerous authorities have been cited; but as their solution depends on the construction of a statute of this State of

him to persevere in refusing to take her back, or to provide a cent to feed and clothe her. Surely, in a civilized country, there must be some tribunal to which she may resort. In such a case a court of equity would unquestionably stretch out its arms to save and protect her."

Alimony Pendente Lite.—The court in term or the judge in vacation may at any time pending the suit, in the discretion of such court or judge, make any order to compel the husband to pay any sums necessary for the maintenance of the wife and to enable her to carry on such suit. Va. Code, § 2261.

Pending Appeal—Lower Court Allowing Wife Counsel Fees to Prosecute Appeal.—In *Cralle v. Cralle*, 81 Va. 778, HINTON, J., in delivering the opinion of the court, intimates that after an appeal is taken to a decree, the lower court has no right to allow the wife money to defend such appeal or for maintenance pending the appeal, saying, "Thenceforth (*i. e.* after *supersedeas* is allowed) the cause is regarded as pending in the appellate court, and any order or decree that is made by the subordinate court must be simply null and void." The case however was dismissed for want of jurisdiction, so the action of the lower court in allowing the alimony was not passed on.

Alimony Allowed—Husband Dies Pending Appeal—The Rule.—A certain sum monthly having been allowed as alimony to the wife, the husband appeals from the decree, and pending the appeal dies. The appellate court affirming the decree, the wife is entitled to the allowance up to the time of his death. *Francis v. Francis*, 31 Gratt. 283.

Estimating Alimony—What May Be Considered—Instance.—In estimating the husband's property in

comparatively recent date, and as that statute has received judicial interpretation by this court in the case of *Bailey v. Bailey*, decided at Wytheville, June term, 1871, and reported 21st Gratt. 43, the court deems it unnecessary to comment in detail on the previous authorities.

The 7th section of chapter 109, Code of 1860, p. 630, authorizing the chancery courts to decree divorces from bed and board, is as follows:

"§ 7. A divorce from bed and board may be decreed for cruelty, reasonable apprehension of bodily hurt, abandonment or desertion."

Sections 12 and 13, of same chapter, confer on the courts full power, on granting a divorce, to make such orders as may seem just and proper under the circumstances, in relation to alimony to the wife, the custody and maintenance of the minor children, and the property of the parties.

The case of *Bailey v. Bailey*, 21 Gratt. 43, above cited, in which this statute was considered and construed by the court, was just the converse of the case under consideration. It was a suit by the wife 172 against the husband, *seeking a divorce a mensa et thoro, for abandonment and desertion by the latter. The fact of desertion by the husband, proved almost exclusively by the letters of the parties, was considered by the court as satisfactorily established, and the divorce was decreed. Alimony was allowed the wife; and the

custody of her only child, an infant of very tender age, was given to her.

In considering that case the court say that "under our statute no particular period is prescribed in which the desertion shall continue, to entitle a party to a divorce a mensa et thoro;" that the courts had not laid down "any particular rules of evidence for determining whether a separation does or does not, as a matter of proof, amount to desertion." And they go on, very properly to say, that "the question does not admit of such rules, but each case must rest on its own circumstances." But the following proposition is affirmed by the court, as the result of the English and American cases on the subject: "We think it may be safely asserted, as a general principle of law, to be extracted from the English and American cases on the subject, that wherever there is an actual breaking off of matrimonial cohabitation, combined with the intent to desert in the mind of the offender, in such case desertion is established, and the party is entitled to a divorce a mensa et thoro." 21 Gratt. 48-9.

Such being the law, there can be but little difficulty in applying it to the facts of this case. Without recapitulating those facts, which we deem wholly unnecessary, it is enough to say, that the pleadings and proofs in the cause abundantly establish "an actual breaking off of matrimonial cohabitation, combined with the intent to desert," on the part of the wife, without legal cause or excuse—an intent deliberately formed,

Court Will Not Allow Alimony Where Wife Is Well Off.—Where the wife owns an estate amply sufficient for the support of herself and children and of much greater value than that of the husband, the court should not decree that the husband shall contribute to their support. *Myers v. Myers*, 88 Va. 806, 815, 6 S. E. Rep. 680.

Deed in Lieu of Alimony No Bar to Costs of Suit.—Where the wife by deed for an adequate consideration releases all her claims for alimony for the husband, such deed does not preclude her from asking the court to decree her all costs and expenses in a suit for divorce against her by her husband, where such suit has failed. *Engleman v. Engleman*, 97 Va. 487, 84 S. E. Rep. 50.

Allowing the Wife Counsel Fees—Instance.—The appellate court will not allow counsel of the wife an additional fee for representing her, in the appellate court, where the record does not show the ability of the husband to meet and pay such fee. *Engleman v. Engleman*, 97 Va. 494, 84 S. E. Rep. 50.

Wife Has No Right to Any Specific Property of Husband.—A claim for alimony on the part of the wife does not give her a right to any specific property of the husband. *Almond v. Almond*, 4 Rand. 662.

Marriage a Prerequisite.—Marriage is of course a prerequisite to alimony, but it may be proven from circumstances, such as co-habitation, name, and reputation. *Purcell v. Purcell*, 4 H. & M. 507.

After Decree Court Should Not Enjoin Husband from Disposing of His Property.—Where the court allows the wife alimony it is improper to enjoin the husband from disposing of or encumbering his real estate. Such conditions are harsh and impressive. The sums decreed to be paid the wife from time to

reference to the amount of alimony to be allowed the wife, it is proper to admit evidence of a decree for a legacy in favor of the husband. *Cralle v. Cralle*, 84 Va. 198, 6 S. E. Rep. 12.

Capacity of Wife to Earn Money Not to Be Considered.—In considering the amount of alimony to be allowed the wife, the capacity of the wife to earn money, is not a question, and therefore not a proper subject of inquiry by the commissioner. *Cralle v. Cralle*, 84 Va. 198, 300, 6 S. E. Rep. 12.

Wife Not Entitled to, When Her Suit Fails.—Where the wife sues for divorce, and such a suit fails, she is not entitled to alimony. *Latham v. Latham*, 30 Gratt. 307, 330, although in this case *STAPLES, J.*, intimates that there may be cases where the court would grant to the wife alimony, and yet not allow her a divorce.

Wife May Forfeit by Her Misconduct.—Although alimony is the right of the wife she may by her misconduct forfeit it; and where she is the offender she cannot have alimony on a divorce decree in favor of her husband. *Harris v. Harris*, 31 Gratt. 17.

The wife is entitled to no alimony if she leaves the home her husband has provided for her, without sufficient cause. *Carr v. Carr*, 22 Gratt. 168. Mr. Minor defines such sufficient cause, as any cause for which a divorce a mensa would be granted, if asked for. 1 Minor's Inst. (4th Ed.) 808.

Where a wife leaves her husband without good legal cause, she is not entitled to alimony. The reasonable or justifiable cause which will warrant a willful separation and refusal to return to the home of her husband, must be such as would authorize a suit for divorce a mensa et thoro. *Martin v. Martin*, 22 W. Va. 605, 11 S. E. Rep. 12.

and unreasonably and persistently adhered to, down to the rendition of the decree, in the face of repeated and earnest appeals and entreaties to her by the husband to return. Without *just cause she has violated her marriage vow, by thus breaking off matrimonial cohabitation with her husband, and has deserted him and his home with the declared purpose of never returning. Under such circumstances, we are of opinion, in the language of this court in *Bailey v. Bailey*, that "desertion is established, and the party deserted is entitled to a divorce a mensa et thoro." There was no error, then, in granting the divorce.

2. We are further of opinion that the Circuit court did not err in refusing to allow alimony to the wife under the circumstances of this case. She was in the eye of the law, and in fact, the offending party. She has, without sufficient cause, deserted her husband and his home, and established herself elsewhere, thus disregarding his comfort and happiness, her own duty, and the decencies of society. To concede to her, under such circumstances, the right to demand of her husband a separate support in her new establishment, would not only be a reward to misconduct, immoral and corrupting in its tendency, but would give a rude shock to the sanctity of the marriage contract. Happily, the law does not require it, and policy and propriety alike forbid it.

Alimony is a right of the wife, and a duty of the husband, growing out of matrimonial cohabitation. When the wife, without cause, and against the wish of her husband, breaks off cohabitation with intent to desert him, her right to alimony ceases. *Bishop on Mar. & Div.* 564, and cases there cited. So long as the husband has committed no breach of matrimonial duty, he is under no obligation to provide the wife a separate maintenance; and she cannot claim it on the ground of her own misconduct. *Bishop, ibid.*

In *Bogges v. Bogges*, 4 Dana's R. 307, C. J. Robertson, delivering the opinion of the court, says: "a wife who has voluntarily abandoned her husband should not have a decree for her separate maintenance, unless her abandonment of him was, without her fault, rendered *necessary for her safety or happiness, and was consistent with social order and public policy."

We think the above ought to be, and is the law; and we have already said, that in

time should have been made a charge upon such real estate. *Trimble v. Trimble*, 97 Va. 217, 33 S. E. Rep. 581.

Wife Summoned by Publication, Appears, Shows Injustice Has Been Done Her—Asks for Alimony Not That Decree Be Set Aside.—In 1874, H. (the husband) obtained a decree of divorce upon an order of publication, a copy of the decree not having been served on W. (the wife), she after two years appears and asks that the cause be reheard and alimony granted her, but does not ask to have the decree set aside; the evidence shows that injustice was done her, and her case fully established. *Held*, there is no reason why she should be refused the relief (alimony) she

our opinion the desertion of the husband by the wife in this case was not only without sufficient cause, but was in violation alike of "social order and public policy." There was no error, therefore, in denying alimony to the appellant.

3. Nor did the court err in remanding the infant daughter to the custody of her father.

The child was three years old at the date of the decree of the Circuit court, and is now four. The tender nursing period has passed by, and the time for moral training and impressions has arrived; and the court must decide whether there is anything in the circumstances of this case which, having in view the good of the child, renders it necessary and proper that it should remain longer with the mother. We think not, but the reverse. We concur with the learned judge of the Circuit court when he says, that she "has too lightly abandoned duties which she was bound by religion, morals, and the laws of society conscientiously to perform." For matters which, however painful and annoying at the time, are not of infrequent occurrence in early married life, and are, at most, of comparatively small importance, she has undertaken, of her own accord, to disregard and sever the sacred bond of marriage—"the prop and bulwark of the social system"—and to throw herself upon society, as was said by this court in *Bailey v. Bailey*, "in the undefined character of a wife without a husband, burdened with disgrace"; and we are asked to compel the father and deserted husband to allow his innocent and unoffending daughter to share with the mother this undefined, ambiguous position, this burden of disgrace, during the critical period of moral training and education, when the mother has neither a home to which to take her (except at sufferance) nor means whereby to maintain her. We are of opinion that this should not be done, and that the Circuit court did not err in remanding the child to the custody of its father.

4. We are further of opinion that there was no error in failing to provide that the mother should have access to the child. It does not appear to have been asked, and was in fact unnecessary; first, because the decree provides that either party may apply at any time for such further order as may be desired; and secondly, because the record shows that the heart and home of the hus-

seeks for, because less is asked than might have been claimed (decree of divorce set aside). But in estimating the proper amount of alimony it is improper to consider property acquired by H. after the decree of divorce. *Cralle v. Cralle*, 79 Va. 182.

Alimony as a Provable Debt in Bankruptcy Proceedings.—See article in 5 Va. Law Reg. 365, by W. G. Mathews of the Charleston (W. Va.) Bar.

Foreign Judgments.—A decree for alimony not in a divorce suit, rendered by an Ohio court having jurisdiction will at the suit of the wife against the husband be enforced in this state. *Stewart v. Stewart*, 27 W. Va. 167.

band are ever open to receive his misguided wife.

Upon the whole, we are of opinion that there is no error in the record of which the appellant can complain. But in holding, as we do, that there was no sufficient cause for the desertion of the husband by the wife in this case, we must add that we are very far from holding the husband blameless. On the contrary, his conduct towards his young and inexperienced wife has in many respects been in the highest degree reprehensible. He has treated her with too little tenderness and consideration in the new and trying position in which she was placed. He has at times been coarse, rude, and petulant, when he should have been gentle, soothing, and affectionate. He has left her to bear alone burdens and trials which it should have been his highest pleasure to share and relieve; and he has been close, exacting and penurious with her, when he should have been, to the extent of his means, open handed, liberal, and generous. We think he has much, very much, for which to reproach himself. Both parties have been to blame. A proper spirit of forbearance and conciliation on each side would have saved much trouble. But we believe that neither contemplated or desired the sad consequences which have resulted from their unhappy dissensions. Believing this, and believing also that there is no good and substantial reason why the parties should

not be reunited, and lead for the future respectable and happy lives, we are reluctant, by an unconditional decree of divorce a mensa et thoro and perpetual separation, to close the door apparently against reconciliation. The decree will be so modified, therefore, as to give the appellant the option, within six months from this day, of returning voluntarily, with her child, to the home of her husband, to his bed and board; and should she fail to avail herself of this invitation, the decree of the Circuit court will stand affirmed as an act of this day. Should she return, the Circuit court will be instructed, on her motion, to set aside the decree, and dismiss the bill.

In ordinary cases this affirmance would be with costs to the appellee, as the party substantially prevailing; but this being a suit between husband and wife, and the latter being without estate, the husband must pay the legal costs in both courts.

The decree is as follows:

The court is of opinion that there is no error in the record of which the appellant can complain. But for reasons assigned in the written opinion of the court, it is adjudged, ordered and decreed, that the appellant, Ascenith A. Carr, be allowed the period of six months from this day, within which she is invited to return with her child to the bed and board of her husband, Thomas E. Carr; and unless she shall voluntarily so return within the period aforesaid, then the decree of the Circuit court of Loudoun county of April term, 1871, shall stand affirmed as an act of this day. Should

she elect so to return, she shall be received and treated by the appellee as his wife; and in that event, the said Circuit court is directed, on her motion, to set aside and annul the decree of April term aforesaid, and dismiss the bill.

It is further ordered, that the appellee, Thomas E. Carr, do pay the legal costs of suit in both courts.

Decree amended and affirmed.

177 *Powell & Wife v. Manson.

March Term, 1872, Richmond.

1. **Chancery Practice—Issue Out of Chancery—Depositions.***—Upon the trial of an issue out of chancery, depositions taken in the cause in the chancery court are not to be read to the jury, unless proof be given that the witnesses are dead, or abroad, or otherwise unable to attend the trial.

2. **Same—Answers—Conclusiveness.**†—The positive denials or statements of an answer, responsive to the bill, cannot be overthrown by the admissions, evasions and contradictions, if any, which may be found in the answer.

3. **Same—Same—Same.**—The plaintiff cannot destroy the weight of the whole answer by proving that the defendant is unworthy of credit; nor can he do so by proving, directly or indirectly, that the answer is false in one respect, or several respects. The only effect of such proof being to destroy the weight of the answer to the extent to which it is disproved by that amount of evidence which is required by the rule in chancery.

4. **Same—Same—Weight of Bill and Answer upon Trial of Issue Out of Chancery.**—Upon the trial of an issue out of chancery, the bill is not proof of its allegations, except so far as these allegations are admitted to be true by the answer. And the answer is not proof of the allegations therein contained, unless the allegations in the answer, as to facts, be positive, and responsive to some allegation of the bill. And to be responsive, such allegations of the answer must not be either evasive or contradictory.

5. **Same—Issue Out of Chancery—Rules of Evidence.**—On the trial of an issue out of chancery, the rule of evidence is the same as on the hearing in the Chancery court; and the allegations of the answer responsive to the bill must be taken as true, unless contradicted by two witnesses, or one witness and corroborating circumstances.

6. **Same—Same—Motion for New Trial.**—Upon a motion for a new trial of an issue out of chancery, on the ground that the verdict is contrary to law and the evidence, the judge, overruling the motion, refuses to certify the facts proved, because the testimony was conflicting, but all the oral testimony is certified. The court will consider not merely whether the evidence adduced before the jury warrants the verdict, but also whether, having regard to the whole case, further investigation is necessary to attain the ends of justice.

***Issue Out of Chancery.**—See monographic note on "Issue Out of Chancery," appended to *Lavell v. Gold*, 25 Gratt. 473.

†**Answers—Conclusiveness.**—See monographic note on "Answers in Equity Pleading," appended to *Tate v. Vance*, 27 Gratt. 571.

178 *7. *Same—Same—Same.*—In such a case, although there may have been a misdirection by the court, or evidence may have been improperly rejected, a new trial will not be granted, if the verdict appears to be right upon a consideration of all the evidence, including that which was rejected.

8. *Marriage of Female Defendant Pending Suit.*—Pending a suit in equity against a female defendant, to recover a debt alleged to be due by her, she marries, and the husband is made a party defendant. There was an ante-nuptial settlement, by which all the wife's property was conveyed in trust for her separate use, and she renounced all interest in that of the husband. The husband is still liable for the debts of the wife contracted before marriage, and the decree may be against both of them.

This is the sequel of the cases of *Magill v. Manson* and *Same v. Manson & al.*, which are reported in 20 Gratt. 527. When the causes went back to the Chancery court of Richmond, that court, in pursuance of the decree of this court, made an order directing a jury to be summoned to try at its bar the issue—"Whether the said Elizabeth Magill was or was not influenced, in giving the bond for twenty-six hundred and thirty-six dollars, in the proceedings mentioned, to said Manson, by any misrepresentation of fact, fraudulent or otherwise, made by the said Manson, to the said Magill, or to John F. Allen."

At the June term, 1871, of the court, the marriage of Elizabeth Magill with William T. Powell was suggested, and on their motion it was ordered that the first of these causes do henceforth proceed in their names as plaintiffs, and the last in their names as defendants. It appears that these parties had made a deed before their marriage, by which all the property, real and personal, of Mrs. Magill, was conveyed to a trustee for her separate use, free from all claim of her intended husband, or liability for his debts or contracts; and she on her part relinquished all claim for dower and distribution in his estate.

At the same term of the court, the case being ready for trial, but before the jury were sworn, the counsel for

179 *Powell and wife moved the court to enter the following order in the cause: "It is ordered that, upon the trial of the issue in this case, all the testimony which was heard by the Court of Chancery may be used before the jury, with leave to either party to adduce such additional testimony as he may deem proper, subject to the control of the court."

But the court overruled this motion, and in lieu of said order entered the following:

"It is ordered that, upon the trial of the issue in these causes, the bills, answers, exhibits, and depositions of such witnesses as are dead or cannot attend, may be read in evidence before the jury, with leave to either party to introduce such other evidence as he may deem proper, subject to the control of the court."

To which opinion of the court, rejecting the one and entering the other order, Powell

and wife excepted. This is their first exception.

In the progress of the trial, and after all the evidence had been introduced, the plaintiffs, Powell and wife, moved the court to instruct the jury as follows:

"Instructs the jury that they are the exclusive judges of the weight of the evidence in this cause; that the plaintiffs, Powell and wife, hold the affirmative, and must prove it to the satisfaction of the jury, or they must find for the defendant; and that in considering the case, they will take the bills, answers, exhibits and testimony of witnesses into their consideration, and decide upon the whole, allowing to the answers, when responsive to the bills, and explicitly and positively denying the allegations of the bills, conclusive force, unless such answers be overthrown by the testimony of two witnesses, or one witness with corroborating circumstances, or by the admissions, evasions and contradictions, if any, which may be found in the answer of any of them."

But the court refused to give said instructions, and in lieu thereof gave the following:

180 *"The court instructs the jury that the plaintiffs, Powell and wife, hold the affirmative of the issue in this cause, and the said plaintiffs must prove to the satisfaction of the jury that the said Elizabeth Magill (now Powell) was influenced in giving the bond for twenty-six hundred and thirty-six dollars, in the proceedings mentioned, to the said defendant, Manson, by some misrepresentation of fact, fraudulent or otherwise, made by the said Manson to the said Magill, or to John F. Allen, or the jury must find for the defendant."

"And the jury are further instructed, that neither the original and amended and supplemental bills of the said Magill against Manson, nor the bill of the said Manson against Magill, are to be regarded as proofs of the allegations therein contained, except so far as they may contain allegations admitted to be true by the answer to such bill. And the answers of said Manson and said Magill, respectively, are not to be regarded as proofs of the allegations therein contained, unless the allegations in the answers, respectively, as to facts, be positive and responsive to some allegation or allegations of the bill in the case in which such answer is filed; and when the answer is thus responsive, it is to be regarded as proof in regard to such allegations; and to be responsive, such allegations of the answer must not be either evasive or contradictory."

"And in deciding the case, the jury will take into their consideration so much of said answers, respectively, as they shall find responsive as aforesaid, the exhibits and the testimony of witnesses which has been adduced before them, as proofs in the cause; and in weighing the testimony, they shall allow to the answers, respectively, where they are responsive as aforesaid, conclusive force as to the allegations to which they are responsive, unless over-

thrown by the testimony of two witnesses, or one witness and corroborating circumstances."

"And the jury are further instructed 181 that, subject to *the qualification in regard to the force and effect of a responsive answer as above indicated, they are the exclusive judges of the weight, effect and sufficiency of the evidence."

To the refusal of the court to give the said instruction asked for by the plaintiffs, and to the ruling of the court giving the instruction in lieu thereof, the plaintiffs excepted, and inserted in their exception all the oral testimony introduced. This is their second exception.

The plaintiffs then moved the court to modify the instruction given by adding the following:

"But so much of the answer of either party as makes in favor of the respondent may be disproved by its context, or by extrinsic evidence; and on the other hand, may be sustained by corroborative testimony." But the court refused to give the instruction, and the plaintiffs again excepted. This is their third exception.

The plaintiffs then moved the court to instruct the jury as follows: "The court instructs the jury, that in the trial of this cause, the jury, in estimating the weight of the allegations of the bills and answers, are not bound by the rule of chancery pleading, which prescribes that the allegations of an answer denying those of the bill must be taken as true unless contradicted by two witnesses, or one witness and corroborating circumstances." But the court refused to give the instruction; and the plaintiffs again excepted. This is their fourth exception.

The jury then rendered the following verdict: We of the jury find that Elizabeth Magill, the plaintiff, was not influenced by any misrepresentation of fact, fraudulent, or otherwise, made by the defendant Manson to the said Magill, or to John F. Allen, in executing the bond of twenty-six hundred and thirty-six dollars mentioned in the proceedings." And thereupon, the plaintiffs, Powell and wife, moved the court to set aside the verdict, and grant them a new trial, upon the ground that the verdict

182 *was contrary to the law and the evidence. But the court overruled the motion, and the plaintiffs again excepted. And the court certifies that the plaintiffs' second exception, which is made a part of this bill, contains all the evidence adduced upon the trial; the court declining to certify the facts because of conflict in the testimony. As this is a mere question of fact, it is deemed unnecessary to state the evidence.

The causes came on to be finally heard upon the papers formerly read and the verdict of the jury on the issue ordered in the first of said causes. On consideration whereof, the court approving said verdict, decreed that the plaintiff in the second of these causes, do recover of William T. Powell, and Elizabeth his wife, the plain-

tiffs in the first and defendants in the second of said causes, the sum of twenty-six hundred and thirty-six dollars, with legal interest thereon, at the rate of six per centum per annum, from the 13th of May 1862 until paid, and his costs in these causes in this court, subject to a credit of two hundred and eight dollars, the costs recovered by the said Elizabeth Powell in the said causes in the Court of Appeals. And it appearing that the debt of Sauer to Mrs. Powell was due, it was decreed that he, within sixty days, should deposit it, with its interest, in the State Bank of Virginia, to the credit of these causes; and when such deposit was made, Manson was authorized to check upon the fund for the sum, with its interest, decreed to him, and his costs, subject to the credit aforesaid. And when Sauer had filed in the papers a certificate of his deposit, Powell and wife were directed to deliver to him his bonds given for the debt.

And it appearing from the deed of marriage settlement, made before the marriage, between Powell and wife, that the balance of said fund was the separate estate of Mrs. Powell, it was decreed that said Elizabeth Powell, or James Lyons, her trustee and counsel, be authorized to check in her favor for said balance.

183 *From this decree Powell and wife applied to this court for an appeal; which was allowed.

The case was elaborately argued in printed notes by Keiley and Lyons, for the appellants, and Steger for the appellee.

For the appellants it was insisted: 1st, That the court erred in its first ruling, because it was the duty of the court to have ordered all the papers which had been read upon the hearing of the cause in the Chancery court, and in the Court of Appeals, to be read upon the trial before the jury. That when the Court of Chancery directs an issue, it will make such an order as will secure a fair trial, and prevent fraud and surprise, directing all proper admissions to be made by either party, and all papers which had been read on the hearing to be read on the trial; and if such an order does not form part of the original order directing the issue, it may be obtained afterwards on motion. And for this rule, and in illustration of it, the counsel referred to 2 Daniels Ch. Pr., 1235, 1296; Gordon v. Gordon, 1 Swanst. R. 166; McCall v. Graham, 1 Hen. & Mun. 13; Ford v. Gardner, 1 Id. 71; Apthorpe v. Comstock, 2 Paige Ch. R. 482; Doe ex dem. of Lloyd v. Evans, 3 Car. & Payne R. 219; Gresley's Eq. vi. 401 et seq.; 1 Beasley N. J. R. 108, 114; 3 Greenl. Evi. § 326, 328, 341, 343, 344; Ringault v. Ahi, 36 Penn. R. 336; Gresley's Eq. Evi. 528; Dunn v. Dunn, 11 Mich. R. 284; 2 Daniel's Ch. R. 1298, and cases cited in notes x, y, z, a, b; Mettert's administrator v. Hagan, 18 Gratt. 231; 1 Greenl. Evi. § 522; 2 Cowen & Hill's notes to Phillip's Evi., note 692, p. 946-70; 2 Daniel's Ch. Pr. 1069, note 1, 1070, 1073 note 1; 1 Id. 1302.

The counsel for the appellee replied, that whilst in directing an issue to satisfy his conscience, the chancellor had a discretion in directing what papers should be read to the jury, it was a legal discretion, and he could not put before the jury either 184 pleadings or evidence which *had no relevancy to the special question which the jury were to try. And in this case much the larger portion of the testimony in the cause related to matters with which the jury had nothing to do. That Mrs. Magill, Dr. Manson, and John F. Allen, were the only parties who could know anything pertinent to the subject of the issue; and there were obvious reasons why they should be examined *ore tenus*, if any party desired it; and they were certainly within reach of the court. The counsel referred to *Gresley Eq. Evi.* § 3, p. 523 to 527, 2d ed.; *Brockenbrough's ex'ors v. Spindle*, 17 Gratt. 21, 27, 28, opinion of Moncure, President; *Ringualt v. Ahl*, 36 Penn. R. 336; *Marston v. Brackett*, 9 New Hamp. R. 336; *Burwell v. Corbin*, 1 Rand. 131, 154; *Gordon v. Gordon*, 1 Swanst. R. 166; *Apthorpe v. Comstock*, 2 Paige, Ch. R. 482; *Grigsby v. Weaver*, 5 Leigh 197; *Butts v. Blunt*, 1 Rand. 255; *Douglas v. McChesney*, 2 Id. 109; *Palmer v. Lord Aylesbury*, 15 Ves. R. 176; 2 Daniel's Ch. Pr., 4 ed., 1117 et seq.; *Black v. Lamb*, 1 Beasley's N. J. R. 108, 114; 3 Greenl. Ev. S. 337, 339; 3 Phillip's Evi. (Cowen & Hills' notes) p. 934, note 656, 1101-2; 1 Phillip's Evi. p. 363.

2d, The counsel for the appellants insisted, that the court erred in refusing to give the first instruction asked for by the plaintiffs, and erred still more in the instruction that was given. That by refusing to give the instruction, the court affirmed that the answers of the defendant could not be overthrown by admissions, evasions and contradictions to be found in them; which was subversive of the law of evidence, as the best mode of destroying the testimony of a witness, or the answer of a defendant, is to array his statements against each other. And by the instruction given, if Manson in one part of his answer has made admissions or denials which were responsive to the bill, and in another part of the same answer, he has made assertions directly in conflict with the previous statements, 185 the jury must believe the first *and disregard the last. They insisted that the instruction ignores the most important office of a bill as proof; that is as an admission. The facts alleged in a bill in favor of a defendant are admissions, and need not be proved aliunde; and this, whether true or not. 1 Daniel Ch. Pr. 838; *Ives v. Medcalfe*, 1 Atk. R. 63; *Robbins v. Ruter*, 24 Illin. R. 387. And so an answer is a confession, and is *semper et ubique* evidence against the respondent. 1 Phillip's Evi. 359, 220, 69, and cases cited; *Hunter v. Jones*, 6 Rand. 541; *Bartlett v. Gale*, 4 Paige Ch. R. 503; *Adams v. Shelby*, 10 Alb. R. 478; 1 Daniel Ch. Pr. 839. And they denied that an answer responsive to the bill could only be overthrown by two

witnesses or one witness and corroborating circumstances. They referred to *Lyons v. Miller*, 6 Gratt. 427; *Fant v. Miller & Mayhew*, 17 Gratt. 187, 211; *East India Company v. Donald*, 9 Ves. R. 275; *Clark's ex'ors v. Van Riemdsick*, 9 Cranch R. 158; *Bowerman v. Sybourn*, 7 T. R. 2; *Gresley's Eq. Evi.*, part 3, ch. 1, pp. 322, 323.

The counsel for the appellees replied, that the instruction asked by the plaintiffs, in the form in which it was presented, was not law, and was calculated to mislead the jury. It asks that the bills shall be regarded as evidence. For this there is no warrant in law, except that an admission in the bill, like any other admission, is evidence against the plaintiff. *Gresley Eq. Evi.* 426. But there is no pretence that the bills in this case contained any such admission, or that they were offered for that purpose.

Again, the instruction asks the court to say broadly to the jury, that the answer may be overthrown by the admissions, evasions and contradictions which may be found in it. The admissions in an answer are always evidence against the defendant, and may destroy the force of its denials. But that must depend upon the character of the admission, and its pertinency to 186 the *issue involved. Whether the admission would or would not affect the force of the answer as evidence depends, therefore, upon the particular facts of each case, and no general rule can be laid down on the subject. It would have been wrong, therefore, for the court to have instructed the jury in this case, as asked by the plaintiffs, as it would have left the jury to infer that any admission in the answer might overthrow its weight as evidence for the defendant, and thus mislead them. But in fact, the instruction given by the court that the positive allegations in the answers responsive to the allegations of the bills, are to be regarded as proof of such allegations, &c., responds completely to the objection. The court does not say that the answer is evidence only for the defendant.

And so evasions and contradictions do not always have the effect to destroy the force of an answer as evidence. Nor has it ever been held as destroying the force and weight of other parts of the answer directly responsive to the bill.

He insisted further, that the instructions given by the court go fully as far as the plaintiff had a right to ask. After announcing the well settled rule as to an answer responsive to the bill, it adds, to be responsive such allegations must not be either evasive or contradictory. This meets every requirement of the instruction asked for by the plaintiffs, and in terms not objectionable, and not calculated to mislead the jury.

3d, The counsel for the plaintiffs insisted that the addition to the first instruction given by the court, should have been made, it being in the very language employed by the judge who delivered the opinion in the case of *Lyons v. Miller*, 6 Gratt. 427, 439.

The counsel for the appellee insisted that the instruction was vague and indefinite, and calculated to mislead the jury; and in fact it means precisely what the court had told the jury in plain and unambiguous terms.

4th, The counsel for the appellants 187 insisted that the *court erred in refusing to instruct the jury, as asked by the plaintiffs, that in estimating the weight of the bills and the answers, they are not bound by the rule of chancery practice, which requires an answer to be taken as true, unless contradicted by two witnesses, or one witness and corroborating circumstances. They referred to the language of the court in *Lyons v. Miller*, 6 Gratt. 427, 439; and to *Fant v. Miller & Mayhew*, 17 Gratt. 187, 211.

The counsel for the appellee replied, that in *Lyons v. Miller*, the court recognized the rule; and the appellants admitted it in the first instruction asked by them. And he insisted that it was of necessity that, on the trial of an issue to satisfy the conscience of the chancellor, the rules of evidence must be the same as that which governs the chancellor when he is considering whether the verdict of the jury does satisfy his conscience. If there is but one witness to disprove an answer, it is error in the court to direct an issue? Then, if a verdict is rendered on the testimony of that one witness, without corroborating circumstances, could the chancellor decree upon the verdict, when it is error to direct the issue? He referred to *Dodge v. Griswold*, 12 New Hamp. R. 573; *Kincheloe v. Kincheloe*, 11 Leigh 393; *Thornton v. Gordon*, 2 Rob. R. 719; *Lancaster's adm'rs v. Ward*, 1 Overton's R. 430; *Wise v. Lamb*, 9 Gratt. 294; *Smith v. Betty & als.*, 11 Id. 752.

5th, The counsel for the appellants insisted that the court erred in overruling the motion for a new trial, on the ground that the verdict was contrary to the law and the evidence. The errors in law relied on are those already considered. The other ground is a question of fact, and the argument need not be reported.

6th, They insisted that it was error to decree personally against the husband, Wm. T. Powell. That the debt, if a debt at all, was the debt of Mrs. Magill, a feme sole, and by deed of marriage settlement, 188 made *before the marriage, all her property was vested in a trustee for her, as her separate estate, to be used and controlled by her as if she was a feme sole; and she had relinquished all right to dower and distribution in the estate of her husband, the said Powell; and the object of the suit of Manson was to enforce the lien on her property, which had been acquired by the attachment. And although Powell was made a party to the suit for conformity, he was not thereby in anywise made liable for the debt which was due by his wife before the marriage. Or if he could be made liable at all, it could only be after the wife's separate estate was exhausted.

The counsel for the appellee replied, that a husband cannot relieve himself from responsibility for his wife's debts, imposed upon him by law, by showing that there is a private arrangement between himself and his wife, whereby the property of the wife is settled upon her, and she renounces all claim to dower and distribution in his estate. The law imposed the responsibility upon the husband to pay his wife's debts contracted *dum sola*, whether she did or did not bring him any property, and he cannot relieve himself from this legal responsibility by any arrangement between them; nor does he attempt to do so by the marriage contract in this case.

STAPLES, J. An issue out of chancery is directed, in doubtful matters of fact, to satisfy the conscience of the court. It is not adopted as a substitute for omitted evidence, but in cases of doubt and difficulty produced by a conflict of testimony. In such cases, the chancellor considers the purposes of justice will be better attained by an investigation before a jury, where the witnesses may be seen by the triers of the fact, their capacity, deportment, accuracy and sources of information, subjected to the tests of a public cross-examination, and the whole merits of the controversy more satisfactorily investigated, than by an examination on paper in the 189 *country. It is, therefore, the rule in most of the American courts, and also in the English courts, not to admit depositions taken in a Chancery court to be read to the jury, unless proof be given that the witnesses are dead, or abroad, or otherwise unable to attend the trial. This rule has received the sanction of the judges of this court in several cases, and is believed to be the settled practice in Virginia. I think, therefore, the court below committed no error in entering the order set out in plaintiff's first bill of exceptions. *Burwell v. Corbin*, 1 Rand. 153; *Douglas v. McChesney*, 2 Rand. 109; *Grigsby v. Weaver*, 5 Leigh, 197; *Cartright v. Godfrey*, 1 Murphy, R. 422; 2 Daniel Ch. Prac. 741, mar. page.

The second assignment of error is to the refusal of the court to give the instruction set out in plaintiff's second bill of exceptions. This instruction is objectionable in several respects. It is, however, only necessary to notice that part of it which asserts that "an answer positively denying the allegations of the bill may be overthrown by the admissions, evasions and contradictions, if any, which may be found therein." It is sufficient to say that this proposition is in conflict with the rule announced in *Fant v. Miller & Mayhew*, 17 Gratt. 187. In that case, the court says, "a plaintiff cannot destroy the weight of the whole answer by proving that the defendant is unworthy of credit; nor can he do so by proving, directly or indirectly, that the answer is false in one respect, or in several respects. The only effect of such proof being to destroy the weight of the answer to the extent to which it is disproved by

of 1849 was amended, so as to add these words at the commencement of section 11 of chapter 151 aforesaid, to wit: "A claim to any debt, or to damages for breach of any contract, against a person who is not a resident of this State, but who has estate or debts due him within the same, may, if such claim exceed \$20, exclusive of interest, be maintained in any court of equity for a county or corporation in which there may be any such estate, or a defendant owing any debt to such non-resident." The effect of this amendment was to give to a creditor, having a legal claim against a debtor residing out of the State, and owning estate or effects therein, the same right to bring a foreign attachment suit in equity as he would have had before the Code of 1849, the only difference being that since the amendment he has had an election to sue at law or in equity in such a case, whereas, before the Code of 1849, he could sue in equity only. But no change was made in section 11 as to the affidavit to be given in a foreign attachment suit in equity for a legal demand. In such a suit, brought under that section, amended as aforesaid, it is necessary to aver in the

216 bill *that the debtor resides out of the State, and has estate or effects therein, as it would have been necessary to make such an averment before the Code of 1849, otherwise the bill would be demurrable. The grounds for equitable relief in such a case are threefold. 1st, that a debt is due to the plaintiff; 2ndly, that the debtor is a non-resident of the State; and 3dly, that he has an estate or effects within the State. These three grounds make up a good case in equity, and if proved, the plaintiff will be entitled to a decree on the hearing for the amount of the debt, and for the application of the said estate and effects, as far as may be necessary, to the payment thereof. To be sure, there can be no decree against an absent defendant without an answer, appearance or publication. And there can be no publication without an affidavit of non-residence. Such an affidavit is, therefore, necessary where there is no answer nor appearance of the non-resident debtor. But if the case be regularly matured for hearing, and be fully proved, the plaintiff is entitled to a decree accordingly, except against parties or persons who may be injured by his non-compliance with some preliminary acquisition of the statute. He is certainly entitled to such a decree against the debtor himself, and all who stand in his shoes.

But even if any other affidavit than that of non-residence of the debtor were necessary in this case, it is well settled that the affidavit, required by the statute to authorize a court to sue out an attachment against the estate or effects of an absent debtor, may be made, either before or after the bill is filed. *O'Brien, &c. v. Stephens*, 11 Gratt. 610. See also *Moore v. Holt*, 10 Id. 284. Indeed, it is expressly declared by the statute, in the very section which gives the remedy in this case, to wit: section 11 aforesaid, that "such affidavit may be, at the time of, or after, the institution of the suit." The decree appealed

from is interlocutory. What is there to prevent the affidavit from being now made,

217 if any other *affidavit be necessary than that which has already been made?

As to the omission of an endorsement on the subpoena, describing the real estate intended to be attached. The 7th section of chapter 151, of the Code of 1860, p. 647, provides, that "every such attachment, (except where it is sued out specially against specified property,) may be levied upon any estate, real and personal, of the defendant, or so much thereof as is sufficient to pay the amount for which it issues. It shall be sufficiently levied in every case by a service of a copy of such attachment, on such persons as may be designated by the plaintiff in writing, or be known to the officer to be in possession of effects of, or to be indebted to, the defendant; and as to real estate, by such estate being mentioned and described by endorsement on such attachment." And the 12th section, Id. p. 648, provides, that "the plaintiff shall have a lien from the time of the levying of such attachment, or serving a copy thereof, as aforesaid, upon the personal property, choses in action, and other securities of the defendant against whom the claim is, in the hands of or due from any such garnishee on whom it is so served, and on any real estate mentioned in an endorsement on the attachment or subpoena, from the suing out of the same."

These provisions were intended to apply, mainly if not entirely, to the ordinary case of an attachment which is ancillary to an action at law for a legal demand, or to a suit in equity for an equitable demand, in which nothing is said in the pleadings about any attachment of any property. In order to constitute an attachment lien upon any property there must be a claim in some form to subject the property to the payment of the debt demanded in the action or suit. If there be no such claim in the pleadings in the action or suit itself, then an attachment must be issued, which may be levied upon any estate, real or personal, of the defendant, or so much thereof as is sufficient to pay

218 the amount for which it *issues: and the plaintiff shall have a lien from the time of the levying of such attachment as aforesaid. In the case of a foreign attachment in equity, the endorsement describing any real estate intended to be attached, may be made either on an attachment, or on a subpoena issued in the case. But where, as in this case, a suit in the nature of a foreign attachment in chancery is brought to enforce a legal demand, and the bill positively avers that the debtor is a non-resident of the State, and has real estate within it, and in the jurisdiction of the court, fully sets out the demand, particularly describes the estate sought to be subjected to the payment of the debt, and contains all other necessary and proper allegations, there is no necessity and no occasion for any endorsement on the subpoena, or any process of attachment in the case, to give to the plaintiff a lien upon the estate for the payment of the debt; but,

upon sustaining the allegations of his bill by proof, and otherwise maturing his cause for final hearing, he will be entitled to a decree to subject the estate to the payment of the debt according to the prayer of the bill. Why should an endorsement on a subpoena, or on process of attachment, be necessary in such a case? What better notice could it give than would be given by the bill itself? Would not the bill give much fuller and more specific notice generally than would be given by such an endorsement? The bill is what would naturally be looked to by inquiries for information as to the object of the suit, rather than the process or any endorsement upon it. Suppose the land were vacant, and there were no home defendants to be served with process: there would seem to be no occasion for any process in such a case, except an order of publication against the non-resident debtor and owner of the land. Suppose an attachment, or a subpoena, were issued in such a case, and such an endorsement as is mentioned in the statute were made thereon, what good purpose could possibly be answered thereby which would not be better answered by the bill?

The process and endorsement would be shown to nobody, but be returned and filed among the papers of the suit. If, however, an endorsement were necessary in such a case, is not the order of publication equivalent to such an endorsement? The order of publication, generally, gives as full information of the object of the suit as an endorsement on the process would, and is in itself in the nature of process. Where the non-resident debtor is the only defendant in the case, the order of publication would seem to be the only necessary process. Suppose the non-resident defendant and the home defendant had all filed their answers in this case, on condition that the attachment should not thereby be discharged, and had admitted the truth of all the allegations of the bill, would any endorsement then have been necessary? Would not the plaintiff have been entitled to a decree according to the prayer of his bill? Suppose, instead of filing their answers and admitting the allegations of the bill, the defendants had suffered the bill to be taken for confessed, as was the case here, would any endorsement then have been necessary, and would not the plaintiff have been entitled to such a decree? I suppose there can be no doubt but that he would have been so entitled in either of the cases above supposed, if no other persons were interested in the subject than the original parties to the suit. But suppose that, after the answers admitting the allegations of the bill are filed, or after it is taken for confessed, the non-resident debtor becomes a bankrupt before any decree is made for the sale of the land charged by the bill with liability for the debt, will the assignee in bankruptcy stand on any higher ground than the debtor himself? Will he not stand in the shoes of the bankrupt in regard to the suit? And will not the plaintiff be entitled to precisely the same decree against him that he would have been entitled to against the

debtor himself, if he had not become a bankrupt? Upon these questions *there can, I presume, be no doubt or difficulty. When the bill was filed there was a lis pendens to subject the real estate to the payment of the debt, as claimed in the bill. All rights acquired from or under the defendant, to the subject in controversy, pending the suit, are subject to any decree which may be made in the suit, except so far as a purchaser without actual notice is protected by the Code, chapter 186, section 5. In all other respects the maxim, *Pendente lite nihil innovetur*, applies.

In this case, the plaintiff, in his bill, fully and plainly stated a case which, if true, entitled him to a decree for the sale of the land in question for the payment of the debt due to him by his non-resident debtor. This bill was filed on the 20th day of February 1867, before the bankrupt law was passed, and more than a year before the non-resident debtor filed his petition in bankruptcy. There was an order of publication entered in the case on the 6th day of May 1867, against the non-resident defendants, including the debtor, Frank A. Sanders, upon an affidavit made in due form, which order was duly posted and published, the publication ending on the 31st day of May 1867, nearly ten months before the petition in bankruptcy was filed. The said order stated, that "the object of this suit is, to subject the interest of Frank A. Sanders in the land now in the possession of James B. Sanders and John L. Sanders, known as the River tract of their father's estate, and seventy-four acres of the Sulphur Spring's tract, to satisfy a debt of \$12,271.49, ascertained by decree of the District court of chancery for the northern district of Alabama, and filed in the cause aforesaid in said Circuit court of Smyth county." The bill was even more full and specific, indeed much more so, than the said order, in the description of the land and the debt. The subpoena was returned executed on John L. Sanders, the only defendant who resided in the State, and who was charged in the bill to be in possession of the land, on the 22d day of February *1867, just two days after the filing of the bill. No answer was filed by any of the original defendants.

Such was and continued to be the state of the case until and on the 2d day of March 1868, when the non-resident debtor, Frank A. Sanders, filed his petition in bankruptcy; and until and on the 28th day of March 1868, when he was adjudicated a bankrupt; and until and on the 3d day of June 1868, when all the estate of the bankrupt was conveyed to the appellant, William Y. Cirode, as assignee in bankruptcy. On the 26th day of August 1868, the cause came on to be heard, upon the bill taken for confessed as to all the defendants, and upon the exhibits, when the court, considering that the interest of the said Frank A. Sanders in the real estate in the bill mentioned, was liable and ought to be subjected to sale for the satisfaction of the debt due to the plaintiff and in the bill mentioned, therefore decreed that John P.

Sheffey, who was appointed a commissioner for the purpose, should sell the said real estate, or so much as might be necessary, in the manner and on the terms in said decree mentioned, and report his proceedings to the court. Before any sale was made under the said decree, it seems that the said assignee in bankruptcy asserted a claim to the said real estate, and on the 18th day of November 1868, an agreement in writing was entered into between the said assignee and the plaintiff in the suit, whereby it was agreed, that the said sale should not be further delayed or suspended, but should be made by the commissioner appointed by the said decree; that the proceeds thereof should be paid into court, to await the determination and final decree of the said court; that the said assignee should become, by virtue of the filing of the said agreement, a party to the said suit, without process; and that, upon the final hearing, the question of the validity of the lien claimed by said plaintiff by attachment, as against the claims of said assignee on behalf of the general creditors of said bankrupt, within the provisions of the bankrupt act, should be argued before, and decided by said Smyth Circuit court, &c. This agreement was filed as an exhibit in the case on the 10th of December 1868, after which, the commissioner, J. P. Sheffey, sold the real estate aforesaid, and reported his proceedings to the court, and on the 31st day of March 1869, his report was confirmed. Shortly after this, the said assignee filed his answer in the case, denying all knowledge of the facts alleged in the bill, and requiring strict proof of them; claiming the proceeds of the sale of the said land, by virtue of the proceedings in bankruptcy aforesaid; and insisting that the plaintiff acquired no lien on the said land before the said petition in bankruptcy was filed, or even before the conveyance of the bankrupt's estate to the assignee, on the 3d day of June 1868, as aforesaid. A copy of the conveyance, which was recorded in the clerk's office of Smyth County court, was filed as an exhibit with the answer. To the said answer the plaintiff replied generally. And the plaintiff also, it seems, filed as an exhibit in the cause, a copy of the record of the suit in Alabama, in which a decree was rendered on the 4th day of December 1866, for the amount of the debt claimed by him, from which copy it appears that the execution issued upon said decree was returned "no property found, June 1, 1867."

On the 19th day of November 1869, the cause came on to be heard on the papers formerly read, the answer of the said assignee in bankruptcy, and replication thereto, and exhibits filed, and the written agreement aforesaid; on consideration whereof, the court was of opinion, that the plaintiff was entitled, as against the said assignee, to the proceeds of the sale of the land of the said Frank A. Sanders, sold by commissioner Sheffey as aforesaid, and decreed accordingly. From that decree the said assignee applied for and obtained the appeal we are now considering. I am of opinion, that from the time

223 of the institution *of this suit, or at least from the time of the filing of the bill, the plaintiff had a lien upon the real estate of his debtor, Frank A. Sanders, therein mentioned, for the payment of the debt therein claimed; that the said debtor having become a bankrupt long after the institution, and during the pendency of the said suit, his assignee in bankruptcy can stand on no higher ground in regard to the said suit and the claim asserted therein than the bankrupt himself, but stands in his shoes, and is entitled only to his rights; and that there is no error in the decree appealed from, either as to the said bankrupt himself, or as to his said assignee.

I am therefore of opinion that the said decree ought to be affirmed.

The other judges concurred in the opinion of Moncure, P.

Decree affirmed.

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*Elys v. Wynne & als.

June Term, 1872, Wytheville.

Absent. ANDERSON and BOULDIN, Js.*

Wills—Devises.—In 1833 W made his will, and died. By clause 6 he gives to his daughter, D, a designated tract of land, to her and the heirs of her body; but should D "die without heir, as above mentioned, my wish is that said land shall return to my other heirs, and be sold, and the moneys arising from the sale to be equally divided among all my heirs." D sells the land, and conveys it with general warranty; and then dies, without ever having had a child. **Held:**

1. **Same—Same—Construction.**—D took under the statute a fee simple estate in the land defeasible upon her dying without a child living at her death.
2. **Same—Same—Limitations over.***—The limitation over to testator's other heirs is valid, and took effect upon the death of D without a child living at her death.
3. **Same—Same—Same.**—Though the deed of D purported to convey the fee, it only conveyed, and did convey, her interest in the land, and the purchaser could not hold an adversary possession thereof before the death of D without leaving a child.
4. **Same—Same—Same—Ejectment.**—Upon the death of D without leaving a child, the title vested in the heirs of W. and not in his executor; and they are the proper parties to maintain ejectment for the land.
5. **Same—Same—Same—Same—Judgment.**—The action is against two holding different parts of the land, the judgment may be separate against each for the land in his possession, and joint for the costs.

This was a supersedeas to a judgment rendered on the 3d day of June 1870, in the Circuit court of Lee county, in a cause depending

*The case was heard before JUDGE BOULDIN's appointment.

***Devises—Limitations over.**—The principal case is cited in the following decisions: *Randolph v. Wright* 81 Va. 608; *Whitelaw's Ex'or v. Sims*, 90 Va. 588, 19 S. E. Rep. 118.

in that court, in which Achles Wynne and others, children and grandchildren of Elkanah Wynne, deceased, were plaintiffs, and Thomas Ely and Andrew M. Ely were defendants. The case is stated in the opinion of the court.

225 *Lane and Caldwell, for the appellants.

J. W. Johnston, for the appellees.

MONCURE, P. delivered the opinion of the court.

This was an action of ejectment, brought by the heirs at law of Elkanah Wynne, in the Circuit court of Lee county, against Thomas Ely and Andrew M. Ely, for the recovery of a tract of land in said county, to which the plaintiffs claimed to be entitled in fee simple. Issue was joined on the plea of not guilty; and the parties, by their counsel, by consent entered of record, waived the right to have a jury, and agreed that the whole matter of law and fact might be heard and determined, and judgment given by the court. Whereupon the court, having maturely considered the matters of law and fact in the case, rendered judgment in favor of the plaintiffs against the defendant, Thomas Ely, for a part of the premises in the declaration mentioned, said part being described in the judgment by metes and bounds; and against the defendant A. M. Ely, for the residue of the premises in the declaration mentioned; and against both defendants for costs of suit. To the said judgment, the defendants excepted; and all the facts admitted or proved on the trial were set out in a bill of exceptions, which was made a part of the record. And the defendants applied to a judge of this court for a supersedeas to the said judgment; which was accordingly awarded.

Both the plaintiffs and defendants in this case claim title to the land in controversy, under Elkanah Wynne, the plaintiffs as his heirs at law, and the defendants under Sarah Dougherty, a devisee of the said Elkanah Wynne. The question of title depends upon the true construction of the 6th clause of the will of said Elkanah Wynne, which will bears date on the 17th of August 1833, and was admitted to probate on the 18th of November 1833. That clause is in these words;

“6thly. I give and bequeath to my daughter, Sarah *Wynne, now Sarah Dougherty, the tract of land purchased of George R. Ely, and joining Alexander Ely and Charles Hamblen, to her and the heirs of (her) body; but should the said Sarah Dougherty die without heir, as above mentioned, my wish is that the said land shall return to my other heirs, and be sold, and the moneys arising from such sale to be equally divided among all my heirs.”

The land devised by that clause is the land in controversy. Josiah B. Dougherty and the said Sarah his wife, held it in her right, under the said clause, from the death of the testator until the 17th of November 1836, when they conveyed it in fee simple, with covenant of general warranty, to James A. G. Ely, who, and those claiming

under him, have been in possession ever since, and under whom the defendants in this action claim title, and were in possession claiming title at the time of the institution of this suit. Sarah Dougherty died two or three years before the institution of the suit, without ever having had a child. The question is, whether the contingent limitation to the other heirs of the testator, contained in the said 6th clause of his will, took effect at the death of his said daughter. If it did, the plaintiffs are entitled to the land in controversy. If it did not, they are not.

There can be no doubt but that, if the testator had died prior to the passage of the act passed February 24th, 1819, 1 R. C. p. 361, ch. 99, the said limitation over would have been a limitation to take effect on an indefinite failure of issue, and would have been ineffectual.

But the testator having died since the passage of that act, to wit: in 1833, the case is governed by sections twenty-five and twenty-six of that act, Id. p. 369, which were then introduced for the first time into our Code, and are in these words:

“25. Every estate in lands which shall be limited by any deed hereafter made, or by the will of any person who shall hereafter die, so that, as the law was on the

227 *seventh day of October, in the year of our Lord, one thousand seven hundred and seventy-six, such estate would have been an estate tail, shall be deemed to be an estate in fee simple, in the same manner as if it had been limited by those technical words which, at the common law, are appropriate to create an estate in fee simple; and every limitation upon such an estate shall be held valid, if the same would be valid when limited upon an estate in fee simple, created by technical language aforesaid.

“26. Every contingent limitation in any such deed or will, made to depend upon the dying of any person without heirs, or heirs of the body, or without issue, or issue of the body, or without children or offspring, or descendant or other relative, shall be held and interpreted a limitation, to take effect when such person shall die, not having such heir or issue, or child or offspring, or descendant or other relative, as the case may be, living at the time of his death, or born to him within ten months thereafter, unless the intention of such limitation be otherwise expressly and plainly declared on the face of the deed or will creating it.”

Now, as the estate given to Sarah Dougherty by the sixth clause of the said will would have been an estate tail, as the law on the 7th day of October 1776, therefore by the force and effect of the said twenty-fifth section, such estate is “deemed to be an estate in fee simple, in the same manner as if it had been limited by those technical words which at the common law are appropriate to create an estate in fee simple,” and the limitation upon such estate to the other heirs of the testator, contained in the latter part of the said clause, is to be held

valid "if the same would be valid when limited upon an estate in fee simple, created by technical language as aforesaid."

The said limitation would be valid when limited upon an estate in fee simple
228 as aforesaid, provided the said *limitation, according to the law of the land, and the true intent and meaning of the testator, was to take effect at the death of the said Sarah Dougherty.

Now, as the limitation aforesaid is, by the said sixth clause of the will, made to depend upon the dying of the said Sarah Dougherty without heir of her body, therefore, by the force and effect of the said twenty-sixth section, such limitation is to "be held and interpreted a limitation, to take effect when such person shall die not having such heir" living at the time of her death, or born to her within ten months thereafter, "unless the intention of such limitation be otherwise expressly and plainly declared on the face of the" will creating it. Certainly no such express and plain intention is declared on the face of the will in this case, but the contrary intention rather appears.

We are therefore of opinion that the plaintiffs, the heirs at law of the said testator, became entitled to the tract of land in controversy upon the death of the said Sarah Dougherty.

We have not deemed it necessary to review the many cases referred to in the argument of the learned counsel of the plaintiffs in error in reference to the question we have just been considering, because we thought that while they might, and no doubt would, have been conclusive against the title of the said heirs at law of the testator, if he had died before the passage of the said act of 1819; yet, as he died thereafter, they, the said heirs, are under the operation of the twenty-fifth and twenty-sixth sections of that act, plainly entitled to the land in controversy.

The next question we will consider is the second assignment of error in the petition of appeal, that the action of the heirs at law is barred by the adversary possession of the defendants in said action, and those under whom they claim. That adversary possession commenced, as it is con-
229 tended, from the time of the *execution of the deed from Dougherty and wife to James A. G. Ely, dated the 17th day of November 1836, and has continued ever since in the said grantee and those claiming under him, including the defendants in the said action.

The deed aforesaid certainly conveys the land in absolute fee simple to the said grantee, with covenant of general warranty. At the time of the conveyance, the grantors, in right of the wife, were seized of an estate in fee, defeasible by the death of the wife without issue living at her death. Had she left issue living at her death, the estate in fee would thenceforward have been indefeasible. Probably, when the deed was executed, it was expected that she would leave issue living at her death. At all

events, the deed, however absolute and un- conditional on its face, could have no greater effect than to invest the grantee with the title of the grantors, and it invested him with that title, even though it may have professed to convey more. The effect of the conveyance, as to the parties claiming under the contingent limitation over, is precisely the same as if the conveyance had been expressly subject to such limitation. Until the death of Sarah Dougherty, without issue living at her death, the heirs at law of the testator had no right of action for the land. Their right of action then and thereby accrued, and the act of limitation could begin to operate against them only from that time. Sarah Dougherty and her assigns held the land in privity with the title of those claiming under the contingent limitation over, and could not hold adversely against it during her life. This view is fully sustained by the decision of this court in Clarkson, &c., v. Booth, 17 Gratt. p. 490.

We are, therefore, of opinion that the action is not barred by adversary possession, or the act of limitations.

The third assignment of error is, that if the heirs at law of the testator have any interest under the contingent limitation contained in the said 6th clause of the
230 *will, it is not such an interest as entitles them to maintain an action of ejectment for the land, but the right to maintain such action is vested only in the executor of the will.

The land is not by the will devised to the executors to be sold for the benefit of the heirs at law of the testator, in the event contemplated, but the will declares that in that event, "my wish is, that the said land shall return to my other heirs, and be sold, and the moneys arising from such sale to be equally divided among all my heirs." To be sure, the Code, chapter 131, section 1, p. 598, provides that "real estate devised to be sold shall, if no person other than the executor be appointed for the purpose, be sold and conveyed" "by the executors who qualify, or the survivor of them." But this statute does not operate as a conveyance of the estate, or any interest therein, to the executors, but merely to give them power to make any sale of real estate which the will directs to be sold, without empowering any particular person to make the sale. The object of the statute was to prevent the necessity of resorting to a court of equity for the appointment of a trustee, by devolving the execution of the power upon the executors, who are supposed to be fit and proper persons for the execution of it. The nice distinctions taken by the authorities between a power coupled with an interest or a trust, and a naked power, in regard to devises of land for sale by an executor, which distinctions are referred to in 4 Kent's Com. p. 320, marg.; 1 Lomax on Executors, p. 218, marg.; and Mosby's adm'r, &c., v. Mosby's adm'r, 9 Gratt. p. 590, seem not to be applicable to this case, in which there was no devise either to the executors to sell,

or that a sale should be made by the executors, but merely an expression of a wish that the land should be sold, without saying by whom. If it could be said that those distinctions apply to this case, the executor under the statute would seem to have a naked power of sale, rather than a power coupled with an interest; and

231 "if it is a power coupled with a trust, the operation of the power and the trust did not commence before the making of the sale, so as to prevent the heirs before that time from maintaining an action for the land, recovering and retaining possession thereof, and receiving and enjoying the rents and profits until it should be sold. The testator says that in the event contemplated, "my wish is, that the said land shall return to my other heirs." Now here is an express devise to his other heirs, who thereby became invested, on the happening of the said event, with the title and right of possession of the land. To be sure, the will further proceeds in these words: "and be sold, and the moneys arising from such sale to be equally divided among all my heirs." But that was surely not intended, and cannot have the effect, to impair the right of the heirs, under the express devise to them, to take and hold the land to their own use until a sale should be made. The power was to sell, not to hold or rent out the land in trust for the heirs. But that power—if power it could be called without a donee—was intended for the exclusive benefit of the heirs, who might have waived it, and elected to hold the land as real estate, instead of regarding it as converted, and holding it as personalty. More than three years after they became entitled to the land they brought an action of ejectment to recover possession of it. It does not appear that a sale of it has ever been attempted, or been in contemplation. It does not appear that there is now, or was at the death of Sarah Dougherty, any personal representative of her father in existence. His will was recorded in 1833, nearly forty years ago. Can it be said, under these circumstances, that when this action was brought, his heirs had not "a subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof," within the true intent and meaning of the Code, chapter 135, section 4, page 610? We think not.

232 "We are, therefore, of opinion that the said heirs have a right to maintain this action.

The fourth and last assignment of error is, that the verdict and judgment are void for uncertainty and variance.

We think there is no just foundation for this assignment of error; that there is sufficient certainty in the verdict and judgment; and that there is no material variance between them. It is not material that an order of survey was made in the case, and not executed. It sufficiently appears, from the facts admitted or proved on the trial, and certified in the record, and from inferences properly deducible therefrom,

that the land recovered by the verdict and judgment is identical with the land demanded in the declaration, and that both parties claimed under the will of Elkanah Wynne. That all proper inferences which might be drawn by a jury may be drawn by the court from the facts proved or stated in such a case, was decided by this court in *Dearing's adm'x v. Rucker*, 18 Gratt. 426.

Upon the whole, we are of opinion that there is no error in the judgment, and that it be affirmed.

Judgment affirmed.

233 *White v. Mech. Building Fund Association.*

June Term, 1872, Wytheville.

Absent, BOULDIN, J.†

1. **Building and Loan Associations—Distribution of Funds—Rights of Shareholder.**—W, a shareholder in a Building Fund Association, having obtained an advance of money on his shares, the association thereby acquired the right of property therein; and the assignment of the shares to the association for the advance he received was not a hypothecation for a loan, but an absolute surrender of them to the association, whereby they were sunk and extinguished, and cannot entitle the said W to participate in the final division and distribution of the funds of the association.

2. **Same—Same—When Requisite.**—Such final division and distribution is required to be made when the accumulated fund is sufficient to pay to each of the unredeemed shares the par value of the shares, after the payment of all debts and liabilities of the association.

3. **Same—Assignment of Shares—Liabilities of Assignee—Interest—Usury.**—The assignment of his shares by W to the association, does not release him from his covenant, as a party to the articles of association, to make his regular monthly payments on shares, and on account of fines; and the enforcement of his said obligations is secured by his bond and deed of trust, by which also he obligates himself to pay six per cent. interest on the sum received, as authorized by section eight of the statute, until the termination of the association; and the transaction between the parties is not usurious, nor within the prohibition of the said eighth section.

4. **Same—Same—Sale of Shares by Assignee—Ascertaining Indebtedness.**—For any default in the pay-

*For monographic note on Building and Loan Associations, see end of case.

†The case had been argued before his election.

‡**Building and Loan Associations.**—Upon this subject, see *Crabtree v. Building Association*, 95 Va. 675, 20 S. E. Rep. 741; *Muller v. Stone*, 84 Va. 837, 6 S. E. Rep. 228; *Fox v. Cottage B. F. Association*, 81 Va. 665; *Cason v. Seldner*, 77 Va. 297; *Davies v. Creighton*, 33 Gratt. 703; *Edelin v. Pascoe*, 22 Gratt. 830; *Winchester Building Association v. Gilbert*, 23 Gratt. 793; *Pfelster v. Wheeling Building Ass'n*, 19 W. Va. 703; *Parker v. U. S. Building, etc., Ass'n*, 19 W. Va. 744.

§**Interest—Usury.**—See monographic note on "Interest" appended to *Fred v. Dixon*, 27 Gratt. 541, and monographic note on "Usury" appended to *Coffman v. Miller*, 26 Gratt. 698.

[**Judicial Sales—Ascertaining Indebtedness.**—See

tracts sold for \$3,309.25, and the expenses of sale were about \$100.

At the March term of the court for 1869, W. Y. Cirode filed his answer in the cause. He says he knows nothing of the allegations of the bill, and neither admits or denies them, but calls for strict proof. He says further, that Frank A. Sanders was adjudicated a bankrupt on the 28th of March 1868, and on the 3d of June 1868, conveyed all his estate to the respondent, for the benefit of his creditors. Respondent is advised that he is entitled to the proceeds of the land sold by the commissioner; that the complainant acquired no lien in any way upon this land before Sanders filed his petition in bankruptcy, or when the conveyance was made to respondent on the 3d of June 1868; and he asks that the commissioner be directed to collect the purchase money, and pay it over to him.

The plaintiff filed a copy of the record of the case in the Alabama court, showing that there had been a decree in December 1866, in favor of the administrators in Alabama, against Frank A. Sanders, for \$12,271.49, upon which an execution of fieri facias had been sued out in March 1867, and had been returned by the officer, "no property found." The defendant filed a copy of the deed from the register in bankruptcy in the District Court of the United States for West Tennessee, to himself, as assignee in bankruptcy of Frank A. Sanders, by which reciting that Sanders had been adjudicated a bankrupt in that court, he conveyed to the said
210 assignee "all the property of Sanders which he then had, or in which he was interested and entitled to have on the 2d of March 1868.

The cause came on to be heard on the 19th of November 1869, when the court held that the plaintiff was entitled to the proceeds of the sale of the land as against the assignee in bankruptcy, and made a decree directing Sheffey, the commissioner, to collect the money and pay over the net proceeds to the plaintiff. And thereupon, Cirode applied for and obtained an appeal to the District Court of Appeals at Abingdon. And when that court ceased to exist, it was transferred to this court.

Gilmore, for the appellant.

J. W. & J. P. Sheffey, for the appellee.

MONCURE, P. This is an appeal from a decree of the Circuit court of Smyth county, and involves a question of priority between a foreign attachment creditor and an assignee in bankruptcy of a common debtor, in regard to certain real estate of the debtor lying in said county. The question depends upon the priority of time, when the respective liens or claims of the conflicting claimants attached to the subject. The attachment creditor claims a lien from the time of filing his bill, to wit: the 20th day of February 1867; the assignee in bankruptcy claims a lien from the time of the filing of the petition in bankruptcy, to wit: the 2d day of March 1868, or at least from the time of the adjudication of

the bankruptcy, to wit: the 28th day of March 1868. If the claim of the former be well founded, it is of course paramount to that of the latter. Prior in tempore est prior in jure. The assignee takes the estate of the bankrupt just as the bankrupt held it, subject to all liens and equities which were good against the bankrupt at the time he became such. James on Bankruptcy, and cases cited in notes, pp. 36, 37 and 44. He stands
211 in the shoes of the bankrupt "in regard to such estate, except that conveyances thereof fraudulent and void as to creditors, are void also as to him. Id. 37. The bankrupt law avoids any attachment of the bankrupt's property made on mesne process within four months next preceding the bankruptcy, but not any such attachment made more than four months before such bankruptcy.

There is no contest in this case as to the fact that the common debtor filed his petition in bankruptcy on the 2d day of March 1868, and was adjudged a bankrupt on the 28th day of March 1868. Nor does it appear that there is any contest as to the fact, that the debt claimed by the attaching creditor was due by the common debtor at the time of the institution of the suit, and still remains unpaid. Nor as to the facts, that the debtor at that time was a non-resident of the State of Virginia, that he owned the real estate on which the attachment lien is claimed, that the said real estate is situated in the said county of Smyth, in this State, and that these facts were all averred in the bill, which was filed in this suit on the 20th day of February 1867. And all these facts are fully sustained by the pleadings and proofs in the cause. The foreign attachment creditor had, undoubtedly, a good cause for a foreign attachment in chancery at the time of the filing of this bill, and the controversy in this cause seems to be narrowed down to this: Whether he so prepared his bill, and so proceeded upon it, as to make him a foreign attachment creditor, and to give him the benefit of a foreign attachment lien from the time of the filing of his bill?

He had a good case for a foreign attachment suit in chancery. Has he sufficiently stated it in his bill? And he has done what was necessary to give effect to his attachment lien? If he has not, he has certainly been very unfortunate.

He had a good case for a foreign attachment suit, because the debtor resided
212 "without the jurisdiction of 'this commonwealth,'" and had "lands or tenements within the" same. And that was the only ground which he had for subjecting the said real estate to the payment of the debt. He had no lien upon the land before he brought his suit. The judgment which had been obtained in Alabama for the debt was no lien upon the real estate of the debtor in Virginia. He was to that real estate a mere creditor at large; and he could acquire no lien upon it in invitum, but by an attachment suit, or by obtaining a judgment in Virginia for the debt.

Can this suit be regarded as a foreign attachment suit? Are the averments of the bill sufficient for that purpose? Have the pro-

ceedings in the suit been such as to give effect to it as an attachment suit? These are the questions we now have to solve.

The complainant in his bill, 1st, Sets out the claim against the debtor, Frank A. Sanders, showing that it amounts to \$12,271.49, for which a decree had been rendered in the State of Alabama, of which decree a copy is filed with the bill; 2d, Charges, that the debtor has large and valuable real estate in Virginia, and within the jurisdiction of the court, to subject which to sale for the payment of the said debt is the declared object of the bill, and the said real estate is particularly described in the bill as to quantity, title, and otherwise; 3d, Charges, that the debtor is a non-resident of the State; 4th, Makes the proper persons defendants to the bill; 5th, Prays for a sale of the said real estate for the payment of the said debt; and 6th, Prays for general relief.

Now this is certainly a sufficient bill to give effect to the suit as a foreign attachment suit in chancery. For although the suit is not called an attachment suit, by name, in the bill, and although the bill does not, in terms, pray that the land may be attached for the payment of the claim; yet the bill contains all the necessary and proper allegations for such a suit, and prays for suit-

213 able *specific as well as for general relief; which is all sufficient in substance, notwithstanding the formal omissions aforesaid, to make the suit an attachment suit, and give full effect to it as such; unless the complainant has omitted something in the proceedings in the suit which the statute requires to give it effect as an attachment suit; in other words, to give it effect as an attachment lien upon the land, against the claim of the assignee in bankruptcy arising subsequently thereto.

Has there been any such omission in the proceedings, then? is the question.

If there has been, it consists in the omission of such an affidavit as the statute requires to be made in such cases, or in the omission of an endorsement on the subpoena, describing the real estate intended to be attached.

As to the affidavit, the act of 1819, 1 R. C., p. 474, § 1, only required an affidavit that the debtor was out of the country, or that, upon inquiry at his usual place of abode, he could not be found, so as to be served with process; upon which affidavit the court was authorized to make an order, and require security, if it should appear necessary, to restrain the defendants in this country from paying, conveying away, or secreting the debts by them owing to, or the effects in their hands of such absent debtor or defendant. An affidavit of the non-residence of the debtor was made in this case on the 6th day of May 1867, about ten months before his petition in bankruptcy was filed, on which affidavit an order of publication against him was made. This affidavit would have been a full compliance with the requisition of that act. But the Code of 1849, chapter 151, made a material change of the attachment law; and section 11, which relates to attachments in equity, provides that "there may be an affidavit

according to the nature of the case, conforming, as near as its nature will admit, to what is specified in previous sections." Section 1

of the same chapter is the section here 214 chiefly referred to, and *provides that "when any suit is instituted for any debt, or for damages for breach of any contract, on affidavit stating the amount and justice of the claim, that there is present cause of action therefor; that the defendant, or one of the defendants, is not a resident of this State, and that the affiant believes he has estate or debts due him within the county or corporation in which the suit is, or that he is sued with a defendant residing therein, the plaintiff may forthwith sue out of the clerk's office an attachment against the estate of the non-resident defendant for the amount so stated." An affidavit which corresponds substantially with that prescribed by section 1 seems to be such an one as is contemplated by section 11, and is more comprehensive than the affidavit required by the act of 1819, which was only as to the non-residence of the debtor, or that, upon enquiry at his usual place of abode, he could not be found, so as to be served with process. But in construing the attachment law of 1849, we must bear in mind one of the chief purposes which the legislature had in view, to wit: to provide a substitute for the right which previously existed, to hold a defendant to bail, and we must look at the whole act together. The plan of the legislature was to apply legal remedies to legal demands, and equitable remedies to equitable demands, so as to give a remedy by attachment in equity only in those cases where the demand was equitable, and where, if all the defendants resided in the State, the suit would have to be brought in equity. According to this plan, the attachment was a mere collateral proceeding, incident to the main action or suit, which was the same in form as if no attachment was incident to or connected with it. It did not appear from the pleadings in the action or suit that any of the defendants were non-resident, or whether they had any, and if any, what estate in the jurisdiction of the court. Those pleadings merely showed that

the plaintiff had a good cause of action 215 or suit, supposing all the defendants *to be residents of the State. Therefore, it was fit and proper, when a plaintiff wished to have the benefit of an attachment to secure the amount of what he might recover in the action or suit, that he should be required, as a foundation of the attachment, to make such an affidavit as was required by the Code of 1849. The law had previously been different. The only remedy which then existed against a non-resident debtor owning estate in this commonwealth, was a foreign attachment in chancery, whether the debt was a legal or an equitable debt. Where the debt was a legal debt, it was necessary to aver in the bill that the debtor was a non-resident of the State, and owned estate within the same, otherwise the bill would have been demurrable. Where the debt was an equitable debt, no such averment in the bill was necessary. In 1852 the Code

of 1849 was amended, so as to add these words at the commencement of section 11 of chapter 151 aforesaid, to wit: "A claim to any debt, or to damages for breach of any contract, against a person who is not a resident of this State, but who has estate or debts due him within the same, may, if such claim exceed \$20, exclusive of interest, be maintained in any court of equity for a county or corporation in which there may be any such estate, or a defendant owing any debt to such non-resident." The effect of this amendment was to give to a creditor, having a legal claim against a debtor residing out of the State, and owning estate or effects therein, the same right to bring a foreign attachment suit in equity as he would have had before the Code of 1849, the only difference being that since the amendment he has had an election to sue at law or in equity in such a case, whereas, before the Code of 1849, he could sue in equity only. But no change was made in section 11 as to the affidavit to be given in a foreign attachment suit in equity for a legal demand. In such a suit, brought under that section, amended as aforesaid, it is necessary to aver in the

216 bill *that the debtor resides out of the State, and has estate or effects therein, as it would have been necessary to make such an averment before the Code of 1849, otherwise the bill would be demurrable. The grounds for equitable relief in such a case are threefold. 1st, that a debt is due to the plaintiff; 2ndly, that the debtor is a non-resident of the State; and 3dly, that he has an estate or effects within the State. These three grounds make up a good case in equity, and if proved, the plaintiff will be entitled to a decree on the hearing for the amount of the debt, and for the application of the said estate and effects, as far as may be necessary, to the payment thereof. To be sure, there can be no decree against an absent defendant without an answer, appearance or publication. And there can be no publication without an affidavit of non-residence. Such an affidavit is, therefore, necessary where there is no answer nor appearance of the non-resident debtor. But if the case be regularly matured for hearing, and be fully proved, the plaintiff is entitled to a decree accordingly, except against parties or persons who may be injured by his non-compliance with some preliminary acquisition of the statute. He is certainly entitled to such a decree against the debtor himself, and all who stand in his shoes.

But even if any other affidavit than that of non-residence of the debtor were necessary in this case, it is well settled that the affidavit, required by the statute to authorize a court to sue out an attachment against the estate or effects of an absent debtor, may be made, either before or after the bill is filed. *O'Brien, &c. v. Stephens*, 11 Gratt. 610. See also *Moore v. Holt*, 10 Id. 284. Indeed, it is expressly declared by the statute, in the very section which gives the remedy in this case, to wit: section 11 aforesaid, that "such affidavit may be, at the time of, or after, the institution of the suit." The decree appealed

from is interlocutory. What is there to prevent the affidavit from being now made, 217 if any other *affidavit be necessary than that which has already been made?

As to the omission of an endorsement on the subpoena, describing the real estate intended to be attached. The 7th section of chapter 151, of the Code of 1860, p. 647, provides, that "every such attachment, (except where it is sued out specially against specified property,) may be levied upon any estate, real and personal, of the defendant, or so much thereof as is sufficient to pay the amount for which it issues. It shall be sufficiently levied in every case by a service of a copy of such attachment, on such persons as may be designated by the plaintiff in writing, or be known to the officer to be in possession of effects of, or to be indebted to, the defendant; and as to real estate, by such estate being mentioned and described by endorsement on such attachment." And the 12th section, Id. p. 648, provides, that "the plaintiff shall have a lien from the time of the levying of such attachment, or serving a copy thereof, as aforesaid, upon the personal property, choses in action, and other securities of the defendant against whom the claim is, in the hands of or due from any such garnishee on whom it is so served, and on any real estate mentioned in an endorsement on the attachment or subpoena, from the suing out of the same."

These provisions were intended to apply, mainly if not entirely, to the ordinary case of an attachment which is ancillary to an action at law for a legal demand, or to a suit in equity for an equitable demand, in which nothing is said in the pleadings about any attachment of any property. In order to constitute an attachment lien upon any property there must be a claim in some form to subject the property to the payment of the debt demanded in the action or suit. If there be no such claim in the pleadings in the action or suit itself, then an attachment must be issued, which may be levied upon any estate, real or personal, of the defendant, or

218 so much thereof as is sufficient to pay the amount for which it *issues; and the plaintiff shall have a lien from the time of the levying of such attachment as aforesaid. In the case of a foreign attachment in equity, the endorsement describing any real estate intended to be attached, may be made either on an attachment, or on a subpoena issued in the case. But where, as in this case, a suit in the nature of a foreign attachment in chancery is brought to enforce a legal demand, and the bill positively avers that the debtor is a non-resident of the State, and has real estate within it, and in the jurisdiction of the court, fully sets out the demand, particularly describes the estate sought to be subjected to the payment of the debt, and contains all other necessary and proper allegations, there is no necessity and no occasion for any endorsement on the subpoena, or any process of attachment in the case, to give to the plaintiff a lien upon the estate for the payment of the debt; but,

upon sustaining the allegations of his bill by proof, and otherwise maturing his cause for final hearing, he will be entitled to a decree to subject the estate to the payment of the debt according to the prayer of the bill. Why should an endorsement on a subpoena, or on process of attachment, be necessary in such a case? What better notice could it give than would be given by the bill itself? Would not the bill give much fuller and more specific notice generally than would be given by such an endorsement? The bill is what would naturally be looked to by inquiries for information as to the object of the suit, rather than the process or any endorsement upon it. Suppose the land were vacant, and there were no home defendants to be served with process: there would seem to be no occasion for any process in such a case, except an order of publication against the non-resident debtor and owner of the land. Suppose an attachment, or a subpoena, were issued in such a case, and such an endorsement as is mentioned in the statute were made thereon, what good purpose could possibly be answered thereby which would

219 not be *better answered by the bill? The process and endorsement would be shown to nobody, but be returned and filed among the papers of the suit. If, however, an endorsement were necessary in such a case, is not the order of publication equivalent to such an endorsement? The order of publication, generally, gives as full information of the object of the suit as an endorsement on the process would, and is in itself in the nature of process. Where the non-resident debtor is the only defendant in the case, the order of publication would seem to be the only necessary process. Suppose the non-resident defendant and the home defendant had all filed their answers in this case, on condition that the attachment should not thereby be discharged, and had admitted the truth of all the allegations of the bill, would any endorsement then have been necessary? Would not the plaintiff have been entitled to a decree according to the prayer of his bill? Suppose, instead of filing their answers and admitting the allegations of the bill, the defendants had suffered the bill to be taken for confessed, as was the case here, would any endorsement then have been necessary, and would not the plaintiff have been entitled to such a decree? I suppose there can be no doubt but that he would have been so entitled in either of the cases above supposed, if no other persons were interested in the subject than the original parties to the suit. But suppose that, after the answers admitting the allegations of the bill are filed, or after it is taken for confessed, the non-resident debtor becomes a bankrupt before any decree is made for the sale of the land charged by the bill with liability for the debt, will the assignee in bankruptcy stand on any higher ground than the debtor himself? Will he not stand in the shoes of the bankrupt in regard to the suit? And will not the plaintiff be entitled to precisely the same decree against him that he would have been entitled to against the

debtor himself, if he had not become a
220 bankrupt? Upon these questions *there can, I presume, be no doubt or difficulty. When the bill was filed there was a *lis pendens* to subject the real estate to the payment of the debt, as claimed in the bill. All rights acquired from or under the defendant, to the subject in controversy, pending the suit, are subject to any decree which may be made in the suit, except so far as a purchaser without actual notice is protected by the Code, chapter 186, section 5. In all other respects the maxim, *Pendente lite nihil innovetur*, applies.

In this case, the plaintiff, in his bill, fully and plainly stated a case which, if true, entitled him to a decree for the sale of the land in question for the payment of the debt due to him by his non-resident debtor. This bill was filed on the 20th day of February 1867, before the bankrupt law was passed, and more than a year before the non-resident debtor filed his petition in bankruptcy. There was an order of publication entered in the case on the 6th day of May 1867, against the non-resident defendants, including the debtor, Frank A. Sanders, upon an affidavit made in due form, which order was duly posted and published, the publication ending on the 31st day of May 1867, nearly ten months before the petition in bankruptcy was filed. The said order stated, that "the object of this suit is, to subject the interest of Frank A. Sanders in the land now in the possession of James B. Sanders and John L. Sanders, known as the River tract of their father's estate, and seventy-four acres of the Sulphur Spring's tract, to satisfy a debt of \$12,271.49, ascertained by decree of the District court of chancery for the northern district of Alabama, and filed in the cause aforesaid in said Circuit court of Smyth county." The bill was even more full and specific, indeed much more so, than the said order, in the description of the land and the debt. The subpoena was returned executed on John L. Sanders, the only defendant who resided in the State, and who was charged in the bill to be in possession of the land,
221 on the 22d day of February *1867, just two days after the filing of the bill. No answer was filed by any of the original defendants.

Such was and continued to be the state of the case until and on the 2d day of March 1868, when the non-resident debtor, Frank A. Sanders, filed his petition in bankruptcy; and until and on the 28th day of March 1868, when he was adjudicated a bankrupt; and until and on the 3d day of June 1868, when all the estate of the bankrupt was conveyed to the appellant, William Y. Cirode, as assignee in bankruptcy. On the 26th day of August 1868, the cause came on to be heard, upon the bill taken for confessed as to all the defendants, and upon the exhibits, when the court, considering that the interest of the said Frank A. Sanders in the real estate in the bill mentioned, was liable and ought to be subjected to sale for the satisfaction of the debt due to the plaintiff and in the bill mentioned, therefore decreed that John P.

Sheffey, who was appointed a commissioner for the purpose, should sell the said real estate, or so much as might be necessary, in the manner and on the terms in said decree mentioned, and report his proceedings to the court. Before any sale was made under the said decree, it seems that the said assignee in bankruptcy asserted a claim to the said real estate, and on the 18th day of November 1868, an agreement in writing was entered into between the said assignee and the plaintiff in the suit, whereby it was agreed, that the said sale should not be further delayed or suspended, but should be made by the commissioner appointed by the said decree; that the proceeds thereof should be paid into court, to await the determination and final decree of the said court; that the said assignee should become, by virtue of the filing of the said agreement, a party to the said suit, without process; and that, upon the final hearing, the question of the validity of the lien claimed by said plaintiff by attachment, as against the claims of said assignee on behalf of the general creditors of said bankrupt, within "the provisions of the bankrupt act," should be argued before, and decided by said Smyth Circuit court, &c. This agreement was filed as an exhibit in the case on the 10th of December 1868, after which, the commissioner, J. P. Sheffey, sold the real estate aforesaid, and reported his proceedings to the court, and on the 31st day of March 1869, his report was confirmed. Shortly after this, the said assignee filed his answer in the case, denying all knowledge of the facts alleged in the bill, and requiring strict proof of them; claiming the proceeds of the sale of the said land, by virtue of the proceedings in bankruptcy aforesaid; and insisting that the plaintiff acquired no lien on the said land before the said petition in bankruptcy was filed, or even before the conveyance of the bankrupt's estate to the assignee, on the 3d day of June 1868, as aforesaid. A copy of the conveyance, which was recorded in the clerk's office of Smyth County court, was filed as an exhibit with the answer. To the said answer the plaintiff replied generally. And the plaintiff also, it seems, filed as an exhibit in the cause, a copy of the record of the suit in Alabama, in which a decree was rendered on the 4th day of December 1866, for the amount of the debt claimed by him, from which copy it appears that the execution issued upon said decree was returned "no property found, June 1, 1867."

On the 19th day of November 1869, the cause came on to be heard on the papers formerly read, the answer of the said assignee in bankruptcy, and replication thereto, and exhibits filed, and the written agreement aforesaid; on consideration whereof, the court was of opinion, that the plaintiff was entitled, as against the said assignee, to the proceeds of the sale of the land of the said Frank A. Sanders, sold by commissioner Sheffey as aforesaid, and decreed accordingly. From that decree the said assignee applied for and obtained the appeal we are now considering. I am of opinion, that from the time

223 of the institution *of this suit, or at least from the time of the filing of the bill, the plaintiff had a lien upon the real estate of his debtor, Frank A. Sanders, therein mentioned, for the payment of the debt therein claimed; that the said debtor having become a bankrupt long after the institution, and during the pendency of the said suit, his assignee in bankruptcy can stand on no higher ground in regard to the said suit and the claim asserted therein than the bankrupt himself, but stands in his shoes, and is entitled only to his rights; and that there is no error in the decree appealed from, either as to the said bankrupt himself, or as to his said assignee.

I am therefore of opinion that the said decree ought to be affirmed.

The other judges concurred in the opinion of Moncure, P.

Decree affirmed.

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*Elys v. Wynne & als.

June Term, 1872, Wytheville.

Absent, ANDERSON and BOULDIN, Jr.*

Wills—Devises.—In 1838 W made his will, and died. By clause 6 he gives to his daughter, D, a designated tract of land, to her and the heirs of her body; but should D "die without heir, as above mentioned, my wish is that said land shall return to my other heirs, and be sold, and the moneys arising from the sale to be equally divided among all my heirs." D sells the land, and conveys it with general warranty; and then dies, without ever having had a child. **Held:**

1. **Same—Same—Construction.**—D took under the statute a fee simple estate in the land defeasible upon her dying without a child living at her death.
2. **Same—Same—Limitations over.***—The limitation over to testator's other heirs is valid, and took effect upon the death of D without a child living at her death.
3. **Same—Same—Same.**—Though the deed of D purported to convey the fee, it only conveyed, and did convey, her interest in the land, and the purchaser could not hold an adversary possession thereof before the death of D without leaving a child.
4. **Same—Same—Same—Ejectment.**—Upon the death of D without leaving a child, the title vested in the heirs of W, and not in his executor; and they are the proper parties to maintain ejectment for the land.
5. **Same—Same—Same—Same—Judgment.**—The action is against two holding different parts of the land, the judgment may be separate against each for the land in his possession, and joint for the costs.

This was a supersedeas to a judgment rendered on the 3d day of June 1870, in the Circuit court of Lee county, in a cause depending

*The case was heard before JUDGE BOULDIN's appointment.

*Devises—Limitations over.—The principal case is cited in the following decisions: *Randolph v. Wright* 81 Va. 608; *Whitelaw's Ex'or v. Sims*, 90 Va. 583, 19 S. E. Rep. 113.

in that court, in which Achles Wynne and others, children and grandchildren of Elkanah Wynne, deceased, were plaintiffs, and Thomas Ely and Andrew M. Ely were defendants. The case is stated in the opinion of the court.

225 *Lane and Caldwell, for the appellants.

J. W. Johnston, for the appellees.

MONCURE, P. delivered the opinion of the court.

This was an action of ejectment, brought by the heirs at law of Elkanah Wynne, in the Circuit court of Lee county, against Thomas Ely and Andrew M. Ely, for the recovery of a tract of land in said county, to which the plaintiffs claimed to be entitled in fee simple. Issue was joined on the plea of not guilty; and the parties, by their counsel, by consent entered of record, waived the right to have a jury, and agreed that the whole matter of law and fact might be heard and determined, and judgment given by the court. Whereupon the court, having maturely considered the matters of law and fact in the case, rendered judgment in favor of the plaintiffs against the defendant, Thomas Ely, for a part of the premises in the declaration mentioned, said part being described in the judgment by metes and bounds; and against the defendant A. M. Ely, for the residue of the premises in the declaration mentioned; and against both defendants for costs of suit. To the said judgment, the defendants excepted; and all the facts admitted or proved on the trial were set out in a bill of exceptions, which was made a part of the record. And the defendants applied to a judge of this court for a supersedeas to the said judgment; which was accordingly awarded.

Both the plaintiffs and defendants in this case claim title to the land in controversy, under Elkanah Wynne, the plaintiffs as his heirs at law, and the defendants under Sarah Dougherty, a devisee of the said Elkanah Wynne. The question of title depends upon the true construction of the 6th clause of the will of said Elkanah Wynne, which will bears date on the 17th of August 1833, and was admitted to probate on the 18th of November 1833. That clause is in these words;

226 "6thly. I give and bequeath to my daughter, Sarah *Wynne, now Sarah Dougherty, the tract of land purchased of George R. Ely, and joining Alexander Ely and Charles Hambler, to her and the heirs of (her) body; but should the said Sarah Dougherty die without heir, as above mentioned, my wish is that the said land shall return to my other heirs, and be sold, and the moneys arising from such sale to be equally divided among all my heirs."

The land devised by that clause is the land in controversy. Josiah B. Dougherty and the said Sarah his wife, held it in her right, under the said clause, from the death of the testator until the 17th of November 1836, when they conveyed it in fee simple, with covenant of general warranty, to James A. G. Ely, who, and those claiming

under him, have been in possession ever since, and under whom the defendants in this action claim title, and were in possession claiming title at the time of the institution of this suit. Sarah Dougherty died two or three years before the institution of the suit, without ever having had a child. The question is, whether the contingent limitation to the other heirs of the testator, contained in the said 6th clause of his will, took effect at the death of his said daughter. If it did, the plaintiffs are entitled to the land in controversy. If it did not, they are not.

There can be no doubt but that, if the testator had died prior to the passage of the act passed February 24th, 1819, 1 R. C. p. 361, ch. 99, the said limitation over would have been a limitation to take effect on an indefinite failure of issue, and would have been ineffectual.

But the testator having died since the passage of that act, to wit: in 1833, the case is governed by sections twenty-five and twenty-six of that act, Id. p. 369, which were then introduced for the first time into our Code, and are in these words:

"25. Every estate in lands which shall be limited by any deed hereafter made, or by the will of any person who shall hereafter die, so that, as the law was on the 227 *seventh day of October, in the year of our Lord, one thousand seven hundred and seventy-six, such estate would have been an estate tail, shall be deemed to be an estate in fee simple, in the same manner as if it had been limited by those technical words which, at the common law, are appropriate to create an estate in fee simple; and every limitation upon such an estate shall be held valid, if the same would be valid when limited upon an estate in fee simple, created by technical language aforesaid.

"26. Every contingent limitation in any such deed or will, made to depend upon the dying of any person without heirs, or heirs of the body, or without issue, or issue of the body, or without children or offspring, or descendant or other relative, shall be held and interpreted a limitation, to take effect when such person shall die, not having such heir or issue, or child or offspring, or descendant or other relative, as the case may be, living at the time of his death, or born to him within ten months thereafter, unless the intention of such limitation be otherwise expressly and plainly declared on the face of the deed or will creating it."

Now, as the estate given to Sarah Dougherty by the sixth clause of the said will would have been an estate tail, as the law on the 7th day of October 1776, therefore by the force and effect of the said twenty-fifth section, such estate is "deemed to be an estate in fee simple, in the same manner as if it had been limited by those technical words which at the common law are appropriate to create an estate in fee simple," and the limitation upon such estate to the other heirs of the testator, contained in the latter part of the said clause, is to be held

valid "if the same would be valid when limited upon an estate in fee simple, created by technical language as aforesaid."

The said limitation would be valid when limited upon an estate in fee simple
228 as aforesaid, provided the said "limitation, according to the law of the land, and the true intent and meaning of the testator, was to take effect at the death of the said Sarah Dougherty.

Now, as the limitation aforesaid is, by the said sixth clause of the will, made to depend upon the dying of the said Sarah Dougherty without heir of her body, therefore, by the force and effect of the said twenty-sixth section, such limitation is to "be held and interpreted a limitation, to take effect when such person shall die not having such heir" living at the time of her death, or born to her within ten months thereafter, "unless the intention of such limitation be otherwise expressly and plainly declared on the face of the" will creating it. Certainly no such express and plain intention is declared on the face of the will in this case, but the contrary intention rather appears.

We are therefore of opinion that the plaintiffs, the heirs at law of the said testator, became entitled to the tract of land in controversy upon the death of the said Sarah Dougherty.

We have not deemed it necessary to review the many cases referred to in the argument of the learned counsel of the plaintiffs in error in reference to the question we have just been considering, because we thought that while they might, and no doubt would, have been conclusive against the title of the said heirs at law of the testator, if he had died before the passage of the said act of 1819; yet, as he died thereafter, they, the said heirs, are under the operation of the twenty-fifth and twenty-sixth sections of that act, plainly entitled to the land in controversy.

The next question we will consider is the second assignment of error in the petition of appeal, that the action of the heirs at law is barred by the adversary possession of the defendants in said action, and those under whom they claim. That adversary
229 possession commenced, as it is contended, from the time of the "execution of the deed from Dougherty and wife to James A. G. Ely, dated the 17th day of November 1836, and has continued ever since in the said grantee and those claiming under him, including the defendants in the said action.

The deed aforesaid certainly conveys the land in absolute fee simple to the said grantee, with covenant of general warranty. At the time of the conveyance, the grantors, in right of the wife, were seized of an estate in fee, defeasible by the death of the wife without issue living at her death. Had she left issue living at her death, the estate in fee would thenceforward have been indefeasible. Probably, when the deed was executed, it was expected that she would leave issue living at her death. At all

events, the deed, however absolute and un-conditional on its face, could have no greater effect than to invest the grantee with the title of the grantors, and it invested him with that title, even though it may have professed to convey more. The effect of the conveyance, as to the parties claiming under the contingent limitation over, is precisely the same as if the conveyance had been expressly subject to such limitation. Until the death of Sarah Dougherty, without issue living at her death, the heirs at law of the testator had no right of action for the land. Their right of action then and thereby accrued, and the act of limitation could begin to operate against them only from that time. Sarah Dougherty and her assigns held the land in privity with the title of those claiming under the contingent limitation over, and could not hold adversely against it during her life. This view is fully sustained by the decision of this court in *Clarkson, &c., v. Booth*, 17 Gratt. p. 490.

We are, therefore, of opinion that the action is not barred by adversary possession, or the act of limitations.

The third assignment of error is, that if the heirs at law of the testator have any interest under the contingent limitation contained in the said 6th clause of the
230 "will, it is not such an interest as entitles them to maintain an action of ejectment for the land, but the right to maintain such action is vested only in the executor of the will.

The land is not by the will devised to the executors to be sold for the benefit of the heirs at law of the testator, in the event contemplated, but the will declares that in that event, "my wish is, that the said land shall return to my other heirs, and be sold, and the moneys arising from such sale to be equally divided among all my heirs." To be sure, the Code, chapter 131, section 1, p. 598, provides that "real estate devised to be sold shall, if no person other than the executor be appointed for the purpose, be sold and conveyed" "by the executors who qualify, or the survivor of them." But this statute does not operate as a conveyance of the estate, or any interest therein, to the executors, but merely to give them power to make any sale of real estate which the will directs to be sold, without empowering any particular person to make the sale. The object of the statute was to prevent the necessity of resorting to a court of equity for the appointment of a trustee, by devolving the execution of the power upon the executors, who are supposed to be fit and proper persons for the execution of it. The nice distinctions taken by the authorities between a power coupled with an interest or a trust, and a naked power, in regard to devises of land for sale by an executor, which distinctions are referred to in 4 Kent's Com. p. 320, marg.; 1 Lomax on Executors, p. 218, marg.; and Mosby's adm'r, &c., v. Mosby's adm'r, 9 Gratt. p. 590, seem not to be applicable to this case, in which there was no devise either to the executors to sell,

or that a sale should be made by the executors, but merely an expression of a wish that the land should be sold, without saying by whom. If it could be said that those distinctions apply to this case, the executor under the statute would seem to have a naked power of sale, rather than a power coupled with an interest; and

231 "if it is a power coupled with a trust, the operation of the power and the trust did not commence before the making of the sale, so as to prevent the heirs before that time from maintaining an action for the land, recovering and retaining possession thereof, and receiving and enjoying the rents and profits until it should be sold. The testator says that in the event contemplated, "my wish is, that the said land shall return to my other heirs." Now here is an express devise to his other heirs, who thereby became invested, on the happening of the said event, with the title and right of possession of the land. To be sure, the will further proceeds in these words: "and be sold, and the moneys arising from such sale to be equally divided among all my heirs." But that was surely not intended, and cannot have the effect, to impair the right of the heirs, under the express devise to them, to take and hold the land to their own use until a sale should be made. The power was to sell, not to hold or rent out the land in trust for the heirs. But that power—if power it could be called without a donee—was intended for the exclusive benefit of the heirs, who might have waived it, and elected to hold the land as real estate, instead of regarding it as converted, and holding it as personality. More than three years after they became entitled to the land they brought an action of ejectment to recover possession of it. It does not appear that a sale of it has ever been attempted, or been in contemplation. It does not appear that there is now, or was at the death of Sarah Dougherty, any personal representative of her father in existence. His will was recorded in 1833, nearly forty years ago. Can it be said, under these circumstances, that when this action was brought, his heirs had not "a subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof," within the true intent and meaning of the Code, chapter 135, section 4, page 610? We think not.

232 "We are, therefore, of opinion that the said heirs have a right to maintain this action.

The fourth and last assignment of error is, that the verdict and judgment are void for uncertainty and variance.

We think there is no just foundation for this assignment of error; that there is sufficient certainty in the verdict and judgment; and that there is no material variance between them. It is not material that an order of survey was made in the case, and not executed. It sufficiently appears, from the facts admitted or proved on the trial, and certified in the record, and from inferences properly deducible therefrom,

that the land recovered by the verdict and judgment is identical with the land demanded in the declaration, and that both parties claimed under the will of Elkanah Wynne. That all proper inferences which might be drawn by a jury may be drawn by the court from the facts proved or stated in such a case, was decided by this court in *Dearing's adm'x v. Rucker*, 18 Gratt. 426.

Upon the whole, we are of opinion that there is no error in the judgment, and that it be affirmed.

Judgment affirmed.

233 *White v. Mech. Building Fund Association.*

June Term, 1872, Wytheville.

Absent. BOULDIN, J.†

1. **Building and Loan Associations—Distribution of Funds—Rights of Shareholder.**—W, a shareholder in a Building Fund Association, having obtained an advance of money on his shares, the association thereby acquired the right of property therein; and the assignment of the shares to the association for the advance he received was not a hypothecation for a loan, but an absolute surrender of them to the association, whereby they were sunk and extinguished, and cannot entitle the said W to participate in the final division and distribution of the funds of the association.

2. **Same—Same—When Requisite.**—Such final division and distribution is required to be made when the accumulated fund is sufficient to pay to each of the unredeemed shares the par value of the shares, after the payment of all debts and liabilities of the association.

3. **Same—Assignment of Shares—Liabilities of Assigner—Interest—Usury.**—The assignment of his shares by W to the association, does not release him from his covenant, as a party to the articles of association, to make his regular monthly payments on shares, and on account of fines; and the enforcement of his said obligations is secured by his bond and deed of trust, by which also he obligates himself to pay six per cent. interest on the sum received, as authorized by section eight of the statute, until the termination of the association; and the transaction between the parties is not usurious, nor within the prohibition of the said eighth section.

4. **Same—Same—Sale of Shares by Assignee—Ascertaining Indebtedness.**—For any default in the pay-

*For monographic note on Building and Loan Associations, see end of case.

†The case had been argued before his election.

‡**Building and Loan Associations.**—Upon this subject, see *Crabtree v. Building Association*, 95 Va. 675, 29 S. E. Rep. 741; *Muller v. Stone*, 84 Va. 837, 6 S. E. Rep. 223; *Fox v. Cottage B. F. Association*, 81 Va. 685; *Cason v. Seidner*, 77 Va. 297; *Davies v. Creighton*, 33 Gratt. 708; *Edelin v. Pascoe*, 22 Gratt. 830; *Winchester Building Association v. Gilbert*, 23 Gratt. 793; *Pfeister v. Wheeling Building Ass'n*, 19 W. Va. 703; *Parker v. U. S. Building, etc., Ass'n*, 19 W. Va. 744.

§**Interest—Usury.**—See monographic note on "Interest" appended to *Fred v. Dixon*, 27 Gratt. 641, and monographic note on "Usury" appended to *Coffman v. Miller*, 26 Gratt. 608.

§**Judicial Sales—Ascertaining Indebtedness.**—See

ment of monthly dues or fines, the trustees in the deed of W are authorized and required to sell, when requested by the board of directors of the association, the property conveyed to them in trust by W, not only to satisfy the arrearages of monthly dues and fines due, but also such sum as may be due and payable by him on account, or in lieu, of the principal sum advanced or paid to him for his shares; to be ascertained and determined by the referees appointed by the articles of association for that purpose, according to the rate at which the shares may be redeeming at the time the sale is advertised to take place. But such sale should not be made until such indebtedness is ascertained.

234 5. *Same-Same-Injunction*.—If W obtains an injunction to a sale under the deed of trust, on grounds that are insufficient or unsustained, the injunction, nevertheless, should not be dissolved until his indebtedness is ascertained by a commissioner of the court.

This was a suit in the Circuit court of Rockbridge county, brought in April 1870, by George A. White, against the Mechanics Building Fund Association of Lexington, Virginia, and others, to enjoin the sale of a tract of land by the trustees in five deeds executed by White to secure certain liabilities to said association, upon the advance to him of five sums of money. The facts are substantially as follows:

The Mechanics Building Fund Association of Lexington was organized on the 19th of November 1867, under the act of May 29th, 1852, and of January 31st, 1867, amending the same, to provide for the incorporation of building fund associations. The constitution of the association seems to be like other associations of the kind. Article 13, § 1 and 2, are as follows:

"§ 1. Every member of this association shall, on or before each regular meeting of the association, pay one dollar for each share then held by him, during the continuance of the association, whether redeemed or not; and for any neglect in so doing shall be fined for every failure to pay on each share as follows: the first month, ten cents; the second month, twenty cents; the third month, thirty cents; fourth month, fifty cents; and each succeeding month, fifty cents.

"§ 2. All shares on which no payment is made for six months shall be forfeited to and sold by the association, and the surplus of the proceeds, after deducting therefrom the dues, fines, &c., owing to the association, shall be paid over to the delinquent member."

Article 14, § 1, part of 3, and 6, are as follows:

235 "§ 1. In redeeming shares the offers shall be oral, *and one shall be offered at a time; but the member whose offer is accepted may have as many shares redeemed at the same rate as will not exceed the number then held by him unredeemed.

"§ 3. Every stockholder whose shares are redeemed shall, in addition to monthly dues, &c., pay interest monthly at the rate of six per centum per annum on the amount advanced to him. He shall assign to the association the shares so redeemed, and also secure the association for the amount by bonds, deed of trust, and policy of insurance, to be renewed annually at his expense, and, in his default, by the association, the amount to be charged to the member conveying the property insured, who shall repay to the association the amount of such premiums at the time his next payment to the association falls due.

"§ 6. Should any stockholder, having received an advance on any portion of his stock, neglect or refuse to pay any or all of his dues to the association for three successive months, then the board may compel payment by instituting proceedings on the bond and other security according to law."

Article 23, §§ 1, 2, 3, are as follows:

"§ 1. Whenever it shall appear by the books of the association that there is sufficient money in hand and due the association to pay on each unredeemed share, to the holder thereof, the sum of two hundred dollars, over and above all liabilities of the association, all arrears of monthly dues, fines and otherwise, shall become payable at once.

"§ 2. On such exhibit of the books, the board of directors shall pay, satisfy, and discharge, first, all debts and liabilities of the association, and then pay over to the owners of each unredeemed share an equal dividend of all sums on hand, and which shall afterwards be received, until the whole shall be divided; and from the time of the commencement of such dividends no further *monthly dues or premiums shall be payable, except that all arrears shall be fully paid up. And the board shall deliver to each grantor in trust, who has complied with the condition of his deed, a release and discharge thereof, duly executed as before prescribed, and all papers connected therewith.

"§ 3. After the performance of the foregoing duties, this association shall cease to exist; and it shall not sooner be dissolved; nor shall this article be altered, amended, or repealed, without the unanimous consent of all the voting shares belonging to this association."

The shares in this association, amounting to twelve hundred, were taken; George A. White taking fifty in his own name; and forty were taken in the name of his brother, E. A. D. White; and the association was organized on the 19th of November 1867.

On the 25th of November 1867 George A. White obtained an advance or loan of \$1,198 on twenty shares of his stock. December 14th of same year, he obtained another advance of \$1,020, on fifteen shares. January 15th, 1868, he obtained another advance of \$915, on fifteen shares. March 14th, he obtained another advance of \$600, on ten shares; and June 15th, obtained another advance of \$550, on ten shares. When

Moran v. Brent, 26 Gratt. 104, and note; Kendrick v. Whitney, 28 Gratt. 646, and note; Horton v. Bond, 28 Gratt. 815, and note. See also, Rohrer v. Travers, 11 W. Va. 155; Scott v. Ludington, 14 W. Va. 387.

each of these advances were made to him, he executed a bond to the association, and also a deed of trust. These bonds and deeds are all in the same form, and the same tract of land is conveyed in all of them. The condition of the first bond is as follows:

"The condition of the above obligation is such, that if the above bound G. A. White do well and truly pay to the said 'Mechanics Building Fund Association of Lexington' during its regular continuance, under the seventh section of its charter, passed May 29th, 1852, the monthly interest from the 25th day of November 1867, at the rate of six per centum per annum, on the sum of eleven hundred and ninety-eight dollars, advanced by *them to him, for the redemption of twenty shares of his stock therein, and partly on the credit of his said shares, and also the monthly dues (now fixed at one dollar on each share), fines, and all other proper charges on his said shares, as provided by, and in pursuance of the constitution and by-laws of the said association, from time to time; and also do, in case said association be dissolved before its regular termination under its charter aforesaid, or in case of the sale of any property conveyed in trust to secure this bond, well and truly pay the sum that the board of directors thereof may determine to be right and proper for him, according to the rate at which shares may be redeeming at the time of such sale or dissolution, to pay, in discharge of the penalty of this bond, and in lieu of the said sum of eleven hundred and ninety-eight dollars, then this obligation to be void; else to remain in full force and virtue."

The deed, after reciting the condition of the bond, conveys to Jacob Fuller and two others, a tract of land near Lexington, containing three hundred and forty-nine acres, upon trust, that upon White's failure to perform the condition of the bond, "the trustees, or any two of them, shall, whenever required to do so by the board of directors of the said association, take possession of, and sell at public auction, on the premises, after giving thirty days' notice of the time and place of sale, in one or more of the newspapers published in the town of Lexington, the property hereby conveyed, or so much as may be necessary," &c.

In June 1869, White ceased to pay the monthly dues upon his stock, and interest upon the advances to him; and on the 2d of February 1870, the board of directors of the association made an order, that the secretary notify G. A. White that, unless his arrearages of dues, interest and fines, are paid by the next meeting of the association, February 15th inst., the trustees will be directed to execute the trust as per article fourteen, section *six of the constitution. If this notice was received by White it was not complied with; and on the 25th of March 1870, the trustees advertised the sale of the land under the five deeds of trust.

After the sale was advertised, upon the application of White, statements of his accounts, as they were kept on the books of the association, was furnished him. According to these statements, on the stock standing in his own name, and the advancements made to him upon it, the balance against him on the 16th of April 1870, after giving him credit, for \$4,534.49, was \$7,728.70; and the balance on the stock standing in the name of his brother, E. A. D. White, after crediting him with \$2,448.75 was \$3,189.50; the two making \$10,918.20.

Upon receiving this statement, White applied to the judge of the Circuit court of Rockbridge county for an injunction to stop the sale of his land. In his bill, after setting out the loans that had been made to him, amounting to \$4,283, and that upon these loans he had paid \$358.24 prior to July 1869, which was more than six per cent. interest upon them, he insisted, that the payments of interest being required to be in advance was usurious. He filed with his bill the account which had been furnished him, and insisted it was impossible that, upon any just mode of settlement, upon a loan of \$4,283 for less than two years, he could owe \$10,918.20; for which sum and expenses he believed the trustees were advertising his property for sale. He insists that he is entitled to his shares of stock, which he believes are valued by the association at \$80 a share; and they are more than sufficient to pay back the advances to him, without any recourse to the trust property. And the advances having been made upon the credit of these shares, they should be first applied to the payment of them. He filed with his bill a copy of the constitution and by-laws of the association, and also of the acts of assembly.

239 *The injunction was granted; and the association demurred to, and also answered the bill. As to the interest, they say that they only charged the interest in amount and mode authorized by the statute under which the association was organized. As to the amount due from the plaintiff, they say that the statement furnished to him was not intended, and did not purport to present the amount claimed, and for which a sale of the land had been directed. But they do claim that the said G. A. White was in arrears to the Mechanics Building Fund Association on the 16th of April, on account of fines, dues and interest in the sum of \$ 861.70
And on account of premiums paid
on advances in the sum of . 6,867.00

7,728.70

And they claim that the said E. A. D. White was in arrears on the same day, on account of fines, interest and dues, 339.50
And on account of premiums on advances, 2,850.00

\$3,189.50

Which together make the sum of . \$10,918.20
All they ask from the plaintiff is for him

to pay the sum of \$861.70, the amount due from him on the 16th of April 1870, on account of instalments on his stock, interest on the advances received by him from the association, and fines for the non-payment of his monthly instalments; and all they ask and claim on account of the shares standing in the name of E. A. D. White on the same day, is the sum of \$339.50, due on the like account. They do not claim that the whole amount of the premiums paid by the said G. A. White must be paid in money; but that the premiums will be paid in part or entirely by being cancelled when the money advanced to the said White is returned.

240 *They further say, that by the provisions of the charter, section three, article fourteen, the plaintiff has assigned his shares to the association, and that he has no right, title, or interest therein, except to pay his monthly dues of one dollar per share, and to pay interest monthly on the advances received by him, unless he returns the money so received to the association; when the shares will be released from the liens of redemption, and he will hold them, and sell or redeem them a second time as he pleases.

They say that, under the provisions of the articles of association, Article 14, § 6, they have authority to compel payment from delinquent members who have received advances, by proceeding upon their bonds and other securities according to law; and it is expressly provided in the bonds executed by the plaintiff, that in case of the sale of any property conveyed in trust to secure the bond, he will pay the sum that the board of directors may determine to be right and proper for him, according to the rate at which shares may be redeeming at the time of such sale, to pay in discharge of the penalty of the bond. And in the event of a sale of the trust property to pay the arrearages due to the association for the sums advanced to him, or such other amount as the board may determine to be right and proper for him to pay, then, and in that event, the said shares may be sold by the said association in part satisfaction of the arrearages due them. And they say that, if the board of directors shall require the plaintiff to return the actual amount of money advanced on the said shares, his indebtedness to the association will amount, on the 10th of April 1870, to the sum of \$3,377.20, instead of \$10,918.20, as stated in the bill. And they make a statement to show how this result is attained. And they say that, though the board of directors have authority to require the plaintiff to pay, in lieu of the amount of \$4,283, the amount of the advances to him, such sums

241 *as may be right and proper, in no event can it amount to the sum of \$10,918.20, or any sum approaching it.

The cause came on to be heard on the 12th of September, 1870, when the court overruled the demurrer, but dismissed the bill. And thereupon George A. White ap-

plied to this court for an appeal, which was allowed.

The case was argued in Staunton at the August term, 1871, of the court, and was decided at Wytheville at the June term, 1872.

Fultz and Letcher, for the appellant.

Sheffey, for the appellees.

ANDERSON, J. The appellees are a body corporate, organized in November 1867, under the acts of May 29, 1852, and January 31, 1867, as a building fund association. The appellant was a member thereof, holding ninety shares of stock therein; fifty in his own name, and forty in the name of his brother, E. A. D. White; seventy of which were redeemed by the association, within the first seven months of its organization, for the sum of \$4,283. The remaining twenty shares were sold to the institution, and cancelled.

The appellant alleges in his bill, that the money was advanced to him as a loan, and that his shares were assigned to the association as a pledge or security for the same; and that upon the final division he is entitled to his shares, subject to a deduction for the advances made on them, which he understands will be contested by the appellees; and, therefore, he asks that the matter may be determined by the court, and his rights in the premises adjudicated. The answer of the defendants to this allegation does not clearly reveal the ground on which they stand. But in the argument the pretension of the appellant was earnestly opposed. And it is plainly negatived by the twenty-third article of the association, which provides, that the associ-

242 tion is to cease when the money *in hand and due is sufficient to pay two hundred dollars on each unredeemed share to the holder thereof, over and above all liabilities of the association. There is no provision for any payment on the redeemed shares. But as soon as there is money enough in hand and due, after paying debts and liabilities, to pay two hundred dollars on each unredeemed share, all further contributions to increase the capital stock are to cease; the holders of the unredeemed shares are to be paid, and the association to be dissolved. The deeds of trust are to be released where the grantors have complied with their requirements, but no money is required to be paid on the redeemed shares. No provision is made for it, and none intended ever to be made; for the association, after dividing all the fund accumulated amongst the unredeemed shares, is dissolved, and ceases to be. Evidently the parties who mutually agreed to form this association, and entered into these articles, did not intend, as now claimed by the appellant, that the stockholder who had received payment for his shares in advance should, at the final division, come in for a further payment.

If this article is within the scope and authority of the statute, the transactions of

the parties in conformity to it cannot be gainsaid. I was at first of opinion that it was irreconcilable with section 7 of the statute before referred to. That section is in these words: "Every such association, unless sooner dissolved by a vote of a majority of the stockholders, shall continue in being until the fund accumulated, including shares redeemed, and all property, money and other effects, shall amount to such a sum as will enable the company to divide on each share a sum equal to the par or ultimate value of the shares agreed upon in the articles, and no longer; and in such estimate the redeemed shares shall be estimated at their par value." The articles require a dividend to be made amongst the holders of the unredeemed shares when the

fund is sufficient to divide two hundred *dollars a share amongst them.

This section of the statute requires division to be made only when the fund is sufficient to pay on "each share" (which means redeemed and unredeemed) two hundred dollars, and requires the association to continue in being until then, "and no longer." The other requires the association to continue in being until the fund is sufficient to divide two hundred dollars amongst the unredeemed shares only, and requires it to be paid to the holders of them, and that the association shall then be dissolved. The one contemplates and requires that the association shall terminate when the fund is sufficient to divide two hundred dollars amongst all the shares, redeemed and unredeemed. The other requires the dissolution when the fund is sufficient only to divide two hundred dollars amongst the unredeemed shares, and requires that the whole of it shall be divided amongst the holders of the unredeemed shares. How can they be reconciled?

The difference is only apparent. The statute provides that, in ascertaining the sufficiency of the fund for division, the redeemed shares shall be computed at their par or ultimate value, as a part of it. The articles do not include them in the fund for division. The statute treats them as the property of the association, having been paid for in advance, and therefore as assets. The article ignores them, as having been bought in by the association and sunk—merged in its capital stock, which consists of "money in hand and due the association;" and therefore provides that it shall be dissolved when "there is sufficient money in hand and due the association for the purposes of division," &c. So that, in fact, the condition of the association is precisely the same when it is to be dissolved, either by the statute or by the articles—that is, when its actual fund is sufficient to divide two hundred dollars on the unredeemed shares. To illustrate it, suppose there were twenty shares, ten of them redeemed,

and the remaining ten unredeemed.
244 *The fund required to divide two hundred dollars on each share, redeemed and unredeemed, is four thousand dollars. But according to the provision of the stat-

ute, two thousand dollars of that fund consists of the estimated value of the redeemed shares, which leaves two thousand dollars, which is only sufficient to pay the unredeemed shares, and there is, in fact, nothing provided by the statute to pay the redeemed shares. And there was no occasion for it, as they had already been paid in anticipation.

This view also comports with the declaration of the purposes of the act of incorporation in the first section: to accumulate "a fund which will enable its respective members to purchase houses and lots," &c; "and for the further purpose of distributing among the members who do not receive aid by advances on their shares, for the object aforesaid, their proper dividends of the funds so accumulated in money." It seems to have been contemplated, that one class of stockholders would be aided by the use of money, in acquiring and preserving homesteads, whilst the other class was to receive a dividend of the fund accumulated. By this construction these sections are in harmony one with the other, and both are in harmony with the articles of association. We are of opinion, therefore, that the appellant, by the assignment of his shares for the sums paid him by the association, parted with his property in them, and that he is not entitled to receive a dividend upon them in the division of the assets of the association; that the redemption of his shares was in conformity with the requirements of the statute, and the articles of association; and that, when the assets of the association, exclusive of the redeemed shares, are sufficient, after payment of debts and liabilities, to pay on each unredeemed share, to the holder thereof, the sum of two hundred dollars, all monthly accruing demands of interest and payments

on stock and fines must cease; a di-
245 vision of the assets be *made amongst the holders of the unredeemed shares; the grantors in deeds of trust, who have complied with the conditions and requirements of their deeds, released; and the association be dissolved. Whether these conclusions will subject the advanced stockholder to onerous burdens, is a matter the opinions in relation to which widely differ. It is contended on the one hand, that the institution operates very beneficially to the man who has but small means, and who is destitute of a home that he can call his own, as it will enable him to acquire property in a home for himself and family, and pay for it in the course of six or eight years, at a cost very little exceeding what he would have to pay in rent for a leasehold for the same period. On the other hand, it is contended, that the exactions operate as a grinding oppression on those who find themselves unable to meet the requisitions.

Which of these opinions is correct, we will not undertake to say. If the transactions and dealings of this association with its members are warranted by statute, and that statute is warranted by the constitution, though they may operate harshly and

oppressively, it is not the province of the courts to relieve. The fault is in the law, which the legislature alone can alter; or in the improvidence of the party, which neither the legislature nor the courts can remedy. We will remark, however, that such institutions have existed in England for many years, and in America from a period long anterior to the first recited statute. And it would seem that they must have been regarded as useful institutions where they have been so long sustained. But we will remark further, that whether this association proves beneficial or not to the advanced stockholder, there is an exhibit it makes in this case, which shows very great inequality between the two classes of stockholders; and that is, whilst the appellant has received upon an average only \$61.90 a share for his

stock, the unadvanced stockholder
246 *will receive \$200 a share for his; a difference on each share of \$138. It is true that the former receives payment in advance; but he is required to pay interest monthly upon the sum he received, until the unadvanced stockholder receives his \$200; and is required to pay all the other requisitions which the unadvanced stockholder is required to pay. This inequality would not be, if redemption could be regarded as a loan and security, and the advanced stockholder, as still the owner of his shares of stock, subject to a charge for the sums advanced upon them. But we find that the articles of association are plainly to the contrary, and that, upon a careful scrutiny, they are supported by the statute; and we are bound to enforce the law as it is written.

As to the charge of usury in the bill, we do not think it is supported. But is not the difference between the sums paid to the advanced and unadvanced stockholders on their shares, a premium paid by the former, at least in part, in addition to the six per cent. interest which he is required to pay on the money which he received upon his shares of stock, and, therefore, within the prohibition of the eighth section? I was strongly inclined to that opinion. But upon a careful review of the case, the consideration that this excess which one class of stockholders receives over the others for their shares is produced by the payment of interest authorized by the eighth section, and the requisitions expressly authorized by the proviso to the prohibition, and that the seventh section requires the division to be made in a way by which these monthly payments necessarily enure to the benefit of the unadvanced stockholder, by raising his shares of stock to the par or ultimate value, I yield my doubts, and concur with my brethren in the opinion, that it is authorized by the statute, and, therefore, cannot fall within the prohibition of the eighth section.

Hitherto we have considered the case upon the contract of redemption, and the
247 assignment of the appellant's *shares to the association, upon the hypothesis that the appellant meets the regular

requisitions upon him until the association is dissolved by force of the charter. We have now to consider it in the other aspect—that is, in a case where the association is dissolved by the vote of the stockholders, as authorized by the statute, before a dissolution by force of the charter could take place; or in a case where the appellant is in default in the payment of the regular monthly dues and fines, so that his property conveyed by the deeds of trust to secure the payment during the continuance of the association, or a part of it, has to be sold before the termination of the association.

The stockholders might desire to dissolve the association long before its regular termination by force of the statute. Suppose they had desired to dissolve the association at their next meeting after the seventy shares of appellant had been redeemed, when he had paid in only nine dollars on the share, upon which he had received \$61.90; they could not do so in justice to the other members of the association, unless they could require appellant to return a part of what had been paid to him. Or suppose that, long before the accumulated fund, after paying debts and liabilities, was sufficient to divide two hundred dollars on the unredeemed shares, which is this case, the appellant stops payment, and refuses to pay up the arrearages against him, and that the board, in order to enforce payment, directs his property conveyed in trust to be sold, and his property is sold—what security has the association that he will afterwards continue to pay, in fulfilment of his solemn covenant, until the association is in condition to dissolve? What provision is made to meet these contingencies?

It is the agreement, evidenced by the bonds of appellant and his deeds of trust, that in either of those contingencies he will pay such sum in discharge of his obligation, and in lieu of the principal
248 sums which had *been advanced to him, as shall be determined to be right and proper by the board of directors, "according to the rate at which shares may be redeeming at the time of such sale or dissolution." And the deeds of trust require the trustees to pay such sum to the association, out of the proceeds of the sale, in addition to the arrearages on account of monthly dues and fines, which he may be owing. It is virtually an agreement that the association will take the appellant's shares of stock, with his covenants in relation to them, and the security he offered for the fulfilment of those covenants, for the price paid; with condition that if he shall fail to fulfil his covenants, and the security has to be sold, he will pay back such sum as the referees mutually chosen shall determine to be right and proper, according to a certain specified rule or method of ascertaining it. We can perceive nothing in such an agreement that would render it unlawful, or the parties incompetent to make it.

The only remaining question is, Was it a proper case for an account? or ought the

amount of appellant's indebtedness to have been ascertained before the injunction was dissolved? In *Smith & al. v. Flint & al.*, 6 Gratt. 40, it was held that the sale of land should not be directed, though unquestionably chargeable in equity, until the amount of the debt is ascertained. Judge Cabell, delivering the opinion of the court, says: "John S. Wellford, executor, has an unquestioned lien for the payment of his debt; and if the amount had been ascertained, it would have been proper to direct a sale of the land for its payment. But as the record states that it did not appear to the court what amount was due, the decree for a sale of the land for the payment of that debt was premature and erroneous." See also *Lane v. Tidball*, 1 Va. R. 130.

A part of the debt for which the sale, it seems, was to be made, to wit, \$1,201.28—the balance due from the appellant on account of monthly dues and fines—
249 *was well ascertained; and the deed of trust expressly authorizes a sale for any default in those payments. But the appellant alleges in his bill, and it is not denied in the answer, that the land advertised to be sold was worth, and would sell for, vastly more than the amount so due. It was clearly competent for him to have objected to the sale of the whole tract to satisfy that sum. The trustees are the agents of both parties, and are bound to have respect to the rights and interests of both in the administration of the trust. And if the appellant had laid off a portion of the tract, and requested the trustees to sell that to satisfy the arrearage of monthly dues and fines, and their authority was limited to sell for that sum, it would have been their duty to comply with the request, unless they had reason to believe that the portion so laid off was insufficient, or that their compliance might impair or endanger the security which the deed was designed to give for his other indebtedness.

But in this case the record does not show that the appellant proposed to lay off a part or parcel of the land conveyed to be sold to satisfy this debt, or that he requested the trustees to sell in parcels. No such request having been made, and no proposition made to lay off and sell any particular portion of the land, was it required of them, as the agents of both parties, to have done so of their own motion? The case did not present that question for their decision.

It was not their purpose to sell only to satisfy the arrearage of \$1,201.28, but the sum also which the appellant was liable to pay in lieu of the principal sums advanced to him, which was to be ascertained and determined on by the board of directors, which they are authorized by the deeds to do. For the deeds expressly require the trustees to pay that sum out of the proceeds of sale, and the balance, if any, to
250 pay over to the *grantor. And we are here met by the question, Was it necessary that such sum should be ascertained before sale was made?

It was not necessary that the appellant

should know the amount in order to stop the sale by its payment. He was authorized to stop the sale without paying any part of it; that is, by the payment of \$1,201.28. And inasmuch as the question as to the amount due and owing on the latter account could be as well determined after as before the sale, and was not in conflict with the deeds, but seems to have been contemplated by them, and was authorized upon any default, and the determination would be equally subject to judicial supervision, whether made before or after the sale, I was inclined to think that this case did not fall within the principle of *Smith v. Flint*, supra, and that the sale could be made within the authority of the deeds of trust before the chosen referees had determined what sum should be paid in lieu of the principal sums advanced. But my brethren being of opinion that the amount should have been ascertained before the sale, and as the uncertainty as to the extent of the charge upon the land might in some way have prejudiced the sale, I yield to their judgment.

The court is therefore of opinion, that the board of directors should have ascertained and determined what sum was due from the appellant in lieu of the principal sums advanced to him by the association before they made sale of the land conveyed to them, and that the decree dissolving the injunction was therefore premature and erroneous, and for this cause must be reversed.

The other judges concurred in the opinion of Anderson, J.

The decree was as follows:

This case having been heard by the
251 court at its place of session at Staunton, where it is pending, but not having been there determined, this day came on for determination here; whereupon the court having maturely considered the transcript of the record of the decree aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing, to be filed with the record, that the Building Fund Association, by the redemption of the appellant's shares of stock, acquired the right of property therein; and that the assignment of them to the association, by the appellant for the price he received, was not an hypothecation for a loan, but an absolute surrender of them to the association, whereby they were sunk and extinguished, and consequently could not entitle the appellant to participate in the final division and distribution.

The court is further of opinion, that such division and distribution is required to be made when the accumulated fund is sufficient to pay on each of the unredeemed shares two hundred dollars, after the payment of all debts and liabilities of the association, and that the twenty-third article of the association on this subject is authorized by section seven of the statute.

The court is further of opinion, that the assignment of his shares of stock by the appellant to the association, did not release

him from his covenant, as a party to the articles of association, to make his regular monthly payments on stock, and on account of fines, and that the enforcement of his said obligations is secured by his bond and deed of trust, by which also he obligates himself to pay interest at the rate of six per cent. per annum on the sums actually received, as authorized by section eight of the statute, until the termination of the association; and that the transactions between the parties were not usurious, nor within the prohibition of the said eighth section.

The court is further of opinion, that for any default in the payment of monthly dues or fines, the trustees were authorized and required to sell, when requested 252 by the "board of directors, the property conveyed to them in trust by the appellant, not only to satisfy the arrearages due, but also such sum as might be due and payable by him on account, or in lieu, of the principal sums advanced, or paid to him for his shares, to be ascertained and determined by the board of directors, who are the chosen referees of the parties for that purpose, according to the rate at which the shares may have been redeeming at the time the sale was advertised to take place; but that such sale ought not to be made until such indebtedness was ascertained, and that, consequently, the decree dissolving the injunction, and allowing the trustees to proceed with the sale before the amount of the debt charged upon appellant's land was so ascertained, was premature and erroneous.

It is, therefore, decreed and ordered, that for this cause, said decree be reversed and annulled, and that the appellees, The Mechanics Building Fund Association of Lexington, pay to the appellant his costs expended in the prosecution of his appeal aforesaid; and the cause is remanded to the Circuit court of Rockbridge for further proceedings to be had therein, in conformity with the principles of this decree; that an account be directed to be taken by a commissioner of said court to ascertain the amount of plaintiff's indebtedness to the association on the 26th day of April 1870, on account of arrearage of interest, monthly payments on stock and fines, and also an account of principal sums paid to him by the association, as may be ascertained and determined by the board of directors, according to the rate at which shares were redeeming at that time, it being the time when the property was advertised to be sold, and the time when the accounts should be closed. And that said commissioner be required to report to the court thereof, with such testimony as either party may offer, bearing upon the questions submitted to him, in order to a final decree.

253 *Which is ordered to be entered on the order-book of the court here, and to be forthwith certified to the clerk of this court at Staunton, who shall enter the same on his order-book, and certify the same to

the clerk of the Circuit court of Rockbridge county.

Decree reversed.

BUILDING AND LOAN ASSOCIATIONS.

- I. Organization of Association.
- II. Constitution of Association.
- III. Loans and Security.
- IV. Usury.
- V. Redemption of Stock.
- VI. Assignment of Shares.
- VII. Withdrawal of Members.
- VIII. In General.

I. ORGANIZATION OF ASSOCIATION.

The act of May 29, 1862, which authorizes the organization of building fund associations without order of court, has not been repealed by subsequent statutes. *Davies v. Creighton*, 33 Gratt. 696. (1880.)

This act was omitted from the Code of 1887, and, being a law of a general nature, was repealed by § 4202. *Crabtree v. Bldg. Ass'n*, 96 Va. 673, 29 S. E. Rep. 741. (1898.)

II. CONSTITUTION OF ASSOCIATION.

The articles of an association prescribe the limits within which the corporation can properly act; the by-laws indicate the extent to which the corporation has seen fit to put into action the powers which the articles have conferred, and though the charter or articles in conferring the power may use imperative or mandatory language, yet if it be a benefit, a privilege or advantage conferred upon the corporation, such as the power to impose fines on delinquent stockholders, and not a duty imposed, it may qualify, diminish, or waive its exercise in whole, or in part. *Dupuy v. Eastern B. & L. Ass'n*, 98 Va. 460, 26 S. E. Rep. 537.

General Statute.—When the statute provides that, "stated dues, fines, etc.," may be assessed and collected, the association may levy reasonable fines and may provide for payment of a reasonable transfer fee and the payment of these may be enforced by the corporation. *McGannon v. Cent. Bldg. Ass'n*, 19 W. Va. 726; *Dupuy v. Eastern B. & L. Ass'n*, 98 Va. 460, 26 S. E. Rep. 537; *Parker v. U. S. Bldg., etc., Ass'n*, 19 W. Va. 744.

New York Statute.—According to New York law, an association has no power to guarantee that stock will be matured in a fixed time. To hold otherwise would be to so decide at the expense of other stockholders.

Nor is obligation to pay dues on stock void for uncertainty. The company had no power to make anything but an indefinite contract, so far as the time when its stock would mature is concerned. *Campbell v. Bldg. Ass'n*, 98 Va. 735, 27 S. E. Rep. 350.

Representations of Agents.—A building association is not bound by the statements of their agent as to a balance due on a loan, it appearing that his duty was simply to receive and receipt for premiums and dues payable to the association. *Day v. Bldg. Assoc.*, 96 Va. 486, 31 S. E. Rep. 902.

III. LOANS AND SECURITY.

Priority of Liens.—A building fund company agrees to advance to one of its members money to build a house on a lot owned by him, and advances a part of the money and takes a lien upon the lot and the buildings which may be erected upon it, to secure the advances made and to be made. The member

then makes a contract for the building of a house on the lot, with a mechanic who, to raise money faster than it can be gotten from the company, assigns the contract to a person who undertakes to advance the money; and the contract is recorded, so as to create a mechanic's lien. After the contract is recorded, the company advances money from time to time, as it had agreed to do, which is paid to the assignee in part satisfaction of his advances to the mechanic, with a knowledge on his part, that it comes from the company, and that the company claims priority of lien upon the property. The company is entitled to priority over the mechanic's lien, for its advances made after the contract was recorded, as well as for its advances made before. *Iaeger, etc., v. Bossieux*, 15 Gratt. 83, 76 Am. Dec. 189; *Nat. Mut. Bldg. Ass'n v. Blair*, 96 Va. 49, 36 S. E. Rep. 513.

Sale under Deed of Trust.—Borrower from a building association gave a deed of trust allowing sale on defaults for *cash* enough to pay sums *due* to association and *credit* as to the residue. *Held*, such deed did not authorize sale for *cash* enough to cover amounts not yet due. *Fox v. Cottage Bldg. Fund Ass'n*, 81 Va. 677.

When a deed of trust authorizes a sale to pay an amount to be ascertained by referees appointed according to the articles of association, the sale should not be made until such indebtedness is ascertained. *Nat. B. & L. Ass'n v. Ashworth*, 91 Va. 706, 23 S. E. Rep. 521; *White v. Mech. Bldg. Fund Ass'n*, 23 Gratt. 233; *Moran v. Brent*, 25 Gratt. 104, and *note*; *Kendrick v. Whitney*, 28 Gratt. 646, and *note*; *Horton v. Bond*, 28 Gratt. 815, and *note*; *Rohrer v. Travers*, 11 W. Va. 155; *Scott v. Ludington*, 14 W. Va. 387; *Christian v. Cabell*, 22 Gratt. 82; *Lipcombe v. Rogers*, 30 Gratt. 660; *Wash., etc., R. Co. v. Alex., etc.*, R. Co., 19 Gratt. 617; *Carroll Co. v. Collier*, 22 Gratt. 310; *Palro v. Bethell*, 75 Va. 881; *Alexander v. Howe*, 85 Va. 201, 7 S. E. Rep. 248; *Muller v. Stone*, 84 Va. 838, 6 S. E. Rep. 223.

Insurance—Security.—A building association has not an insurable interest in the life of a member who is in no wise indebted to it. Nor can the company defeat the claim of the assignee of such member by confessing judgment in favor of another creditor. *Tate v. Bldg. Ass'n*, 97 Va. 82, 33 S. E. Rep. 322.

IV. USURY.

The legislature may create a corporation with power to make contracts contrary to existing usury laws. But the courts have no such power. The power that erects may remove. Art. I, § 6 of the Bill of Rights has no application to such case. *Smoot v. Bldg. Ass'n*, 95 Va. 686, 29 S. E. Rep. 746; *Town of Danville v. Pace*, 25 Gratt. 1; *Bosang v. B. & L. Assoc.*, 95 Va. 119, 30 S. E. Rep. 440; *Crabtree v. Old Dom. Bldg. Ass'n*, 95 Va. 670, 30 S. E. Rep. 741; *White v. Mech. Bldg. Fund Ass'n*, 23 Gratt. 233; *Archer v. Balt. B. & L. Ass'n*, 45 W. Va. 37, 30 S. E. Rep. 241; *Pfeister v. Bldg. Ass'n*, 19 W. Va. 676; *Parker v. U. S. Bldg. Ass'n*, 19 W. Va. 769. See monographic *note* on "Usury" appended to *Coffman & Bruffy v. Miller*, 26 Gratt. 698.

Building associations are authorized to adopt by-laws fixing a minimum premium at which to award loans to their members, such premiums to be deducted from the loans in advance or paid in periodical installments. *Archer v. Baltimore Building & Loan Ass'n*, 45 W. Va. 37, 30 S. E. Rep. 241; *Counselman v. Nat. B. & L. Ass'n*, 97 Va. 261, 33 S. E.

Rep. 698; *Gray v. Balt. Loan Ass'n (Va.)*, 37 S. E. Rep. 533.

A charter granted under § 1145 of the Code is subject to the general laws of the commonwealth. An association organized under § 1145 cannot vouch its charter to justify or excuse any violation of the law upon the subject of usury. *Crabtree v. Bldg. Ass'n*, 95 Va. 670, 29 S. E. Rep. 741.

The *locus solutionis* determines whether the contract be usurious. If the by-laws show that the contract is to be performed in a state by whose laws the contract is valid, the contract will be deemed valid where made. *Nickels v. People's Bldg. Ass'n*, 93 Va. 380, 25 S. E. Rep. 8; *Nat. B. & L. Ass'n v. Ashworth*, 91 Va. 706, 22 S. E. Rep. 521; *Ware v. Banker's L., etc., Co.*, 95 Va. 680, 29 S. E. Rep. 744; *People's B. & L. Ass'n v. Tinsley*, 96 Va. 322, 31 S. E. Rep. 508; *Counselman v. Bldg. Ass'n*, 97 Va. 261, 33 S. E. Rep. 608; *Saunders v. Balt. Ass'n (Va.)*, 37 S. E. Rep. 775.

V. REDEMPTION OF STOCK.

A building fund association by the redemption of shares of stock acquires the right of property therein. The assignment thereof to the association is not an hypothecation for a loan, but an absolute surrender of them to the association, and consequently cannot entitle such assignor to participate in the final division and distribution. *White v. Mech. Bldg. Fund Ass'n*, 22 Gratt. 233; *Winchester Bldg. Ass'n v. Gilbert*, 23 Gratt. 787; *Cason v. Seldner*, 77 Va. 293.

In this case the division was required to be made when the accumulated fund should be sufficient to pay on each of the unredeemed shares two hundred dollars; after the payment of all debts and liabilities of the association. *Held*, such an article of the association is not in conflict with § 7 of the statute under which the association was organized. *White v. Mech. Bldg. Fund Ass'n*, 22 Gratt. 233.

VI. ASSIGNMENT OF SHARES.

The assignment of his shares of stock to the association, does not release a member from his covenant, as a party to the articles of association, to make his regular monthly payments on stock, and on account of fines. Nor does a bond which obligates him to pay interest at six per cent. per annum on the sums actually received until the termination of the association render the transaction usurious. *White v. Mech. Bldg. Fund Ass'n*, 22 Gratt. 233; *Edelin v. Pascoe*, 22 Gratt. 836; *Winchester Bldg. Ass'n v. Gilbert*, 23 Gratt. 787. See monographic *note* on "Interest" appended to *Fred v. Dixon*, 27 Gratt. 541, and monographic *note* on "Usury" appended to *Coffman v. Miller*, 26 Gratt. 698.

VII. WITHDRAWAL OF MEMBERS.

The position of a withdrawing member is anomalous. He is not an ordinary creditor; he cannot compete with outside creditors. He is not a member, for he cannot take part in the affairs of the society. He cannot sue at all until there is money in the treasury legally applicable to the payment of his claim; and until that time the statute of limitations does not begin to run against him. If the association refuse to provide for such fund, he may ask for a receiver to wind up the affairs of the company. *Andrews v. Bldg. Ass'n*, 96 Va. 445, 36 S. E. Rep. 531.

The terms of a member's withdrawal from a building association are governed by the constitution of the association. Though the language used in the constitution be inappropriate in a particular case, yet if the general purpose intended can be carried

out, some of the details may be disregarded in order to effect the general purpose. *Haigh v. U. S. Bldg., etc., Ass'n*, 19 W. Va. 792; *Eastern Bldg. Ass'n v. Snyder*, 98 Va. 710, 37 S. E. Rep. 208.

VIII. IN GENERAL.

Forfeiture of Stock.—One who has forfeited his stock by reason of nonpayment of dues, cannot insist on such forfeiture to escape the liability incident to the ownership thereof when the company has waived such forfeiture. *Nickels v. People's Bldg. Assoc.*, 93 Va. 890, 25 S. E. Rep. 8.

Embezzlement.—One who as secretary of a building fund association receives and wrongfully appropriates its funds, cannot be heard, upon a criminal prosecution therefor, to contradict the legal existence of such association. *Shinn v. Com.*, 32 Gratt. 899; *Pixley v. Roanoke, etc., Co.*, 75 Va. 320; *Crump v. U. S. Mining Co.*, 7 Gratt. 352. See note in 11 Am. & Eng. Corp. Cas., N. S., 398 *et seq.*; *Nat. B. & L. Assoc. v. Ashworth*, 91 Va. 706, 22 S. E. Rep. 521.

Dissolution.—In a suit to wind up the affairs and to collect and distribute the assets of the association, all the stockholders should be made parties, including such as are alleged to have been illegally released from their obligations to the association. *Cason v. Seldner*, 77 Va. 299; *Styles v. Laurel, etc., Co.*, 45 W. Va. 574, 32 S. E. Rep. 227. See W. Va. Code 1899, §§ 25, 26, 27, 28, 29.

254 *Alex., Loud., & Hamp. R. R. Co. v. Burke & als.

June Term, 1872, Wytheville.

Absent, BOULDIN, J.*

Negotiable Notes—County Bonds—Banks.—C, trustee of a bank in liquidation, transfers to B the note of A, due to the bank, and certain county bonds which had been deposited with the bank by A as security for his note, to be applied first to pay a debt due B, and then for the trustee. After this transfer an order was made in a suit in the Circuit court of the United States, in which C, as trustee of the bank, was a defendant, appointing C receiver in the cause. The note having been protested for non-payment, B gives A notice that, unless the note was paid by a day specified, he would proceed to sell the county bonds; and the note not having been paid, B advertises the bonds to be sold at auction, specifying time and place. Notice of this sale is not given to A, but he has knowledge of it. A files a bill to enjoin the sale, making B and C defendants. **Held:**

1. **Same—Same—Jurisdiction.**—The transfer of the note and bonds to B, having been made before the appointment of C as receiver, the State court has jurisdiction of the case.
2. **Same—Same—Sale.**—The mode of making county bonds available being by a sale of them, the bank, whilst it held them, and B, after the transfer to him, had authority to sell them.
3. **Same—Same—Notice of Time and Place.**—A was entitled to notice of the time and place of sale of the bonds; but it appearing that he had actual knowledge of the fact a reasonable time before the sale was to take place, this was sufficient without a formal notice to him.

This case was argued in Richmond at the March term, and was decided at Wytheville at the June term.

*The case was heard before his appointment.

This is an appeal from a decree of the Circuit court of Alexandria county. The facts of the case, so far as it is material to state them, seem to be substantially

255 *these: Sometime previous to June 1861, the Alexandria, Loudoun & Hampshire Railroad Company borrowed of the Exchange Bank of Virginia, at their office of discount and deposit at Alexandria, ten thousand dollars, for which they executed their note, and at the same time, as collateral security for the payment thereof, they deposited with the said bank fifteen thousand dollars of the coupon bonds of Clarke county, in the State of Virginia. The note was renewed from time to time till the 1st of June 1861, when the last note for said sum of \$10,000 was given, payable six months after date. That note, not having been paid at maturity, was protested for non-payment, and has ever since remained unpaid. On the 12th day of July 1866, the said bank, by deed of that date, assigned and conveyed all its assets to George W. Camp, in trust for the purposes of liquidation, in pursuance of the act of the General Assembly, passed on the 12th day of February 1866, entitled "An act requiring the banks of this commonwealth to go into liquidation"—Acts of Assembly 1865-66, p. 204. At the time of the execution of the deed the note aforesaid was in possession of the bank, and passed to the trustee as part of its assets, together with the said coupon bonds, as collateral security for the payment of said note. After the execution of said deed, Burke, Herbert & Co., being holders of notes of the bank to the amount of \$8,500, an arrangement was made between them and Camp, trustee in said deed, whereby it was agreed that the said notes should be surrendered by the former to the latter, in consideration of which the former should be allowed thirty-three and one-third per cent. on the dollar on the \$8,500 of notes surrendered, and should have an interest in the said note of \$10,000 to the extent of \$2,833.33 $\frac{1}{3}$ and interest thereon, and that the former should undertake the collection of said note, retain the amount due themselves, and pay the excess to said Camp, trustee. Accordingly the said note of \$10,000, *and the Clarke county bonds held as collateral security thereof, were transferred by the said Camp to the said Burke, Herbert & Co., for the purposes aforesaid. On the 21st of November 1868, in a suit pending in the Circuit court of the United States for the district of Virginia, in which William H. Ryan was plaintiff, and said Camp, trustee as aforesaid, was defendant, an order was made appointing said Camp receiver of the said court in the said cause, and requiring him to take, hold, collect and distribute all the assets of the said bank, under the further direction and order of the said court. It appears that this order was made after the aforesaid arrangement was made between Camp, trustee, and Burke, Herbert & Co., and after the said arrangement by the former to the latter of the said note

for \$10,000, and the Clarke county bonds as aforesaid. The Alexandria, Loudoun & Hampshire Railroad Company having failed to make payment of their said note for \$10,000, or any part thereof, Burke, Herbert & Co., by a notice in writing, dated October 27th, 1869, required of them immediate payment of the said note, and notified them that, unless the same should be paid on or before the 10th day of November next thereafter, they, the said Burke, Herbert & Co., would, after that day, proceed to sell the said Clarke county bonds, and apply the proceeds of such sale to the payment of the said note. And payment not having been made as required by said notice, Burke, Herbert & Co. (or rather Burke & Herbert, who, it appears, were successors or assignees of Burke, Herbert & Co.,) on the 3d of December 1869, advertised in the Alexandria Gazette that they would, "on Saturday, the 15th day of January 1870, at 12 M. of that day, in front of the Mayor's office in the city of Alexandria, sell by public sale, for cash," the bonds aforesaid, described in the advertisement as "Fifteen thousand dollars of the bonds of Clarke county, in the State of Virginia, with interest coupons attached, from the 1st day of July 1861. These bonds, of one of the richest counties of the State, are secured by the first deed of trust on the Alexandria, Loudoun & Hampshire railroad, and offer an excellent opportunity for a safe and profitable investment.

On the 8th day of January 1870, just one week before the day fixed for the said sale, the Alexandria, Loudoun and Hampshire Railroad Company obtained an injunction of said sale from the judge of the Circuit court of Alexandria county. In the bill on which the injunction was obtained, the plaintiffs claim the right to discharge their said note by the payment of bills of the said bank; aver that they had offered to make such payment, which was refused; and charge that the said note had been fraudulently assigned by said Camp, trustee, for the purpose of defeating their right of set-off or payment as aforesaid; and that the said note was still the property of said Camp, trustee, and subject to such right of payment on their part. They also state that the said note was renewed on the 1st day of June 1861, while the city of Alexandria was occupied by the troops of the United States government, and all communication was cut off and interrupted between Alexandria, where the transaction took place, and Norfolk, Virginia, the place where the bank was located, by the then subsisting hostilities; and they submit that all contracts made between citizens separated by the hostile lines are utterly null and void, and that the transaction before referred to was such a contract. Copies of the notice and advertisement aforesaid were exhibited with the bill.

Answers were filed to the bill by the defendants Burke, Herbert & Co., and George W. Camp. An answer was also filed by W. M. Sutton, also made a defendant in the

cause, but it is immaterial to state for what purpose. The answers deny the allegations of fraud made in the bill, and affirm the reality and bona fides of the transfer to Burke, Herbert & Co., as aforesaid.

258 "They also deny that any tender had been made by the railroad company of payment of the note in bills of the bank. Camp, in his answer, also refers to the aforesaid order of the Circuit court of the United States, for the district of Virginia, appointing him receiver of the said court, and says that, in obedience to the said order, all the remaining assets and property of the said bank, which were at that time in his hands as trustee, came into his hands and were thenceforward held by him as receiver aforesaid. No evidence was taken in the cause, except an affidavit of Lewis McKenzie, president of the said railroad, which affidavit seems to have been read as evidence. It relates chiefly to offers which he says he made to pay the note in bills of the bank. It also states that "no authority, either verbal or written, was given to the said bank to sell the Clarke county bonds. They were left as collateral, neither party intending that they should be put in the market and sold, at the time of the loan, or at any time afterwards."

On the 28th of February 1870, a final decree was rendered in the cause, dissolving the injunction and dismissing the bill. No reason for the decree is stated therein, nor is any reference therein made to any opinion of the court. But there is an opinion of the court copied into the record, though it does not appear to have been regularly made a part thereof. It appears from that opinion, that the case was decided upon the last ground taken in the answer of Camp, that he had been appointed receiver of the Circuit court of the United States for the district of Virginia; the court being of opinion, that if the plaintiffs had any equities against the sale, they must go to that tribunal which had assumed and obtained complete jurisdiction of the property before the State court undertook to interfere with the sale.

From the decree aforesaid, the Alexandria, Loudoun & Hampshire Railroad Company applied for and obtained an appeal to this court.

259 "Beach, for the appellant, insisted, 1st, That there being no special agreement to confer on the bank the power to sell the security, it was not competent for the bank to sell, much less Burke, Herbert & Co. *Wheeler v. Newbould*, 16 New York R. 392.

2d, If creditors had authority to sell without judicial proceedings, personal notice to redeem, and of the time, place and manner of the intended sale, must be given to the pledger. And no such notice was given in this case.

3d, If the bill was dismissed on the ground that Camp was acting as receiver of the court, and the plaintiff's redress was in that court, the court should have expressed in its decree that the dismissal was without

prejudice. *Gaylord v. Kershaw*, 1 Wall. U. S. R. 81; *Durant v. Essex Company*, 7 Id. 107.

F. L. Smith and Claughton, for the appellees, insisted,

1st, That it was not necessary to give express authority to the pledgee to sell the bonds. *Story Eq. Jur.* § 1008; 2 Kent's Com. 582.

2d, That it was not necessary to give personal notice to the railroad company of the time, place and manner of sale; and their bill shows they had actual notice on all these points, for they file with it the advertisement.

MONCURE, P. delivered the opinion of the court. After stating the case he proceeded:

In the petition of appeal various errors in the decree are assigned, but it will be necessary to notice only a few of them. The counsel for the appellants contended that the State court, and not the Federal court, had jurisdiction of the controversy, and in this view we concur with the counsel. It sufficiently appears in the record that before the appointment of Camp as receiver, and while he was acting as trustee, he transferred the note and bonds to Burke, Herbert & Co., whose duty it thenceforward became to collect the note, and make

260 the *bonds available as collateral security, if necessary, for that purpose. They were invested with the title to the subject, for their own benefit, to a certain extent, and for the benefit of the trustee, Camp, or the creditors of the bank, as to the residue. They were entitled to pursue, in their own name, all the remedies which existed to make the claim available, and they had a right to do so as well after as before the appointment of Camp as receiver. That appointment was in subordination to the transfer to them, which was prior in time and paramount in right. If such appointment had been prior and paramount to the transfer to them, then we would have concurred with the Circuit court in considering that the remedy of the appellants, if entitled to any, was by an application to the Federal and not to the State court, and that on that ground the decree was rightly rendered. But differing as we do with the Circuit court in that respect, and regarding the controversy as a proper subject of litigation in the State courts, we proceed, in that view, to consider the errors assigned in the petition, or such of them as seem to be material.

The counsel for the appellants very properly placed no reliance on, if he did not expressly waive, such of the assignments of error as are plainly untenable. For instance, he placed no reliance on the first assignment of error, "That it was the duty of Camp, as trustee of the bank, to have received the notes of the bank in payment of the petitioner's negotiable note due to the bank." That it was not his duty to have done so, was expressly decided by this court in the cases cited by the counsel of

the appellee, *Camp, of Exchange Bank of Virginia v. Knox, &c.*, and *Farmers Bank of Virginia v. Anderson & Co.*, 19 Gratt. 739. It is proper to state, however, that those cases were decided after the appeal was applied for in this case. Nor did he place any reliance on the fourth assignment of error, "That the said note is invalid and

261 inoperative, the same having been made at *Alexandria whilst in the Federal lines, and payable to a person residing in the Confederate lines." This was a mere renewal of a note which had been long running at bank. It was merely the evidence of the debt, which remained the same debt, notwithstanding the renewal of the note from time to time. The appellant would have owed the debt if the last renewal had never been given, and would owe it if that renewal could be avoided. As the counsel for the appellee, Camp, rightly argued, "The note was discounted by the branch of said bank at Alexandria, and was held by the said branch as the authorized agent of the mother bank for collection. It so remained until the close of the war. *Ward v. Smith*, 7 Wall. U. S. R. 447."

But we will proceed at once to consider the only assignments of error relied on by the counsel for the appellants. They are the fifth and the sixth.

The 5th is in these words: "There being no special agreement to confer on the bank the power to sell the security, it was not competent for the bank to sell, much less Burke, Herbert & Co."

In regard to the right of a pawnee or pledgee to make the pawn or pledge available, the law is thus laid down in 2 Kent's Com. 582, marg.: "The English law now is that after the debt is due the pawnee has the election of two remedies. He may file a bill in chancery, and have a judicial sale under a regular decree of foreclosure; and this has frequently been done in the case of stock, bonds, plate and other chattels, pledged for the payment of the debt. But the pawnee is not now bound to wait for a sale under a decree of foreclosure, as he is in the case of a mortgage of land (though Lord Chancellor Harcourt once held otherwise), and he may sell without judicial process, upon giving reasonable notice to the debtor to redeem." To the same effect is the law laid down in 2 Story's Eq. § 1008.

In ordinary cases no special agreement is necessary to confer on the pledgee

262 *power to sell the property pledged. The power is, ordinarily, incident to the pledge. There are, however, exceptions to the general rule. The case of *Wheeler v. Newbould*, 16 New York R. 392, cited in the petition, is a case in which there was such an exception. There it was held that "the pledge of commercial paper as security for a loan of money does not, in the absence of a special power for that purpose, authorize the pledgee, upon the non-payment of the debt, and upon notice to the pledger, to sell the securities pledged, either at public or private sale; but he is bound

to hold and collect the same as they become due, and apply the money to the payment of the loan." The natural and proper mode of making such a security available was by collecting the money, and not by selling the security. The notes pledged in that case were due at short periods, and it could not have been intended by the parties that they might be sold by the pledgee, if the principal debt were not paid at maturity. But the same reason does not apply to property which can be made available only by a sale, or to make which available a sale is the proper and legitimate mode. In this case the pledge was of coupon county bonds, which are an ordinary subject of sale, and the proper and legitimate, if not the only, mode of making them available is by a sale. In *Wheeler v. Newbould*, the existence of the ordinary rule as laid down in *Kent* and *Story* supra, is admitted, and those authorities are referred to, and the cases of *Willoughby v. Comstock*, 3 Hill, N. Y. R. 389, and *Dykens v. Allen*, 7 Id. 497, are cited, in which the ordinary rule was applied to pledges of stock.

We, therefore, think it was competent for the bank to sell the bonds in this case, or would have been if the bank had not transferred them to *Burke, Herbert & Co.* We also think that it was competent for *Burke, Herbert & Co.*, as transferees of the note and bonds, to make the sale.

263 *It seems to have been conceded by the counsel for the appellants, in argument, that the Exchange Bank would have had a right to sell the bonds, and also that the assignment of the note carried with it an assignment of the pledge. In this case, the bonds were expressly transferred along with the note. But the counsel argued that the original pledgee was, in effect, a trustee, who could not delegate his trust, and therefore, that an assignee of the debt is not a trustee, and cannot sell the property pledged, though he may have it sold under a decree of a court of chancery. The counsel admitted that he could find no authority to sustain this view. The power to sell property pledged for the security of a debt does not arise from any peculiar trust reposed in the original creditor, but is an incident to the pledge, and a part of the security of the debt. It follows the debt in to whosoever hands it may come. That no authority can be found, or was not found, by the learned counsel to sustain his view, goes far, very far, to show that it is unsound. In the commercial world it must often occur that debts secured by a pledge are assigned, and that the assignee exercises the ordinary right of selling the subject of the pledge on the non-payment of the debt. We have not sought for cases of this kind, but doubt not there are many in the books. If there are not, it is doubtless because the right has never before been questioned. On principle, we think there is no doubt.

The sixth assignment of error is in these words: "Even if the creditors had authority to sell without judicial proceedings, personal notice to redeem, and of the time, place

and manner of the intended sale, must be given to the pledger. No such notice was given. 16 New York R. 392."

Certainly before a sale can be made by the pledgee, without judicial proceedings, he must give reasonable notice to the debtor to redeem. Such notice is indispen-

264 sable. *2 Kent's Com. 582, marg.; *Stearns v. Marsh*, 4 Denio's R. 227.

Such notice was given in this case. So also reasonable notice must be given to the debtor of the time and place of sale. Id. 2 Story's Eq. § 1008. "The creditor will be held at his peril to deal fairly and justly with the pledge, both as to the time of the notice and the manner of the sale." 2 Kent's Com., supra. It does not appear that in this case any formal notice of the time and place of sale was served upon or given to the debtor, but it does appear that the debtor had actual notice thereof, and that is sufficient. It is equivalent to the most formal notice. The only object of requiring notice to be given in such a case is to inform the debtor of the time and place of sale; and when he is already otherwise fully informed on the subject, to require a further and more formal notice to be given him is to require a vain thing. The case is not like a legal proceeding, in which service, or waiver of notice, should appear in the record. Here the whole matter is in pais, and the question is, Did the debtor have actual notice of the time and place of sale? The safest course is to have a formal written notice served upon him, for then the fact of notice can be easily proved. If this safe course be not pursued, the creditor must, at his peril, be prepared to prove otherwise that the debtor was informed of the time and place of sale a reasonable time before the same was to take place. Here there can be no doubt about the fact that the debtor had such information. The written notice to redeem was very specific, and notified the debtor that unless payment of the debt should be made on or before a certain day, the creditor would thereafter proceed to sell the bonds and apply the proceeds to the payment of the debt. The debtor, not having complied with this requisition to redeem, had every reason to expect that his failure would soon be followed by a sale, according to the notice.

Accordingly, early in December fol-
265 lowing, the very next month, *a sale of the bonds was advertised in the *Alexandria Gazette*, a newspaper published in the city which was the chief terminus of the road of the *Alexandria, Loudoun & Hampshire Railroad Company*, and the place, no doubt, where the principal office of the company was located and their chief officers resided. The day fixed for the sale was the 15th of January, more than a month after the advertisement was first inserted in the newspaper, and such insertion was to be continued weekly until the day of sale. If the fact of actual notice could not be inferred from these strong circumstances, there is other and conclusive evidence in the record of such actual notice. The in-

junction was obtained on the 8th day of January 1870, one week before the day fixed for the sale, and a copy of the advertisement is filed as an exhibit with the bill, thus conclusively showing that the plaintiffs were fully informed of the time and place of sale, just as much so as if a copy of the advertisement had been served upon them.

We are, therefore, of opinion that there is no error in the decree, and that it ought to be affirmed.

Decree affirmed.

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***The Homestead Cases.**

June Term, 1872, Wytheville.

[12 Am. Rep. 507.]

1. **Homestead—Constitutionality of Statutes.**—The Article XI, § 1, of the Constitution of Virginia, and the act of June 27th, 1870, ch. 187, passed in pursuance thereof, in relation to homestead exemptions, are in conflict with Article 8, § 10 of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts, so far as the Virginia Constitution and Act apply to debts contracted before that Constitution went into operation.
2. **Same—Same—Jurisdiction of State Courts.**—A State court has jurisdiction to decide that a provision of the Constitution of the State is in violation of the Constitution of the United States.

The three cases of *Tackett & Ford v. Stone*, *Goode v. Boyd's ex'ors*, and *Hill v. Burgin*, were heard together in Richmond, and they all present a single question—the constitutionality of the provision of the State constitution, and the act passed to carry it into effect, in relation to homestead exemptions.

The first case was a supersedeas to the judgment of the Corporation court of Fredericksburg, by which that court refused to allow to *Tackett & Ford* the benefit of the act. The second was an appeal from the decree of the Circuit court of Mecklenburg, to the same effect; and the third was a supersedeas to the judgment of the Circuit court of the city of Richmond, also disallowing the exemption. In all the cases the debts which were being enforced were due before the constitution was adopted.

The cases were argued by J. Alfred Jones, H. A. & J. S. Wise, Little, Mason and Grattan for the appellants, and Wallace, Sener, Keily, Page & Maury, for the
267 appellees. *The reporter was unavoidably absent during the argument, and therefore can only give the printed note of Messrs. Wallace and Sener for the appellees, and his own argument for the appellants.

Grattan, for the appellants:

The only question which I shall consider is, whether the 11th article of the constitution of Virginia, so far as it relates to Homestead exemptions, and the statute en-

acted in pursuance thereof, is in violation of the 10th section of the 8th article of the constitution of the United States, so far as that section provides that "no State shall pass any law impairing the obligation of contracts."

I have not examined, and therefore shall not refer to, any of the numerous cases which have been decided in relation to homestead exemptions. They have, I have no doubt, been cited by the counsel who have argued the cases now before this court; but I will consider the question with reference to such past and present legislation as is admitted, on all hands, to be legitimate and constitutional.

And first, let us try to ascertain the meaning and extent of this provision of the constitution of the United States. What is meant by the word "impairing," as it is here used? Let us suppose a case: A executes a bond by which he binds himself to pay to B, ten years after the date thereof, \$10,000, with interest at the rate of six per centum per annum from its date. After the execution and delivery of this bond, the General Assembly passes an act which provides that on all debts heretofore or hereafter contracted, only interest at the rate of four per centum per annum shall be paid. In this case no one will deny that the statute has lessened and restricted, and thus impaired the obligation of the contract. But take another case: Suppose such a bond executed, and an act is passed which provides that on all debts, whether heretofore or hereafter contracted, interest at the
268 rate of *ten per cent. per annum shall be paid. Here the statute has extended and enlarged, and has thus as effectually impaired the obligation of the contract as was done in the first case supposed, by lessening and restricting it. There are two parties to every contract, and the rights of both parties are intended to be protected and secured by this provision of the constitution of the United States.

In both the cases supposed the 10th section of the 8th article of the constitution of the United States is clearly violated. But let us suppose another case: On the first day of January 1860, A executes his bond by which he promises to pay to B, ten years after date, \$10,000. When this bond was executed gold and silver were the only legal tender in payment of debts, and the obligation, therefore, was to pay \$10,000 in gold and silver. But since the execution of the bond the government of the United States has issued a paper currency, and made it a legal tender in payment of debts; and in 1870, when the bond fell due, United States currency was at a discount of ten per cent. as compared with gold; and yet A pays his gold debt by United States currency: or, in other words, he pays to B one-tenth less in value than he contracted to pay. And yet this is constitutional and legitimate legislation.

And take another case: Suppose the bond executed in January 1870, payable in ten years from the date. We may hope, at

*See monographic note on "Homestead Exemption" appended to *Hatorff v. Wellford*, 27 Gratt. 350.

least suppose, that before 1880 United States currency will be withdrawn from circulation, and the legal tender act repealed. In this case, when the bond was executed, United States currency was in circulation and a legal tender; when the bond falls due only gold and silver is a legal tender, and thus A is required to pay for a debt which, when it was contracted, was worth but \$9,000 in gold, \$10,000 in that coin. And yet this is constitutional and legitimate legislation. And we see, therefore, that it is not every enlarging and extending of the obligation of the contract, nor every lessening and restricting of it, that is obnoxious to the charge of unconstitutionality.

The cases to which I have referred apply immediately to the contract; but since the Supreme court held that this 10th section of the 8th article of the constitution of the United States could be violated by impairing the remedies given by law for the enforcement of contracts, the cases in which legislation bears upon them are greatly extended. In some cases the remedies are restricted, but in many more they have been greatly extended. At common law the creditor, having obtained a judgment, might, by an execution of *ca. sa.*, take the body of his debtor and hold him in prison until he paid the debt. An act was first passed giving the debtor the liberty of the prison rules. Then another act was passed, called the insolvent debtor's act, by which he might get out of prison by surrendering his property; and at length, in 1849, the *ca. sa.*, as well as the *levari facias*, was abolished.

There is a case reported, I believe, in 12 Wheaton, which shows how these remedies may be acted on by legislation. It came up from Rhode Island. There they had, at one time, an insolvent debtor's law; but it was repealed, and the legislature was in the practice of passing special acts, on the application of an imprisoned debtor, to give him the benefit of the act. In the case to which I refer, a debtor had given the bond and taken the liberty of the prison bounds, and he then applied to the General Assembly for relief. That body being about to adjourn, passed a resolution authorizing him to give a bond, with condition to return to prison if the legislature did not at its next session pass an act for his relief. He gave the bond, and at the next session the act was passed, and he, therefore, did not return to prison. The creditor thereupon sued the debtor and his sureties in his bounds-bond, and they set out the facts I have stated in a special plea. To this plea the plaintiff demurred, and the Supreme Court of the United States held that it stated a good defence, and gave judgment for the defendants. I need not comment upon this case.

There are other cases to which I may refer as limiting and restricting the remedies upon contracts. One of these is the statute of limitations. At one time it required, in real actions, sixty years, then

thirty years, then, in the trans-Alleghany country, seven years, and now fifteen years to bar the action.

But it is when we look to the legislation enlarging and extending the remedies, that we find to what extent legislation may interfere with them, without a violation of the constitution.

By the common law, upon an *elegit* only one-half of the debtor's land in the State could be taken; and now, by the act of 1849, all may be taken. By the common law, only visible property, not including money, could be taken in execution under a *fi. fa.*; now by statute money and choses in action may be taken. By the common law, the lien of a *fi. fa.* only operated upon the visible property of the debtor in the county or corporation to which it was issued, and the lien only continued until the return day of the execution. By the statute the lien continues without limit as to time, and extends to all the real and personal property of the debtor, including his choses in action, whether in or out of the State. By the common law neither an *elegit* nor a *fi. fa.* could reach real or personal estate of the debtor out of the State. By the statute, under the lien of the *fi. fa.*, real and personal estate, including money and debts, out of the State may be subjected to satisfy the debt.

But not only existing common law remedies have been thus extended, but new remedies, unknown to the common law, have been provided by statute for the benefit of creditors. By the common law the remedy by distress for rent existed in

but one species of rent; and very few of such rents have existed in this country. But by statute the remedy by distress has been extended to all rents, and to this has been added the remedy by attachment against parties out of the State, or removing their effects out of it. By the common law, there was no mode by which a person living out of the State could be sued here. By statute, his property here may be attached and he proceeded against by publication, as if he was present. By the common law, the death of an obligor in a joint bond discharged his estate. By the statute, his executors may be sued as if the bond was several. By the common law, the makers and endorers of a negotiable note could only be sued separately. By the statute, they may all be joined in one action. By the common law, in an action against several parties, the judgment must be against all or none. By the statute, there may be a judgment against some and in favor of others of the defendants. Prior to 1861 there were various statutes of limitations. For eight years previous to 1870 all statutes of limitations were suspended, and since that time they are all again in operation.

But not only have remedies been abolished and added and extended by statute, but the property excepted from or subjected to the payments of debts, has been restricted and enlarged by statute. In addition to what

has been done by extending the operation of the *elegit* and *fieri facias*, I refer to the following cases: By the common law, the widow was not entitled to dower in an equitable estate; by the statute, she is entitled to it. Formerly, judgments and bonds were entitled to priority over simple contract debts in the administration of the personal assets of a deceased debtor; now by statute they all share equally. By the common law, real estate in the hands of the heirs was not liable to satisfy the simple contract debts of their ancestors; and now by statute it is liable.

272 An examination of the legislation of this and other States would, no doubt, furnish many other instances of interference with the remedies for enforcing contracts both as to the mode and the subjects excepted from or embraced in them; but those I have referred to will serve to illustrate my views on the question before the court. They abundantly attest a truth which it is well to keep in mind in considering the question. That truth is, that the creditor class of the community have moulded the legislation, and even the public sentiment, of the States, on the subject of contracts. They have applied their own commercial code of morals to the subject—a code which ignores all other relations and obligations but that of creditor and debtor, and of which the true and fitting representative is the Shylock of the Rialto, and its proper coat of arms is his knife and his scales.

When, however, a statesman comes to consider the subjects which concern the well-being of a whole people, he is compelled to see that there are other relations, with the obligations arising out of them, besides that of creditor and debtor. This relation with its obligations must always be important, and of great consideration in the mind of every wise legislator; but, as I have said, there are others, which he is bound to take into consideration, and which have never been entirely ignored under all the pressure which the creditor class has brought to bear upon the law-making power. These relations are those of husband and wife, parent and child, and citizen; relations springing from man's nature, sanctioned by God himself, to which, with the obligations arising out of them, He has set the seal of His high authority. They are relations even more important than that of creditor and debtor to the well-being of a State, prior in time, and based upon higher sanctions.

I have referred to the provisions which the law, even at the present day, makes 273 for the widow out of the real estate of the husband, and, until a late day, for the children. We have seen, too, that the husband in his lifetime was protected to the extent of one-half his land against the operation of the writ of *elegit*, and as to his money and choses in action as against a *fieri facias*. And it was only by the round about way of coercion of his person by a *ca. sa.* that he could be divested of

this property, and that only when he preferred to give up his property rather than remain in prison.

But the principle of exempting absolutely some of the property of the debtor from the grasp of his creditor has always been recognized and acted on. The wife's paraphernalia has, from the earliest times, been protected from the creditors of her husband; and also whilst a debtor's personal property, and half of his land, might be taken under an *elegit*, his beasts of the plow were left to him, obviously that he might have the means of cultivating the remaining half of his land, and thus fulfilling the obligations of husband and father. In addition to these exemptions, others have been created, by statute, saving to the debtor such articles as were most necessary for the comfort and support of his family. The amount of these exemptions differs in the several States, amounting in some to \$1,500 and \$2,000; and by the bankrupt law, in all cases, property is exempted to the amount of \$500, and also all State exemptions existing and in force in the year 1864. This act of Congress thus recognizing these exemptions, extending in some of the States to \$2,000, and others to one hundred and sixty acres of land, besides personal property, must be held as expressing the views of the government of the United States as to the propriety and sound policy of such exemptions, and the extent to which they may be carried. And as any man may become a voluntary bankrupt, it is obvious that every debtor may have the full benefit of the exemptions provided by the State in which he lives.

In this State we had not, prior to 274 the year 1864, extended these exemptions to more in amount than about \$500. And when we look to the class of debtors who then needed the benefit of these exemptions, it will appear that this amount was fully equal, as to them, to the amount of \$2,000 as to the great class of debtors for whom an exemption is now required. It is to be borne in mind, that an exemption is of no importance to a debtor unless he is insolvent, or so near it that his property will not pay his debts and leave him as much as the law exempts. Now, the great proportion of such debtors before the war were men of small property. In many cases neither their debts nor their property amounted to \$500. In the case of most of the other debtors a very small percentage of their debts would be paid after reserving to them the property exempted. And yet no one questioned the policy or the constitutionality of the exemption.

Since the war, another large class of the debtors of the State have become insolvent, or nearly so. These are the farmers and planters of the State, who, though they owed debts before the war, had generally ample means to pay them, and yet have a competence left. But the war having swept off their slaves and nearly all their personal property, leaving them little less than their lands, these lands are insufficient to pay

their debts; and therefore they ask for some relief from the overwhelming ruin which has been brought upon them, not by any misconduct or extravagance of their own, but by a calamity for which creditors and debtors are alike responsible. Of this class of debtors there are very few whose property will not exceed the amount exempted by the constitution; and there are few cases in which the property remaining will not afford a larger percentage on its debts than was obtained from the property of that class of debtors for whom the \$500 exemption was provided. Then, if it was proper and constitutional to exempt five hundred dollars out of the small property *that this last class of creditors possessed, how can it be said that the exemption provided for the present debtor class by the constitution is improper and unconstitutional.

When the principle of exemption is once admitted to be proper and constitutional, the amount of the exemption is a question of sound discretion, and that discretion is to be exercised in view of the condition of the country and the circumstances affecting the subject. And that, I submit, is a question for the legislative department of the government; and it is one upon which courts cannot enter. This court has frequently and lately expressed itself on this subject. On the question whether the keepers of billiard saloons could be subjected to a license tax, the court said: "The legislature must, in the nature of things, have a large discretion in determining the question as to what business can be reached by the ad valorem system, within the meaning of the constitution. The subject is indefinite in its nature, and although the instances enumerated in the constitution afford material aid in ascertaining the meaning of its framers in the use of the general words which follow the enumerations, still much room is necessarily left for the exercise of legislative discretion in the matter; and we certainly cannot say that such discretion has been so exercised in this case as to make the laws in question unconstitutional." *Lewellen v. Lockharts*, 21 Gratt. 570. In this case there are no instances given in the constitution by which a court may be guided; but it is a simple question of legislative discretion, dependent upon circumstances of which the court can have no judicial knowledge. And I again refer to the act of Congress to show how large a discretion that body considered as vested in the legislatures of the States.

One other topic, and I will conclude. This court has often said, and said in the case to which I have referred, that "certainly it ought plainly to appear that a law 276 is *unconstitutional to warrant the court in so declaring." And the constitution provides "that the assent of a majority of the judges elected to the court shall be required in order to declare any law null and void by reason of its repugnance to the Federal constitution or the constitution of this State;" showing that

it is only in cases of clear violation of the constitution that the court can interpose to annul a statute.

But all this relates to the action of the court upon a statute which is the act of the legislature; a body acting under the powers vested in them by the people by the constitution, and acting under delegated powers, and which can only exercise the powers thus delegated to them. But in this case it is not a question whether the power has been delegated. The question is, whether the sovereign people of Virginia—I say, sovereign people of Virginia, because this court has said, in a late case, that we are a sovereign State—whether the sovereign people of Virginia, acting in their sovereign capacity, establishing their supreme law, by which their legislators and courts and officers are to govern themselves, have, on this solemn occasion, and in this solemn instrument, violated the constitution of the United States.

It has been said by one of the judges of this court, in a late opinion, that the constitution of the United States might be violated by the constitution of a State as well as by a statute. I would respectfully suggest, that this is not a well considered opinion. I can well believe, that the Supreme court of the United States, with the contempt felt by that court, and by all United States authorities, for States, and the people of the States, may undertake to pass upon the most solemn acts of these people. That court is a branch of another government, deriving its authority from another constitution and from another source, and holds itself up, and is set up by others, when it suits them, as the special guardian of the constitution of the

United States; and it may, therefore, 277 *undertake to enquire whether the constitution of a State is or is not violative of that constitution. But the question here is, whether a State tribunal, deriving its authority from the State constitution, which sits here by authority of that constitution, and can only take jurisdiction of the case by virtue of that authority, can constitutionally undertake to pass upon the solemn act of the sovereign people of Virginia.

The pretension is, that the people acting in their capacity of sovereign, establishing their organic law, by which the frame of their government is fixed, and the powers vested in each department is defined, have given to their creature acting as their agent, the power and authority to annul their act, and defeat their will. To my mind, if the pretension is just, popular sovereignty is a farce.

Wallace and Sener, for the appellees:

The provision in the State constitution of Virginia, under which we are now living, article XI, section 1, and the act passed June 27, 1870, are in direct conflict with article 8, section 10, United States constitution, in so far as the provisions of said constitution and law propose to exempt property to the extent of two thousand dol-

lars from all liability to the payment of debts contracted prior to the adoption of said Virginia constitution, and so null and void.

And, first, The laws which exist at the time and place of the making of the contract enter into and form a part of it, and they embrace, we hold, alike those which effect its validity, construction, discharge, and enforcement.

(a) At the time of making 'this contract, the laws of Virginia then recognized, with slight exemptions, the liability of all present and after-acquired property, real and personal, of the debtor, for the payment of his debts; whereas this constitution and law proposes to exempt two thousand dollars'

worth of property of every debtor, 278 which *not only shifts and abridges the remedy of the creditor, but totally, pro tanto, denies all remedy, and all right of recovery.

(b) The decisions touching the right to deal with the remedy have never gone farther than to permit such a modification of the remedy as does not impair the obligation of the contract; i. e. you cannot so abuse the remedy as to make it work a denial of all rights. And the later decisions hold the broad ground that any interference with the remedy to that extent impairs the obligation of the contract. 4 Wall. U. S. R. 554; 8 Id. 575, and *infra*.

Nor can it be argued that this homestead law is constitutional, because poor debtors' laws are recognized, for Chief Justice Taney limits such laws to necessary implements of agriculture, tools of mechanics, or articles of necessity in household and wearing apparel. *Bronson v. Kinzie*, 1 How. U. S. R. 311.

Nor, secondly, can it be held that Congress, in readjusting the relations of the States to the Union, after the war, had any right to validate any special provision of a State constitution which was repugnant to the Federal constitution. *White v. Texas*, 7 Wall. U. S. R. 720:

A State can only pass such laws touching the remedy as do not clog with conditions, or so change the remedy as to make it not worth pursuing; a fortiori the remedy cannot be destroyed without the substitution of some other substantial remedy. And this provision, we hold, destroys all remedy, and it is well settled that all laws existing at the date of the contract for the enforcement, enter into and form a part of the obligation of the contract.

And for these propositions, we rely upon the following additional authorities:

8 Wheat. R. 1, *Green v. Biddle*; 12 Id. 213, *Ogden v. Saunders*; 1 How. U. S. R. 311, *Bronson v. Kinzie*; 2 Id. 608, *McCracken v. Hayward*; 6 Id. 301, 327, *Planters Bank v. Sharp*; 15 Id. 304, 319, *Curran* 279 v. *Arkansas*; *24 Id. 461, *Howard v. Bugbee*; 2 Wall. U. S. R. 10, *Hawthorne v. Calef*; 18 Gratt. 244, *Taylor v. Stearns, &c.*; 4 Wall. U. S. R. 553, *Von Hoffman v. City of Quincy*; 5 Id. 705, *City of Galena v. Amy*; 7 Id. 181, *Lee Co. v.*

Rogers; 8 Id. 575, 583, 584, *Butz v. City of Muscatine*; 9 Id. 477, *The City v. Lamson*; 10 Id. 511, *Railroad Co. v. McClure*; 1 Id. 175, 206, *Gelpecke v. City of Dubuque*.

CHRISTIAN, J. These three cases were heard together at the late session of this court at Richmond. The arguments of counsel were submitted just before the adjournment of that session, which left us no time for their consideration. They involve the question [so full of interest and importance to the whole people of this Commonwealth,] as to the validity of that provision of the State constitution and the act of the General Assembly, passed in pursuance thereof, which exempts from execution, or other legal process, a homestead to each householder or head of a family to the value of two thousand dollars.

This court, deeply impressed with the magnitude of the subject, and the high responsibility imposed upon it in the final adjudication of the question, has had the subject, since its adjournment at Richmond, under careful and anxious consideration.

It is much to be regretted that a subject of such general interest and importance should not, at an earlier day, have received the final adjudication of the supreme tribunal constituted by law, to pronounce the supreme law of the State, instead of being left to the decision of inferior courts, some of which have sustained the validity of the "homestead exemption," while others have pronounced against it, thus leaving the law unsettled, and the people, both debtor and creditor, in doubt as to their rights and liabilities.

Not long after the constitution of 280 the present court, *the announcement was made from the bench, by the president, that the court would take up out of its turn for hearing any case involving this question. No such case, however, was ready to be heard [until near the close of the last session at Richmond,] and we now proceed, at the earliest moment consistent with a due consideration of the important questions involved, to pronounce our unanimous judgment upon the cases submitted to us.

No question of greater delicacy can ever be presented to a judicial tribunal, and especially to one of the last resort, and from which there is no appeal, than a question involving the validity of an act of the legislature, particularly where the act is in furtherance of a provision of the organic law of the State, incorporated in the solemn form of a constitution. Such a law, in pursuance of such a provision, organic in terms, and purporting to speak in solemn form, the sovereign will of the people, must be always sustained and upheld, unless it is plain that it abrogates and annuls that "supreme law of the land," the constitution of the United States.

And while it is the duty of the judicial department generally to give effect to the acts of its co-equal and co-ordinate department, the legislative, and always in a doubtful case to solve the doubt in favor of

the validity of the law; on the other hand, it is one of its highest duties and most solemn prerogatives to declare what the law is. And where the legislative will, or the popular will declared in the solemn form of a constitution, is in contravention of the supreme law of the land, the judicial department must uphold that law, and unflinchingly guard it as inviolable. This principle and this duty grow out of no superiority, which the judicial department of the government claims over the legislative, but is inherent in the very nature and form of our system of government. In exercising this high authority, the courts claim no supremacy over the legislature.

281 They are only the administrators of the paramount law expressing the public will. If an act of the legislature is held void, it is not because the courts have any control over legislative power, but because the act is forbidden by the constitution, and because the will of the people therein declared is paramount to that of their representatives expressed in any law. The power, however, is a delicate one, and is always exercised with reluctance and hesitation. But it is a duty which the courts in a proper case are not at liberty to decline, but must firmly and conscientiously perform.

The provisions of the constitution, and the act of the legislature made in pursuance thereof, and validity of which is called in question in the cases before us, is in these words:

Article XI, section 1. "Every householder or head of a family shall be entitled, in addition to the articles now exempt from levy or distress for rent, to hold exempt from levy, seizure, garnisheeing, or sale under any execution, order or other process issuing on any demand for any debt heretofore or hereafter contracted, his real or personal property, or either, including money or debts due him, whether heretofore or hereafter acquired or contracted, to the value of not exceeding two thousand dollars, to be selected by him," &c.

The single question which we have to determine is whether this provision of the State constitution, and of the act of 1870, which is but a copy of this article, is in violation of the provision of the constitution of the United States, which declares that "no State shall pass any law impairing the obligation of a contract."

We may observe, before proceeding to discuss the main question, that this prohibition of the Federal constitution is upon the State, without regard to the form its laws may take, or the agencies which enact them. It is certain that the obligation of a contract can no more be impaired by the constitution of a State than by an act

282 of its legislature. It has been well settled by the adjudications of the Supreme court of the United States, that a State can no more impair the obligation of a contract by adopting a constitution than by passing a law. In the eye of the constitutional inhibitions they are substantially

the same thing. *Dodge v. Woolsey*, 18 How. U. S. R. 334; *White v. Hart et al.*, (not yet reported). December term, 1870.

The validity of the law in question is attempted to be maintained upon three grounds:

1st. That when the constitution containing the homestead provision was adopted, Virginia was not a State of the Union; that she had sundered her connection as such, and was a conquered territory wholly at the mercy of the conqueror; and that hence the inhibition of the States, by the constitution of the United States, to pass any law impairing the obligation of contracts, had no application to Virginia; that the constitution, having no validity until approved by Congress, was the act of Congress, and not of the State; and though a State cannot pass any law impairing the obligation of contracts, Congress may; and that for this reason also the inhibition in the constitution of the United States has no operation.

2d. That the law in question affects only the remedy, and does not impair the obligation of contracts; that all exemption laws must be considered as affecting the remedy only, and that the legislature has the right to modify the remedy as it may deem proper.

3d. That the power of the legislature to exempt certain articles of necessity has never been questioned, and that the amount of exemption is a matter of discretion with the legislative department of the government, with which the judicial department cannot interfere.

It is upon these three propositions that the argument in favor of the validity of the "homestead exemption" is based; and, if either one is sound, the law must be sustained as valid and constitutional.

283 *As to the first proposition, to wit, that the inhibition of the constitution of the United States applies to States in the Union, and that Virginia was not at the time of the adoption of her present constitution a State in the Union, it is sufficient to remark that very recently that question has been definitely adjusted by the Supreme court of the United States, and the status of the seceding States with reference to the Federal Union is no longer an open question.

The case of *White v. Hart*, decided at the last term of that court, was a writ of error to the Supreme court of the State of Georgia. The constitution of that State contained a provision "that no court or officer shall have, nor shall the General Assembly give, jurisdiction, to try or give judgment on, or enforce any debt, the consideration of which was a slave, or the hire thereof;" and the question was, whether this provision of the constitution of Georgia was in conflict with that of the constitution of the United States, which declares that no State shall pass any law impairing the obligation of a contract. The Supreme court of Georgia decided in favor of the validity of the constitutional provision of that State. That judgment was reversed by the Supreme court of the

United States. It was sought to be maintained mainly upon the ground that when the constitution of 1868 was adopted Georgia was not a State in the Union, and that the inhibition of the constitution of the United States had no application to her.

This question, which had been incidentally discussed in other cases before that court, was thus directly brought up and pronounced upon by that tribunal. Mr. Justice Swayne, delivering the opinion of the court, says: "At no time were the rebellious States out of the pale of the Union. Their rights under the constitution were suspended, but not destroyed. Their constitutional duties and obligations were unaffected and remain the same." * *

"Georgia, after her rebellion, and before her *representation was restored, had no more power to grant a title of nobility, to pass a bill of attainder, an ex post facto law, or law impairing the obligation of contracts, or to do anything else prohibited to her by the constitution of the United States, than she had before her rebellion began, or after her restoration to her normal position in the Union."

This decision upon a constitutional question, made by the highest tribunal in the land, specially constituted and clothed with the authority to adjudicate questions of this character, is binding upon this court; and while we do not adopt its language or its reasoning in all respects, its conclusions must be adopted as settling the status of the seceding States. But if the question was not res adjudicata—if it were still an open question whether the seceding States by the act of secession actually sundered their connection with the Federal Union—the result, in my view, would be precisely the same. If they are to be regarded as "out of the Union" from the date of the adoption of their respective ordinances of secession until their representation in Congress was restored, yet the moment they were readmitted and restored to their normal position in the Union, the constitution of the United States at once operated upon them as the "supreme law of the land," and they became at once bound by the force of its prohibitions, as well as entitled to the benefits of its protection. And if there was anything in their constitution and laws in conflict with the constitution of the United States, thenceforward the latter would prevail as controlling and supreme.

But it is further insisted by the counsel for the appellants, that the present constitution of Virginia, having no validity under the reconstruction laws, until approved by Congress, must be regarded as a law of Congress; and that therefore the inhibition of the constitution of the United States which is upon the States, and not upon Congress, has no application.

285 *In answer to this view (which I would not deem it necessary to notice, except out of respect to the counsel who so earnestly pressed it in argument), it is sufficient to remark, first, that in no sense can the constitution of this State be re-

garded as a law of Congress. It is true that, under the act of March 1867, the approval of the constitution by Congress was required before the State should be entitled to representation. The effect of withholding its approval would have been to continue the military government to which the State was then subjected. But when the constitution was approved, and senators and representatives elected under it admitted, it then became the organic law of this State, binding upon all the citizens of the State and all departments of the State government organized under it, except so far as any of its provisions may be in conflict with the constitution of the United States. If it is to be considered a mere creature and law of Congress, then Congress may repeal it and declare it void. It can no more do this than it can declare the constitution of New York a nullity. It is as much the constitution of Virginia, and beyond the power or control of Congress, as the constitution of any of the northern States of the Union. The approval of the constitution by Congress was a condition precedent to the withdrawal of the military authority of the United States, and re-establishment of the civil authority of the State. That having been accomplished, the power and authority of Congress (if it ever legitimately had any) is at an end.

But suppose the constitution of Virginia could, in any view, be considered an act of Congress, then I deny that Congress can violate the constitution of the United States any more than a State. That constitution is the "supreme law of the land," paramount in its obligation and binding force upon all departments of government, State and Federal; upon the National legislature as well as the State legislatures; upon 286 the judicial and executive, *as well as upon the legislative departments of both Federal and State governments; upon the whole people, governing and restraining their acts and conduct, whether exercised by their representatives in the National Congress or by their representatives in State conventions and State legislatures. It is to each and all the supreme law of the land.

It would be a monstrous fallacy to hold, either that Congress can authorize a State to do that which the constitution of the United States prohibits a State from doing, or that Congress may itself supersede the National constitution.

The prohibition of the constitution upon the States was necessary because the States could do anything not prohibited by the constitution. The prohibition upon Congress was not necessary, because Congress could do nothing except under powers granted by the constitution. But I will not pursue the discussion further, because the point that Congress no more than a State can supersede the National constitution has been very recently expressly decided by the Supreme court of the United States. See *White v. Hart*, to be reported in 13 *Wallace*, decided at the last term.

I am therefore of the opinion that the validity of the "homestead exemption" cannot be maintained upon the first ground insisted upon by the appellant's counsel.

I am now to consider the second proposition upon which it is sought to be maintained, to wit, that "the law in question affects the remedy only, and does not therefore impair the obligation of contracts," and consequently is not within the inhibition of the constitution of the United States. It here becomes necessary to ascertain with precision the meaning of the constitutional prohibition and the object of its insertion. Its object plainly was to secure against legislative invasion the sanctity of contracts, and to preserve their uniform inviolability in all the States. Of such importance
287 is this "principle regarded, that the large majority of the States have incorporated it either in their bill of rights or constitution in the same language used in the constitution of the United States.

It was said by this court in *Taylor v. Stearns*, 18 Gratt. 244, after an instructive review of the circumstances under which this restriction was adopted, "the contemporaneous history of the legislation out of which this restriction grew, and the declarations of the framers of the constitution, conclusively prove that this clause was designed to interdict to the States all legislative interference with contracts, such as had so disastrously relaxed the morals, interrupted the commerce, and disturbed the harmony of the States. For obvious reasons, no attempt was made to enumerate cases within this prohibition; but its terms were so comprehensive as clearly to embrace the antecedent mischiefs to which it was directed, as well as to provide against future evils of the same kind." The terms used in the constitution, "no State shall pass any law impairing the obligation of a contract," are terms, in the language of Chief Justice Marshall, for which "it would seem difficult to substitute words which are more intelligible or less liable to misconstruction." *Sturges v. Crowningshield*, 4 Wheat. R. 122.

But plain and comprehensive as are the terms used in the constitution, they have been the subject of settled judicial interpretation by the Supreme court of the United States, as well as the Supreme courts of many of the States of the Union, and we are not left to etymological discussion to arrive at their true meaning and legal import. These are indubitably and irreversibly fixed by a weight of authority which cannot now be shaken.

The decisions of the Supreme court of the United States in a long series of years, from *Fletcher v. Peck*, 6 Cranch, decided in 1810, down to *White v. Hart*, to be reported in 13 Wallace, decided in December 1871, *have given a uniform and unvarying construction to this clause of the Federal constitution.

From these decisions may be extracted the following propositions as to the true

interpretation and legal import of the constitutional provision referred to:

(1.) The obligation of a contract is the law which binds the parties to perform their agreement.

(2.) Nothing can be more material to the obligation than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which are guaranteed by the constitution against invasion.

(3.) The laws which subsist at the time and place of making a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to and incorporated into its terms.

(4.) It is competent for the States to change the form of the remedy, or to modify it otherwise as they may see fit, provided that no substantial right secured by the contract is thereby impaired. But any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution.

Fletcher v. Peck, 6 Cranch R. 87; *Green v. Biddle*, 8 Wheat. R. 1; *McCracken v. Haywood*, 2 How. U. S. R. 608; *Sturges v. Crowningshield*, 4 Wheat. R. 122; *Ogden v. Saunders*, 12 Wheat. R. 213; *Von Hoffman v. City of Quincy*, 4 Wall. U. S. R. 553; *Hawthorne v. Calef*, 2 Id. 10; *White v. Hart*, to be reported in 13 Wallace.

These decisions have been uniformly followed by this court, and recently re-affirmed in the cases of *Taylor v. Stearns*, 18 Gratt. 244, and the *Bank of the Old Dominion v. McVeigh*, 20 Gratt. 457.

Applying these principles which must be regarded as now well settled (notwithstanding some contrary decisions of State courts, which I shall notice presently),
289 let *us enquire what were the mutual rights and obligations of debtor and creditor as to contracts made before the homestead law."

The obligation of the debtor was to pay his debt. The right of the creditor was to enforce its payment. Under the laws existing at the time, which entered into and were a part of the contract, the creditor had a right to subject, by execution or other legal process, the whole property of the debtor, (except certain articles of personal property already exempted by existing laws.) Nay more, the debtor was prohibited from withdrawing his property from that liability, and appropriating it, either openly or upon secret trust, to his own use, or the use of his family. Every attempt to do that was, by law, declared fraudulent and void. But this "homestead law," to the extent of two thousand dollars, takes away the right which the creditor had at the time that the contract was entered into to enforce the payment of his debt, and allows the debtor to make a conveyance of the property, to that extent, for the use of himself and family, which, before the law was passed, would have been pronounced by the courts fraudulent and void. How

can it be said that such a law does not impair the obligation of the contract? "One of the tests that the contract has been impaired (says Mr. Justice Woodbury, in *Planter's Bank v. Sharp*, 6 How. U. S. R. 327), is that its value has, by legislation, been diminished. It is not by the constitution to be impaired at all." In nine cases out of ten, under this law, the obligation of the contract has not only been impaired, but utterly destroyed; its value has not only been diminished, but its enforcement is made impossible. In the large majority of cases the remedy is not only obstructed, but wholly denied. I am aware that some of the decisions of the State courts have gone to the extent of maintaining the validity of exemption laws even at so antecedent

debts, but I have seen no opinion
290 which can be regarded as *prevailing authority against the unbroken current of decisions of the Supreme court of the United States, from 1810 down to 1871, and which have been uniformly acted upon and followed in this country.

The difference of judicial opinion and interpretation (if there can be said to be any difference worthy of an attempt to reconcile, the great weight of authority, even in the State courts, being one way), grows out of a confused and untenable distinction between laws which operate on the rights, under a contract, and those which operate on the remedies by which they are to be enforced. Those distinctions have grown up from the dicta of judges wrested from the connection in which they were used, and upon which ingenious theories have been built up, to sustain popular legislation.

Every opinion which I have seen sustaining the validity of the "homestead exemption," as applicable to antecedent contracts (except those cases like the Georgia case, lately overruled by the Supreme Court of the United States, which puts the decision upon the ground that Georgia was not a State in the Union, and therefore not governed by the constitutional), is based upon a dictum of Chief Justice Taney, in *Bronson v. Kinzie*. And yet *Bronson v. Kinzie* is one of the very strongest cases in favor of the now acknowledged doctrine of the Supreme court, that the laws in force at the time of the contract, and the place of its performance, enter into and form a part of it, as if they were expressly referred to and incorporated into its very terms; and that any subsequent law which in its operation amounts to an obstruction or denial of the rights accruing by a contract, though professing to act only on the remedy, is clearly obnoxious to the prohibition of the constitution.

I say, most if not all the cases which attempt to sustain these homestead laws in other States, are based upon an obiter dictum of Chief Justice Taney, in *Bronson v.*

Kinzie, (for the question of the absolute exemption of *property did not arise in the case,) and that dictum
291 even does not justify the decisions, for it is wrested from its connection, and the

sense is obscured by giving only a garbled extract from his opinion.

The chief justice is speaking of the right of a State to modify remedies and regulate modes of proceedings in its courts. He uses the following language:

"For, undoubtedly, a State may regulate at pleasure, modes of proceedings in its courts, in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims should be barred by the statute of limitations. It may, if it think proper, direct that necessary implements of agriculture, or the tools of a mechanic, or articles of necessity in household furniture, like wearing apparel, shall not be liable to execution on judgments. Regulations of this description have always been considered in every civilized community as properly belonging to the remedy to be exercised or not by every sovereignty according to its own rules of policy and humanity. It must reside in every State to enable it to secure its citizens from unjust and harrassing litigation, and to protect them in those pursuits which are necessary to the existence and well being of every community. And although a new remedy may be devised, less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional."

Those who ground themselves upon this language of the chief justice stop here; and if he had stopped here, without qualification of these remarks, there might have been some foundation for the position taken in the cases referred to. But the chief justice adds this significant language: "Whatever belongs merely to the remedy, may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial
292 *whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the constitution.

After quoting and approving the decision of the Supreme court in *Green v. Biddle*, a strong case in support of the doctrine, that the impairment of a contract, whether the law operates on the remedy or directly on the contract, is forbidden by the constitution, he proceeds to say, "No one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered it with conditions that rendered it useless or impracticable to pursue it."

After quoting a paragraph from Mr. Blackstone's Commentaries on the laws of England, he proceeds: "We have quoted the entire paragraph because it shows and illustrates by a familiar example the connection of the remedy with the right. It is the part of the municipal law which protects the right and the obligation by which

it enforces and maintains it. It is this protection which the clause in the constitution now in question is mainly intended to secure. And it would be unjust to the memory of the distinguished men who framed it, to suppose it was designed to protect a mere barren and abstract right without any practical operation upon the business of life. It was, undoubtedly, adopted as a part of the constitution for a great and useful purpose. It was to maintain the integrity of contracts and to secure their faithful execution throughout this Union, by placing them under the protection of the constitution of the United States. And it would ill become this court, under any circumstances, to depart from the plain meaning of the words used, and to sanction a distinction between the right and the remedy which would render this provision illusive and nugatory; mere words of form affording no protection and producing no practical results."

293 *Such is the language of Chief Justice Taney, in *Bronson v. Kinzie*, the case mainly relied on by those who maintain the position that the legislature may, in its discretion, exempt property of the debtor to the amount of thousands, and that such exemption is lawful and valid even against antecedent debts. It seems to me to be a strange misconception of the meaning, and a perversion of the sound doctrines of this opinion, to rely upon it as authority to sustain homestead exemptions to the value of thousands of dollars.

But even this dictum of Chief Justice Taney has been virtually overturned by the decision in *McCracken v. Hayward*, 2 How. U. S. R. 608, and *Planters' Bank v. Sharp*, 6 Id. 327. The first named was a case where the law was applicable to the remedy only. The case arose upon a statute touching sales upon executions. The law provided that where executions should be levied upon any property, real or personal, it should be the duty of the officer to summon three householders, who, after being sworn, should fairly and impartially value the property; and when offered for sale it should not be sold unless two-thirds of the amount of such valuation should be bid therefor. This law was held by the Supreme court of the United States to be unconstitutional and void. If a law which only prohibits a creditor from taking the property at less than two-thirds of its sworn value, cannot be supported, it needs no argument to prove that a law cannot be upheld which wholly withdraws the property from the reach of the creditor.

This dictum has also been overruled by the last named case, in which Mr. Justice Woodbury says: "One of the true tests that a contract has been impaired is, that its value has been diminished. It is not by the constitution to be impaired at all."

And yet this mere dictum (already overruled) of the Chief Justice, which favors the opinion that "necessary implements, or the tools of a mechanic, or articles of
294 *necessity in household furniture, like

wearing apparel, may be exempted from sale on execution," is seized upon as the foundation of a false judicial interpretation, which, in some of the southern States, has upheld as valid, exemption laws, which, in the great majority of cases, exempt the whole property of the debtor.

They rest upon the fallacy of assuming that the legislature has the power to make exemptions of what is "necessary" to the debtor or his family. The implements of agriculture are no more a necessity to the farmer than a farm upon which to use them; and "household furniture" is no more essential to the head of a family than a house to live in. The mechanic must have a workshop as well as the tools of his trade, and to all classes money or property with which to purchase food and raiment is as needful as anything else. It is upon reasoning like this, based upon a false premise and a solitary dictum, which has been wrested from its connection with language which qualifies its meaning, that some of the courts referred to, in their efforts to uphold a popular law, have held to be valid and constitutional, laws which exempt and withdraw from the reach of the creditor property to the value of thousands of dollars, and hundreds of acres of land, whether worth one dollar or one thousand dollars per acre; indeed, exempting the whole property which the debtor had in his possession at the time the contract was made, and upon the faith of which the debt was contracted. Such is the absurd result to which this doctrine has been carried.

And indeed this is the logical result of conceding the power of the legislature to exempt from execution, by a subsequent law, property which was liable to execution at the time the debt was contracted. There is, I conceive, no well defined middle ground between holding that none of the debtor's property can, by a subsequent law, be withdrawn from the reach of the creditor,

295 or *else admitting that the whole of his estate may be exempted from sale or execution. In my view, the true doctrine, sustained by the great weight of authority, is that such property as was subject to execution at the time the debt was contracted must continue subject to execution until the debt is paid, so long as it remains in the hands of the debtor. The legislature of this State, up to the adoption of the present constitution, have always recognized this as the correct principle; and whenever, in the interest of humanity or sound policy, they have added to the list of exemptions other property of the debtor not exempted before, they have been careful to make such laws prospective—never retrospective—in their operation; applying the additional exemptions to future—never to past—obligations. As to future obligations, the legislature may make the exemption as broad as it pleases. It may abolish credit altogether. But it cannot, by retrospective legislation, annul the force of prior obligations. If it could do this, then the integrity of contracts, and the security for their

faithful execution, in every State in the Union, would no longer be placed under the protection of the constitution of the United States, but would rest entirely upon the discretion of the legislatures or conventions of the several States. And where would be found the limit upon that discretion? The power to exempt two thousand dollars carries with it the power to exempt \$10,000 or \$20,000, or the whole property of the debtor.

One of the counsel who argued in favor of sustaining the homestead exemption, insisted that the amount of exemption was wholly a matter of legislative discretion, and that the judicial department of the government could not interfere with this legislative discretion. This is a concession that it is without limit or control, and that it is in the power of the legislature virtually to wipe out every debt and destroy every contract of the citizens of this commonwealth, by withdrawing property of 296 the debtor from the reach of the creditor; and that this may be done in the teeth of that provision of the Federal constitution, which declares that "no State shall pass any law impairing the obligation of a contract." Was it to protect a mere barren and abstract right that this provision was adopted? Was it a declaration of a moral principle, without any binding force upon the States, or without any practical operation upon the business of life? Or was it adopted as a part of the constitution for the great and useful purpose of maintaining the integrity of contracts, and securing their faithful execution, throughout the Union, by placing them under the protection of the constitution of the United States, and by pledging the public faith in the most solemn form, that the obligation of contracts, public and private, should remain forever inviolable? There can be but one answer to these questions, and it would not only be "unjust to the memory of the great men who framed the constitution," but in violation of the judicial opinions of the great men who have expounded the constitution, to sanction a doctrine which would render one of its plain provisions illusive and nugatory—mere words of form, affording no protection, and producing no practical results.

The exemption law under consideration withdraws from the reach of his creditors property to the amount of two thousand dollars in the possession of each debtor who is a householder or head of a family, and permits him to appropriate it to his family. It may be the very property upon which credit was given, and upon the faith of which the debt was contracted, that is thus appropriated. It may be that the "homestead" which the debtor is permitted to "lay off and assign" to himself, was purchased with money which was borrowed from his creditor. It may be the debt contracted enabled him to maintain and educate his children. However sacred the obligation, however binding upon the high- 297 est principles of morality and honor, he is permitted by this law to appro-

priate to himself property which rightfully and lawfully belongs to his creditor. At the time the contract was entered into every dollar of this property was bound for the debt. The right of the creditor was to subject it by legal process to the payment of his debt. To appropriate it to the use of the debtor or his family was made by law a fraud upon the rights of the creditor. This right, and the laws in existence at the time for its enforcement, were as much a part of the contract, a part of the obligation, as if they were written out as a part and parcel of the stipulation between the debtor and creditor. And yet it is pretended that because the States have, from motives of humanity, exempted from execution certain articles of necessity, they may, on this idea of legislative discretion, swell the amount to thousands, and, indeed, exempt, in the majority of cases, the whole property of the debtor, and thus cancel by legislative enactment every debt that he owes.

I think it is safe to assume that nine-tenths of the debtors of the State are not owners of more than \$2,000 worth of property. So that the effect of the "homestead exemption" would be practically to relieve nine-tenths of the citizens of the State from the payment of all their debts, while the remaining tenth must pay to the last dollar every debt they ever contracted. Such partial and class legislation ought not to be tolerated, unless it can be clearly sustained by the law and the constitution.

One of the counsel for the appellants, while he insisted that the question as to what amount of the debtor's property ought to be exempted, was a matter of legislative discretion, yet admitted that the legislature ought to exercise a reasonable discretion, and argued that, under the peculiar circumstances of the country, the sum of \$2,000 was as reasonable as the exemptions made under former laws. I have already 298 shown that all exemption laws passed in this State, except the one now under consideration, were always prospective; and I have attempted to show, that every law which withdraws any part of the debtor's property from the reach of the creditor, which was liable to execution at the time the contract was made, is unconstitutional and void. It may be instructive, as illustrating the extreme result to which this view of the counsel would lead, to refer to a few facts and statistics which bear upon the question as to whether the exemption by the statute under consideration is a reasonable one. The whole population of this State, according to the census of 1870, is one million two hundred and twenty-five thousand. It is safe to assume that one-sixth of the whole population are householders or heads of families, which gives, in round numbers, say, two hundred thousand as the number. Multiply 200,000 by 2,000, and we have \$400,000,000 of property in this State exempted from execution. According to the last auditor's report, the whole value of all real estate in Virginia is \$276,116,000, and of personal estate

\$86,321,708, making the aggregate value of the real and personal estate \$365,487,708. The "homestead exemption, allowing each householder or head of a family to set apart for his own use, and the use of his family, \$2,000 of his property, thereby exempts from execution, and withdraws from the reach of creditors, property in this State to the amount of \$400,000,000, which is over \$120,000,000 more than the value of the whole real estate in the limits of the commonwealth, and is over \$300,000,000 more than the value of the whole personal estate owned by all the people of the State. And yet, in the face of such an exhibit as this, it is argued that the legislative discretion (which, it is insisted, controls this subject) has been reasonably and fairly exercised. It seems to me these figures show that such exemption, so far from being reasonable, amounts to absolute repudiation. It is

299 no answer to this startling *exhibit to say that each "householder or head of a family" is not possessed of \$2,000 worth of property. This is true; but, under the law, his future acquisitions to that amount may be appropriated to himself and withdraw from the reach of his creditor, so that the practical effect is to release this enormous amount of property from the enforcement of contracts and the payment of debts.

There is one other view of counsel, which I propose briefly to notice. Much has been said in argument, about the debtor class and the creditor class, and attempts are made to array one against the other, and counsel have indulged in impassioned appeals in favor of the one and denunciations against the other. This tribunal cannot listen for a moment to such arguments and such appeals. No class and no distinction among the citizens of the commonwealth can be recognized here. Whatever the consequences may be, our province is to declare what the law is. This we must do firmly and fearlessly, without regard to the interests of one or another class, without regard to the disasters or benefit which may result to the one or the other from our decision.

But the truth is, there is no such thing as a "debtor class and creditor class" among the people of the State, in the sense in which this expression has been used. In the great majority of cases, every man is both a creditor and a debtor, and in many cases if the debtor could receive what is due to him, he would be no longer a debtor, for he would have the means of paying his debts without selling his property. And I am persuaded that no such disastrous consequences as those depicted by counsel will flow from a judicial sentence against the validity of the homestead exemption. The great bulk of the indebtedness of the people is due to the people of the State, and not to citizens of other States. The latter class of debts have long ago been adjusted and compromised. And while such indebtedness to each other is, undoubtedly, heavy and burdensome, it will require a much

300 smaller *sum to discharge the whole than is generally supposed. Where

A pays his debt to B, it enables B to pay his debt to C, and so to the end of the alphabet. So that an insignificant sum may discharge an enormous amount of the aggregate debt of the whole people.

I feel, too, an abiding confidence in the hope and the belief that debtor and creditor will meet together in a spirit of compromise and fair dealing; and under the influence of those kindly and humane sympathies which should characterize men who have risked so much and lost so much in a common cause, and who have been whelmed in a common ruin, much of the calamity and suffering so eloquently depicted by counsel may be averted.

But whatever may be the consequences; however great the sufferings of individuals; however wide-spread the ruin growing out of a sacrifice of property, and causing universal bankruptcy; however all this might affect our sensibilities as men; yet as the expounders of the laws and constitution for this high tribunal of the last resort, we must uphold with stern inflexibility and unflinching fidelity, the requirements of those laws and the mandate of that constitution, as the only safeguards of private rights and the only protection of a well-ordered society.

And better, far better, for the people of this commonwealth, for social progress and enduring prosperity, would be temporary, though universal, bankruptcy, than the bankruptcy of public morals and the destruction of public and private faith, which laws like the one under consideration, upheld by a subservient judiciary would surely engender. Better, far better, that poverty and adversity should be patiently endured for a time than by temporary expedients, which violate the high morality of the law and the wise restraints of the constitution, to engender a disregard of private rights, the repudiation of public and private obligations, the want of confidence between man and man, and to cultivate and encourage among the people a want of respect for those laws and that constitution,

301 *whose wise restraints and fundamental guarantees can only secure their prosperity and happiness, and which constitute the bulwarks of their protection. No State and no people can have real and enduring prosperity, except where public faith and private faith are guarded by laws wisely administered and faithfully executed.

The inviolability of contracts, public and private, is the foundation of all social progress, and the corner-stone of all the forms of civilized society, wherever an enlightened jurisprudence prevails. In our system of government it has been wisely placed under the constitution of the United States, and there it rests secure against all invasion.

It only remains for me to say that after careful consideration of the important question before us, and deeply impressed with the responsibilities which grow out of it, I am of opinion that the provision of the State constitution and the act of the Gen-

eral Assembly passed in pursuance thereof, known as the homestead exemption laws, so far as they apply to contracts entered into or debts contracted before their adoption, are in violation of the constitution of the United States and, therefore, void. The judgments in each case must be affirmed.

The other judges concurred in the opinion of Christian, J.

Judgments and decree affirmed.

302 *Carroll County v. Collier.

June Term, 1872, Wytheville.

Absent, MONCURE, P.

1. **Contracts—Assumpsit—Declaration.**—In assumpsit by the contractor against a county for the price contracted to be paid for building a jail, it is not necessary to set out the dimensions or a description of the building in the declaration.
2. **Same—Same—Same—Defective Counts.**—In such a case, the contract set out in the count fixes a time within which the jail is to be completed, but there is no averment that it was completed within the time. The count is defective.
3. **Same—Same—Same—Variance.**—The declaration states that the county court appointed three commissioners, naming them, to let out the building of the jail; in the order of the County court offered in evidence by the plaintiff, only two of them are named. This is no material variance, and the order may be admitted as evidence.
4. **Same—Same—Special Pleas.**—In such a case the defendant pleads specially, that the building was not completed in time, and that the material used and the work was defective, so that it is unfit for use as a jail; and the plaintiff takes issue on this plea. Upon the trial the defendant offers a witness to sustain the defense, when the plaintiff objects to the evidence, and offers in evidence an order of the court, showing that the court had appointed commissioners to examine the building, and upon their report, that it had been done according to contract, had received it. **Held:**
 1. **Same—Same—Same—Estoppel.**—The plaintiff having taken issue upon the plea, the order could not operate as an estoppel when offered in evidence, even if it would have been such if set up by replication to the plea, or if the trial had been upon the general issue.
 2. **Same—Same—Same—Same.**—The order was not an estoppel, it not being a judgment, and the report of the commissioners not being an award.

This was an action of assumpsit in the Circuit court of Carroll county, brought in October 1866, by Shadrack Collier against Carroll county, to recover the amount

***Special Pleas—Estoppel.**—"Matter of estoppel may be relied on in evidence by the plaintiff when the only defence is the general issue, for the reason that the estoppel in such case cannot be pleaded. But when the matter to which the estoppel applies is specially pleaded, then the estoppel must be specially replied or it cannot avail. See cases cited in 7 Rob. Prac. 923 et seq.; Davis v. Thomas, 5 Leigh 1; Carroll County v. Collier, 22 Gratt. p. 309." *Per curiam*, in Hayes v. Va. Mutual Protective Ass'n, 76 Va. 231. See also, Despard v. County of Pleasants, 23 W. Va. 324; Long v. Campbell, 37 W. Va. 665, 17 S. E. Rep. 197.

303 *contracted to be paid to him for building a jail for the county.

The declaration contained five counts, the first three the common counts in assumpsit. The fourth count sets out that heretofore, to wit: on the — day of — in consideration that the plaintiff, at the special request of the defendant, would build for the defendant a jail, according to specifications then and there furnished and shown to the plaintiff by the defendant, furnishing, without cost or charge to the defendant, all material of every kind, of suitable and proper character, and would finish the same by the 1st day of December 1861, the said defendant undertook, and then and there promised the plaintiff, to pay him the sum of \$2,975, and to give to the plaintiff the privilege of using the material of the old jail of the said Carroll county; the said sum of \$2,975 to be levied at the July terms of the County court of Carroll county, in the years 1861 and 1862, to be paid to the plaintiff as follows, to wit: \$1,487.50 on the 1st of December 1861, and \$1,487.50 on the 1st of December 1862. And he avers that he did, afterwards on the — day of —, build and erect for the defendant a jail, according to the specifications furnished the plaintiff by the defendant, the plaintiff furnishing all material of every kind for said jail, of suitable kind and character. Of all of which the defendant had notice.

The fifth counts sets out that the defendant, by an order of the County court of Carroll county, did authorize and appoint Ira B. Coltrane, R. P. Cochran and James S. Tipton, commissioners for and on behalf of said defendant, to let out the building of a new jail for the defendant to the lowest bidder, giving to the undertaker of the work the privilege of using the material of the old jail, the value of which said materials was to be taken into consideration by the bidder; and the payment of the money for the building of said jail was by said order directed to be levied in two equal

304 levies, the *first to be made at the June term, 1861, of the County court of Carroll county, and the second to be made at the June term, 1862, of said court; and the sheriff was to have until the 1st day of December of each year to collect said levies, at which said 1st days of December 1861 and 1862, the sums to be levied as aforesaid should be due and payable to the contractor of said work. And the plaintiff then avers that the said commissioners did proceed, in pursuance of said order, to let out to the lowest bidder the building of said jail, according to the terms of said order, and the specifications then and there shown; that the plaintiff, being the lowest bidder, was awarded by the commissioners the building, upon the terms of said order and according to said specifications, at the price of \$2,975, to be levied and due as aforesaid. And the defendant, in consideration that the plaintiff would build said jail in accordance, &c., promised to pay to the plaintiff the said sum of \$2,975, in two equal instalments as aforesaid, and the privilege of using the

material of the old jail as aforesaid. And plaintiff says, that in pursuance of said agreement so made with the defendant, and confiding, &c., &c., the plaintiff afterwards, to wit: on the — day of —, did build a jail for said defendant, according to the terms of said order of said County court, and said specifications, &c., furnishing all material of every kind, of suitable kind and character, of which the defendant had notice. Nevertheless, &c., damages, \$10,000.

At the March term 1867, the defendant appeared and demurred to the whole declaration, and each count thereof, and the plaintiff joined in the demurrer; which was overruled by the court. The defendant then pleaded "non assumpsit" and "payment," and filed an account of offsets, and also two special pleas. The first, that if the plaintiff had been damnified by reason of anything

stated in his declarations, he had
305 been damnified of his *own wrong; and the second is, that the plaintiff did not perform and fulfill the said supposed contract in the declaration mentioned, in this, that he did not build the jail by the first of December 1861, or at any time since; nor did he build the same of suitable materials; nor did he furnish the same with locks, &c., according to the specifications; and in this, that the whole was performed and done unskilfully, negligently and carelessly, and became and is of no use or value to the defendant. To these pleas the plaintiff replied generally; and issues were joined thereon.

Upon the trial of the case, the plaintiff offered in evidence an order of the County court of Carroll, made January 7th, 1861, appointing Ira B. Coltrane and Robert P. Cochran commissioners to let out the building of a jail for the county; which was objected to by the defendant, on the ground of a variance between the order and the declaration, in the names of the commissioners. But no evidence having been introduced, except an order of the County court made December 3d, 1860, appointing three commissioners to receive plans and specifications for a new jail for the county, to be submitted to the court at its next term, on the motion of the plaintiff he was allowed to amend his declaration by striking out the name of James S. Tipton. To which opinion of the court the defendant excepted.

In the progress of the cause the defendant introduced a witness, James M. Dawson, and proposed to prove by him that the jail of said county was not completed according to contract. To the introduction of this evidence the plaintiff objected, on the ground that the defendant was concluded from raising the question under the issues in this cause, whether said jail was completed according to contract, by an order of the County court of Carroll, entered on the 4th of June 1866. This order says James Early, James H. Givers and R. P. Cochran, who were at the last term of this
306 court appointed commissioners *to

examine the new jail of this county and report whether or not the same had been completed according to contract, this day returned their report, from which it appears that the same has been fully completed according to contract, which is received, and ordered to be filed among the papers relating to the public lot and buildings of the county. The court doth therefore receive the said jail as and for the jail of this county, the same having been completed in the manner required by law.

The court sustained the objection, and excluded the evidence; and the defendant again excepted.

There are in the record two papers, marked Exceptions 3 and 4, but not signed by the judge; and there is another paper, signed by him, in which he gives a statement of the evidence and his reasons for not signing said bills. These papers are sufficiently stated by Judge Staples in his opinion.

The jury found a verdict for the plaintiff for \$2,975, with interest, subject to a credit for \$743.75, as paid by a levy made in 1866. And Carroll county thereupon applied to a judge of the District court at Abingdon for a supersedeas; which was allowed.

Tipton, for the appellant.

Walker, for the appellee.

STAPLES, J. This is an action of assumpsit against the county of Carroll. It was instituted to recover the amount claimed to be due the plaintiff upon a contract for the erection of a jail. The defendant demurred to the declaration and to each count; but his demurrer was overruled. The question, therefore, first to be considered, is the sufficiency of the declaration. It is insisted the plaintiff should not only aver he had built a jail, but he ought to show how he had built it, the nature, qualities and dimensions of the building erected, that the court might determine whether it constituted such a jail as the law requires.

307 *The law does not prescribe any specific plan for county jails, but confides the whole subject to the wisdom and discretion of the county authorities. Whether a county can avoid its liability to a contractor who has fully complied with the terms of his contract, by showing that the building possesses none of the requisites of a county jail, it is unnecessary now to decide. It is to be presumed that the court properly discharged the duty devolving upon it, and in the contract with the plaintiff, contracted for a suitable building answering all the requirements and purposes of a public jail. It was, therefore, only necessary in this case, for the plaintiff to aver and prove the contract and its performance on his part, to entitle him to a recovery.

The second objection to the declaration is, that it states a contract for a county levy and the proceeds to be applied to plaintiff's claim, but it is not averred that such levy was not made. It is true the declaration alleges that the County court agreed to provide for paying the plaintiff by two

equal annual levies; and that the sheriff was to be permitted to collect these levies, and make the payments by certain specified periods. But it would not follow, that the plaintiff had thereby released the county from its obligation to him, and consented to look solely to the sheriff for the amount due him. On the contrary, it is expressly averred, that the defendant, in consideration that the plaintiff would build the jail according to the contract, promised to pay the several sums mentioned in the declaration. And it is further averred, that the defendant had wholly failed and refused to make such payments. The breach charged is co-extensive with the legal import of the contract; and that is always sufficient.

I think, however, the objection to the fourth count is well taken. It avers that the plaintiff agreed to build a jail in accordance with certain specifications, and to complete it by a certain time. There 308 is a sufficient averment *of a compliance with these specifications, but there is no averment of the completion of the building at the appointed time. As a general rule, a failure to complete the work at the day agreed, is no answer to the plaintiff's action; unless, indeed, time is made the essence of the agreement. In the case of such failure, however, the plaintiff cannot recover upon the special contract, although the work has been accepted and enjoyed by the defendant; but he may recover upon the common counts, for the reasonable value of the benefit derived from the work by the defendant. If the plaintiff seeks to recover upon the special contract, he must aver and prove the performance at the time and in the manner stipulated; or he may show an agreed modification in the terms of the contract, and a performance on his part in accordance with such modification. As the count in question is defective in failing to aver a performance at the appointed time, the demurrer to that count should have been sustained. The other counts are substantially good.

The question next to be considered arises upon defendant's first bill of exceptions. It is sufficient to say that no substantial variance exists between the names of the commissioners set forth in the declaration and those contained in the order of the County court. It was, therefore, unnecessary to amend the declaration. The defendant could not have been prejudiced or surprised, either by the amendment or by the introduction of the order in evidence. It necessarily results from this view there was no valid reason for a postponement of the trial, or for remanding the case to the rules.

The fourth assignment of error is to the refusal of the court to admit the evidence set out in defendant's second bill of exceptions. The defendant introduced a witness, and proposed to prove by him that the jail was not completed according to contract. To the introduction of this evidence the plaintiff objected, upon the ground that 309 defendant was estopped to raise such question under *the issues in the

cause. In support of this objection, he read an order of the County court, dated 4th June 1866. From which it appeared that the County court had appointed commissioners to examine the jail, and they reported it was fully completed according to contract. The court had thereupon received the jail, as and for the jail of the county, the same having been built and completed according to law. Upon an inspection of this order, the court sustained the objection, being of opinion the defendant was concluded from raising the question of a non-performance of the contract.

It is to be borne in mind that the defendant, in addition to the general issue, filed a special plea, averring that the plaintiff did not complete the jail by the 1st day of December 1861, the time stipulated; and also, averring that the work was unskilfully and negligently performed, and with improper and defective materials. The plaintiff did not demur to this plea, nor did he reply the estoppel arising from the action of the County court, but took issue thereon. Now, if it appeared that the evidence offered by defendant had reference to the time of completing the building, we should hold it was rightly excluded. The defendant having received the jail without protest, will be thereby held to have waived his objections to the delay in its completion. But the evidence was not so restricted. It was also pertinent to that branch of the plea which raised the question of the defective execution of the work, and was clearly admissible in support of that issue. Had the defendant pleaded the general issue only, and under that issue offered the evidence in question, it would have been competent for the plaintiff to rely upon the estoppel in evidence also. And this upon the well settled principle that where there is no opportunity of pleading an estoppel, it is to be held conclusive when offered in evidence. But here the defendant pleaded the matter of defense specially, and thus afforded 310 the plaintiff the *opportunity of replying the estoppel. Instead of pursuing this course, he takes issue upon the plea, and thus opens the door to a full investigation of the matters contained therein.

I have thus far considered the case as if the order of the County court constituted an estoppel. Is it, however, to be so regarded. The plaintiff, by his form of action, treats the contract not as a matter of record, but as resting in parol. The declaration is in assumpsit, and upon the general issue it devolved upon him to prove the construction of the work in strict compliance with the terms of the contract. This he might do by the testimony of witnesses, or he might rely upon the admission contained in the order of the County court. This order furnished evidence of a very strong and persuasive character, but it was not conclusive upon the question of such compliance.

The commissioners appointed to examine the building were not referees, nor was their report in the nature of an award be-

tween the parties. They were mere agents of the court, appointed for the purpose of ascertaining whether the building could be safely received, and the compensation paid the contractor. It is true the report was entered of record, but such entry did not render the inquiry or the acceptance a judicial determination of the fitness of the building. The justices were acting as a board of police for the county, in their ministerial, and not in their judicial capacity. In this case, as in a large majority of instances, the examination of the jail was made shortly after its completion, and before any defects in the material, or in the execution of the work, were discoverable. Under such circumstances, to hold that a county shall be compelled to pay the contract price for public buildings, no matter how defectively constructed, is to establish a rule that will place the public interests at the mercy of fraudulent or incompetent and unskilful contractors. In *Jaeger*

311 v. *Bossieux*, *15 Gratt. 83, by the terms of the contract, the work was to be valued and the price fixed by referees chosen by the parties. Upon the completion of the building, it was examined, valued and priced by the referees, and accepted by the owner. In an action for the price, it being claimed that the work was defectively executed, the award of the referees was relied on as an estoppel. Judge Lee, in alluding to the valuation made by the referees, said: "Such a valuation would, of necessity, be based upon the condition in which the work appeared at the time it should be made, and it could not have been intended to deprive the party of the right to compensation for material defects in the work, not discoverable at the time of the valuation. And as numerous and marked defects were subsequently disclosed, the award of the referees, as to the value of the work in its apparent condition at the time, should not be conclusive." This reasoning is equally applicable to the present case, and warrants the introduction of evidence touching the character and value of the work performed by the plaintiff. I think the court erred in rejecting that evidence as set forth in defendant's second bill of exceptions.

Another ground of error is the refusal of the court to give an instruction asked for by defendants set out in a paper marked bill of exceptions No. 3. This paper is not signed by the judge presiding at the trial, but reference is made to it in a bill of exceptions which is signed, and the reason for such refusal stated. I think the court did not err in refusing to give this instruction; nor was there any error to the prejudice of the defendant in the instruction actually given in lieu of that asked for by the defendant. The plaintiff had no contract with the sheriff, nor was he under any obligation to pursue him; though he may have been authorized so to do under the statute. His contract was with the court, and to it he had the right to look for his compensation. It was the duty of

312 the *justices not only to lay the levy, but to see that the proceeds were applied in payment of plaintiff's debt. Neither the levy nor its collection by the sheriff, furnished any evidence of a payment to the plaintiff. If, in fact, such payment was made, it was easy to establish it by the testimony of the sheriff, the agent of the county and the officer of the court.

Complaint is also made of the refusal of the court to sign a paper appearing in the record as defendant's bill of exceptions No. 4. There is nothing, however, in the record tending to show that such refusal was improper. In the absence of evidence establishing the contrary, an appellate court will always presume the action of the court below was warranted by the facts before it. In this case presumption is rendered conclusive by a statement of the presiding judge of what occurred at the trial, from which it does not appear that any such evidence was offered as is contained in this bill of exceptions. It is impossible to say that the court committed an error in refusing to sign the paper.

What remedy is afforded a party aggrieved by the refusal of a court to sign a proper bill of exceptions, has never been the subject of adjudication by this court. It is an important question, only to be settled upon deliberate consideration. As such decision is not called for in this case, we do not deem it proper or necessary to express any opinion upon the point. For the reasons stated, I am of opinion the judgment should be reversed, the verdict set aside and a new trial awarded, and upon such trial the cause to be proceeded in in accordance with the principles herein announced.

The other judges concurred in the opinion of Staples, J.

Judgment reversed.

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*Jennings v. Jennings.

June Term, 1872, Wytheville.

1. *Guardians—Confederate Money.*—J is appointed guardian of infants in September 1867, and then receives from the administrator of their father \$791 in money, which he does not invest for his wards, but purchases a slave for himself. In February 1868, on the motion of one of his sureties, he is required to give a new bond as guardian, which he declines to do; and he is thereupon removed, and H is appointed guardian in his stead. J never having settled his account as guardian, directly H is appointed, pays to him \$600 in Confederate treasury notes, and transfers to him receipts for moneys he had paid for the wards; it not appearing that H knew what kind of money J had received. **HELD:**

**Guardian—Confederate Money.*—In *Crawford v. Shover*, 29 Gratt. 81, the court, citing the principal case and others, said: "It is not a good defence to the guardian in this case that he did not actually intend to injure the ward by the act complained of, if such injury was the necessary or actual result of such act, nor that he derived no profit from the act complained of."

1. **Same—Same—Scaling.**—J not having invested the money he received, for the benefit of his wards, but having used it for his own purposes, and not having settled his account as guardian, he is to be charged with the amount received in good money, with compound interest, and to be credited with the payments made for the wards, and to H at the scaled value thereof at the time of payment. And he is not to be allowed compensation for his services as guardian.
2. **Same—Same—Same.**—H is to be charged with the scaled value of the money received from J, at the time he received it, with interest.
3. **Statute.**—What contracts are embraced in the act of March 3, 1866, called the adjustment act, see opinion of CHRISTIAN, J.

This was a suit in equity in the Circuit court of Carroll county, brought in April 1866, by Creed R. Jennings and five others—these last infants, by their next friend—against Jefferson Jennings, Fielding L. Hale and others, to compel the said Jennings and Hale to settle their accounts as guardians of the plaintiffs, and to pay what was found to be in their hands.

The facts stated in the bill are, that Peter Jennings, the father of the plaintiffs, 314 died some years before, and *his administrator settled up his estate. That in September 1857, Jonathan Jennings was appointed guardian of the plaintiffs and two other children, and received from the administrator the balance in his hands. That he acted as such guardian up to January 1863, when he prevailed on one of his sureties on his guardian's bond to require him to give other security, which he declined to do, and was thereupon removed by the court, and Fielding L. Hale was appointed guardian of the plaintiffs and their sister. That Jennings had never settled his accounts as guardian, nor did he invest the money he had received for their benefit, but kept it and used it for his own purposes. That after the appointment of Hale, Jefferson Jennings paid Hale a small amount in Confederate treasury notes, worth little then, and utterly worthless afterwards.

The prayer of the bill is for an account, that Hale might be removed from his guardianship, and for payment of what the guardians have received.

Jennings, in his answer, admits the administrator paid to him \$791.18; which sum, with the interest upon it, he paid to Hale on the 2d of February 1863. He denies he used the money for his own purposes; and for the amount of his disbursements for his wards, he refers to the settlement made with Hale, which he exhibits as a part of his answer.

Hale says, in his answer, that about the 2d of February 1863, he received from Jennings \$500 in Confederate States treasury notes, and a check on the bank at Christiansburg for \$300, which was paid in the same kind of money, and other claims paid by the former guardian, which made up the amount for which he gave his receipt to the former guardian. That he was unable to loan out the money, of which he informed

his wards and their mother, and advised them to take it and use it, giving him re-funding bonds.

In August 1866, there was a decree 315 for an account, *and the commissioner made his report, showing that two of the wards had been paid, or nearly so; and that there was due to the other five wards, on the 2d of February 1863, \$704.88½. That Jennings had paid Hale at that date, in Confederate currency, \$690, leaving a balance due them of \$14.88½, which was, in 1867, paid with interest to Hale. And the commissioner reported that the money received by Jonathan Jennings, as guardian, was invested by him in a negro for his own benefit. The commissioner, therefore, charged him with compound interest on this amount; and as he had failed, from the date of his appointment until the date of the report, to settle his account, he was not allowed any compensation for his services as guardian.

Jennings excepted to the report of the commissioner—1st. Because he was charged with interest on the amount he had received in March 1858, without proof that he had any opportunity to invest it. 2d. That the commissioner had charged him with compound interest on the sum received in March 1858, upon the ground that Jennings had invested it in a negro for his own benefit, and yet had not reported the evidence on which he acted, so that the court might judge of the propriety of his action. Upon this last exception the commissioner made a supplemental report, in which he said that the statement in the report, as to the investment of the money in a negro, was made upon the admission of Jennings to the commissioner at the time of making up the report.

The commissioner also reported the account of Hale, the second guardian, and stated the amount due from him to his wards, reduced to specie, at \$159.16 of principal and \$17.81 of interest, no interest having been charged prior to May 1st, 1865, on the ground that the guardian could not invest the money he received from Jennings.

The cause came on to be heard on 316 the 31st of October *1868, when the court held that Jennings was to be credited in his account for the amount he paid to Hale, the second guardian, dollar for dollar; and he having since paid the balance, the court dismissed the bill as to him. And the court held that Hale was to be charged with the gold value of the money he received, with interest from May 1st, 1865, as reported by the commissioner. And the report as to Hale was recommitted to the commissioner for him to make a further statement upon the basis of his report. From this decree the plaintiffs obtained an appeal to the District court of Appeals at Abingdon; and it was transferred from thence to this court.

Tipton, for the appellants.

Walker, Terry and Pierce, for the appellees.

CHRISTIAN, J. There was no error in the decree of the Circuit court of Carroll county in holding the second guardian responsible only for the scaled value of the Confederate currency paid to him by the first guardian. Nothing came into his hands but Confederate currency, and all that can be required of him, is to pay to his wards, the value of that currency at the time he received it from the first guardian.

But the decree appealed from, releases from all responsibility, the first guardian, and in effect declares, that the payment of Confederate currency, then greatly depreciated, to the second guardian, was in full discharge of the debt which he owed to his wards, although the fund which he received for them was in gold or its equivalent, and although he appropriated the same to his own use, and never invested it, as the law requires, for the benefit of his wards.

The record shows that the appellee, Jonathan Jennings, was appointed guardian of the appellants, in September 1857, by the County court of Carroll county. He 317 *received from the administrator of their father, the sum of \$791.18. Instead of investing this fund for the benefit of his wards, he used the money in the purchase of a slave for himself, according to his own admission; and he settled no account of his transactions as guardian until compelled to do so by a decree of the Circuit court of Carroll, entered in this cause in August 1866; nearly ten years after his qualification.

In February 1863, Jonathan Jennings, who, upon the motion of one of his sureties, had been summoned to show cause why he should not be required to give a new bond, appeared in court and admitted that he had received reasonable notice of such motion, and declined to give such bond, whereupon "the court revoked and annulled his power as guardian, and removed him from such trust and appointment"; and declared that "he and his sureties be released from any and all liability on his bond as soon as he shall have settled his guardian account."

On the same day, Fielding L. Hale was appointed guardian in the place of Jennings. And on that day (or certainly on the next), Jennings, without having settled before a commissioner of the court, any account of his transactions as guardian, paid over to Hale, the second guardian, the sum of \$690 in Confederate money, and \$293 in receipts and claims paid by him, making in all \$983.63; for which Hale executed his receipt. This balance is shown by an *ex parte* statement which is filed by Jennings with his answer, showing that it was in his possession at the time the bill was filed. Nor is there any evidence to show that it was ever seen and inspected by Hale. This paper shows that the statement is made up to show the balance due on 2d February 1863, the calculations of interest being made to that day. So far as the record shows, Hale knew nothing of the transactions between Jennings and his wards. No one but Jennings could know anything on the

subject, because he had never settled any account. All that the record 318 *shows on that subject is, that Jennings brought to Hale a certain amount in Confederate money, and claims paid by him, for which Hale executed his receipt; not a receipt in full, but simply a receipt for the aggregate amount. For aught that appears, Hale, the second guardian, knew nothing of the kind of currency which Jennings, the first guardian, had received. So far as he knew, the Confederate currency paid to him had been received by Jennings in the due execution of his trust. There was, therefore, no error in the decree of the Circuit court which held the second guardian responsible for the scaled value of the Confederate currency at the date of the payment to him, charging him with that amount with interest from that date.

But under the decree entered by the Circuit court of Carroll, the first guardian, who received for his wards the sum of \$791, which he, by his own confession, converted to his own use, is released from all liability, and the wards, instead of receiving the sum of \$791, with interest from the 5th day of March 1858, to which they are justly entitled, are to receive under this decree, only \$177, with interest from the 2d day of February 1863.

This decree, so manifestly inequitable and grossly unjust to the wards, is sought to be maintained upon the ground, that the first guardian is released from all liability, by the second section of the act passed March 3d, 1866, known as the "adjustment act." That section is in these words: "2. Whenever it shall appear that any such contract was, according to the true understanding and agreement of the parties, to be fulfilled and performed in Confederate States treasury notes, or was entered into with reference to said notes as a standard of value, the same shall be liquidated and settled by reducing the nominal amount due or payable under such contract in Confederate States treasury notes, to its true value at the time they were respectively made and entered into, or at such other time as

may to the court seem right in the 319 *particular case; and upon the payment of the value so ascertained, the party bound by such contract shall be forever discharged of and from the same: provided, that in all cases where actual payment has been made of any sum of such Confederate States treasury notes, either in full or in part of the amount payable under such contract, the party by or for whom the same was paid, shall have full credit for the nominal amount so paid, and such payment shall not be reduced."

It is insisted by the learned counsel for the appellees, that the payment of Confederate States treasury notes by the first guardian, to the second guardian in February 1863, was such a payment, as under the proviso above recited, entitled him to have full credit for the nominal amount so paid. It is clear that the act of March 3d,

1866, can have no application, and never was intended to apply, to a case like the one under consideration, but was enacted to give relief in a class of cases totally different. The title of the act and all its provisions show this. It is entitled "an act for the adjustment of liabilities accruing under contracts and wills made between the 1st of January 1862, and the 10th day of April 1865." It is only to such contracts as were made and entered into between the times referred to, that the statute is to be applied. But in addition to this, it must appear that it was the true understanding and agreement of the parties to the contract, that it was to be fulfilled and performed in Confederate States treasury notes, or was entered into with reference to said notes as a standard of value. Where under "such a contract" there has been an actual payment, the party shall have "full credit for the nominal amount so paid."

To bring a case within the operation of this statute, three things must concur. First. There must be parties capable of making a contract. Second. It must be a contract made and entered into between the 1st day of January 1862, and the 10th day of April 1865; and *Third. That

the contract according to the true understanding and agreement of the parties was to be performed or fulfilled in Confederate States treasury notes, or was entered into with reference to said notes as a standard of value. After giving this as the true construction of the statute (which can admit of but one construction), it is sufficient to say that, in the case before us, the debt was contracted in the year 1858, and was due to infants.

Nor do the cases relied upon by the counsel for the appellees furnish any authority for sustaining the decree of the court below. The cases cited (*Sallee v. Yeates*, 1 Wash.; *Walker v. Walke*, 2 Wash., and other similar cases) arose under the act of 1781.

The terms and provisions of that act are very different, and far more comprehensive than the act of March 3d, 1866. While under the last named act full credit for the nominal amount actually paid is restricted and cautiously limited to a certain class of contracts, the act of 1781, in the broadest and most unlimited terms, provided "that in all cases where actual payments have been made by any person or persons, of any sum or sums of the aforesaid paper currency, at any time or times, either to the full amount or in part payment of any debt, contract or obligation whatsoever, the party paying the same, or upon whose account such sum or sums have been actually paid, shall have full credit for the nominal amount of such payments; and such payments shall not be reduced, anything in this act, or any other act or acts, to the contrary in any manner notwithstanding."

The decisions construing this act, so entirely different in its provisions, and embracing in its very terms "every debt, contract and obligation whatsoever," can have no controlling effect upon the con-

struction of the act of 1866, which is cautiously restricted in its operation to a certain class of contracts.

321 *But it is further insisted that there is no evidence in the record of a fraudulent purpose on the part of Jennings, the first guardian, but that he acted in good faith, and though he paid the amount due to his wards in a depreciated currency, it was the only currency in circulation at the time, and was at that time generally received in payment of debts. The fact that parties meeting upon equal terms adjusted their debts by paying and receiving Confederate treasury notes, when depreciated, can be no justification to a guardian to pay his own debt due to infants, for which he had received gold five years before. His debt was due to his wards. It is true, the second guardian was the hand which the law appointed to receive it, but the debt was due to the wards. There is nothing in the record to show that the second guardian knew that the Confederate currency paid to him had not been received in the due execution of his trust, and that Jennings was paying his own debt of \$791, due in gold, with interest from March 1858, with a currency depreciated to nearly one-fifth of its nominal value. The fact that the second guardian gave his receipt for so much in Confederate notes, and a check which could only be collected in the same currency, certainly cannot be held to be a discharge of his debt. There is no evidence that the ex parte statement made by Jennings, and filed with his answer, showing the balance due his wards, was ever exhibited to him, and that paper is not evidence for any purpose.

It is not for this court to speculate as to the motives and purposes of the first guardian. We take the facts as we find them in the record. At February term of the County court of Carroll, Jennings appears in court and acknowledges service of a rule upon him by one of his securities, refuses to give a new bond, and as soon as a new guardian is appointed, on the very day—or certainly the next day—without settling his account before a commissioner, but upon an ex parte statement *made by himself, showing the balance due his wards, settles with the second guardian by paying one-fifth of what was justly due his wards. Now he knew that he had received \$791 in sound currency. He knew that he had never invested that amount, as the law requires, for the benefit of his wards, but had used it in purchasing property for himself. He knew he was seeking to discharge this debt in a currency depreciated to nearly one-fifth of its nominal value. And then he comes into a court of equity to ask its aid in shielding him from the payment of an honest debt, due to infants, and to seek a full discharge from all liability, by throwing the loss upon those parties who are the special objects of the protection of a court of equity.

I am of opinion that the decree of the court below ought to be reversed, and that

an account should be taken of the transactions of the first guardian, in which he shall be charged with the whole amount received for his wards in a sound currency, and to be credited by the scaled value of the Confederate currency at the time it was paid to the second guardian; and that he shall be charged with compound interest, and shall receive no commissions.

The other judges concurred in the opinion of Christian, J.

Decree reversed.

323 *Higginbotham v. Brown.

June Term, 1872, Wytheville.

1. **Specific Performance—When Appeal Allowed.**—In a suit by B against H for specific performance of a contract for the sale of one hundred and fifty acres of land, part of a large tract of two thousand six hundred and eighty-four acres, sold by W to C, under whom both B and H claimed, the court holding that B was entitled to recover, directed a surveyor named, to go on the land and lay off the one hundred and fifty acres, by metes and bounds and report to the court. Before the survey is made J obtains an appeal from the decree. **HOLD:** The appeal should not have been allowed until the report was made, and therefore dismissed.

2. **Liability for Purchase Money.**—H having paid a part of the purchase money due from C to W, the one hundred and fifty acres is liable for its due proportion thereof.

In July 1868, Joseph C. Brown instituted a suit in equity in the Circuit court of Tazewell county, against Samuel W. Higginbotham and others, to obtain a conveyance of a tract of one hundred and fifty acres of land, once lying in the county of Tazewell, but at the time of the suit instituted, in the county of Buchanan. The bill alleged, that on the 9th of November 1854, John Cecil executed his title bond to Wm. Mullins for one hundred and fifty acres of land lying on the Laurel fork of Dismal, then in the county of Tazewell, now in the county of Buchanan, being a part of the Warder land; and he bound himself in the penalty of three hundred dollars to make to Mullins a deed with general warranty when the purchase money was fully paid. That Cecil had purchased from the agent of Warder a large tract of twenty-six or twenty-seven hundred acres in the Warder survey, including this one hundred and fifty acres. That

Cecil delivered to Mullins possession
324 of *this one hundred and fifty acres sold to him. That on the 12th of December 1854, Mullins assigned the bond to Shadrack Ratliff, for value received; and on the 26th of October 1857, Ratliff assigned it for value to the plaintiff. That Mullins gave his bond to Cecil for \$150 for the full amount of the purchase money of the one hundred and fifty acres of land; and that Ratliff paid to Cecil the amount due upon the bond and took it in. That Mullins delivered possession of the land to Ratliff, who delivered like possession to the plaintiff, who has had possession ever since.

The bill further states that Cecil not having received a conveyance of the land from the Warders, failed to make a deed to the plaintiff. That he died in 1863, leaving the defendants his heirs at law; and that Henry D. Aston, the attorney in fact of the Warders, had made a deed for the whole tract of twenty-six or twenty-seven hundred acres to the defendants, heirs of John Cecil. He exhibits his title bond with the assignments upon it, and prays for a conveyance to him of the one hundred and fifty acres of land, and for general relief.

Higginbotham answered the bill. He says the plaintiff is mistaken in supposing that the defendants inherited the land from John Cecil. It is true Cecil died in 1863, but he left neither real nor personal estate. He had become largely involved as surety some years before the war, and having to pay these debts, he was reduced to a very destitute condition.

He further says, that Cecil was his father-in-law and was indebted to him \$630.27 due October 2d, 1856, and three other small notes which he sets out. That a year or more before his death, Cecil told respondent that at some previous time he purchased from the Warders two thousand six hundred and eighty-four acres of land, lying upon the waters of Sandy, at ten cents an acre, and held their bond for the title; that he had paid a part of the purchase money,

but owed a balance, the amount of
325 *which he did not know. That he would transfer to respondent the bond, and by paying the Warders the balance of the purchase money, he would procure a title to the land, and might have the same towards what he (Cecil) owed him. Respondent believing he could not be worsted, acceded to the proposition and took the bond. After the war he paid to Aston, the attorney in fact of the Warders, the balance of the purchase money due upon the land, amounting principal and interest to \$243, and obtained from Aston, as attorney in fact for the Warders, a conveyance of the land to himself.

He further says, at the time of his obtaining the transfer of the title bond, and at the time of securing the conveyance and paying the purchase money to the Warders, he had no notice of any claim on the part of the complainant or of any other person, and knew nothing of the transactions alleged in the bill. He is, therefore, a purchaser for valuable consideration without notice, and in this character claims protection against the claims of the plaintiff. Respondent knows nothing of any possession on the part of the complainant. After paying the purchase money and obtaining the legal title, he found a person or two upon the land, whom he regarded as squatters; but they set up no adverse claim, and agreed to hold the land under respondent.

The title bond under which the plaintiff claims, says, Cecil has this day sold Wm. Mullins one hundred and fifty acres of land lying on Laurel fork of Dismal, beginning at a black gum, John Brown's corner, and

running up Laurel for quantity, being part of the Warder land. And he binds himself in the penalty of \$300, to convey with general warranty, when the purchase money is fully paid, November 9th, 1854.

The note, bonds and deed mentioned in the defendant's answer, are also filed. The deed is in consideration of \$268.40, in hand paid, the receipt whereof is thereby acknowledged.

326 *There were but two depositions filed in the cause, one of them of Aston, the attorney in fact of the Warders, who said that he held two promissory notes of Cecil's for the land. He held the notes several years before any payment was made. Some time before the death of John Cecil, his son, Samuel, paid witness \$175, and said it was money sent by his father who wanted it credited on his notes, which was done. Some time after the death of John Cecil, witness received a note from Joseph Straus asking him, if the balance of the purchase money was paid, he would make the title to S. W. Higginbotham; which witness consented to do, and did do, thinking it all right as he was one of the heirs of John Cecil.

Ratliff, the other witness, proved the purchase by himself from Mullins; and that he paid to John Cecil in his lifetime, one hundred and fifty dollars, the amount Mullins was to pay Cecil for the land. And that Cecil stated to his son, S. W. Cecil, that that money must go to-morrow to Esquire Aston as a part of the purchase money for that land. The witness said further, that he took possession of the said land at the time Mullins assigned to him the bond, and built a house thereon, and held possession about three years, and then sold to J. C. Brown; and that Brown has held peaceable possession ever since.

The cause came on to be heard upon the 11th day of November 1869, when the court held that the plaintiff, Brown, was entitled to a decree for the one hundred and fifty acres of land in the bill and title bond mentioned; and decreed that the defendant, Higginbotham, should convey the same to the plaintiff according to said title bond by metes and bounds, to be ascertained by a survey to be made by S. L. Graham, who is hereby directed to make and report such survey to the court.

On the 25th of May 1870, the court made another order in the cause, viz: Samuel L. Graham, the commissioner,
327 *heretofore appointed to make the survey in this cause, not having been able to do so, on motion of complainant by his attorney, it was ordered that Rufus Brittain be appointed surveyor in the place of S. L. Graham, and that he be required to perform the duties required of the said Graham, and report to the court by the next term.

After this last order was made, Higginbotham applied to a judge of this court for an appeal from the decree of November 11th, 1869; which was allowed.

B. J. Johnston and J. T. Campbell, for the appellant.

J. W. & J. P. Sheffey, for the appellee.

MONCURE, P. delivered the opinion of the court.

The appellant claims to be a bona fide purchaser, for value and without notice, of the entire survey of 2,684 acres of land, of which the 150 acres claimed by the appellee, Joseph C. Brown, forms a part, and that, therefore, the said appellee has no right to have specific execution of the title bond for the said 150 acres, according to the claim asserted in the bill. There is no proof in the cause of any purchase made by the appellant, Samuel W. Higginbotham, of the equitable estate of John Cecil, in the said survey of 2,684 acres, bought by him of the Warders, as claimed in the answer of said Higginbotham. The appellant, therefore, wholly failed to sustain his defence of bona fide purchase for value and without notice. He has, however, it seems, paid the balance of the purchase money due by John Cecil to the Warders for the land, and obtained a conveyance of the legal title from them by their attorney in fact. He is, therefore, entitled to stand in their shoes, and to hold the entire survey, including the 150 acres of land, for his indemnity and reimbursement in regard to the balance of the purchase money paid by him as aforesaid.

328 Subject to that right, *the appellee, Joseph C. Brown, has a valid claim against the said survey of land on the title bond for the said 150 acres, and is entitled to have specific execution of the said title bond, provided the said 150 acres of land can be ascertained and laid off according to the description and direction contained in the said bond and the endorsements thereon. The court below, by an interlocutory decree made on the 11th day of November 1869, decreed that the complainant is entitled to a decree for the 150 acres of land in the bill and title bond mentioned, and that the said Samuel W. Higginbotham convey said 150 acres of land to complainant, according to said title bond, by metes and bounds, to be ascertained by survey to be made by S. L. Graham, who was thereby directed to make and report such survey to the court, and the cause was continued. At a subsequent term of the court, the said Graham not having been able to make the said survey, on motion of the complainant, it was ordered that Rufus Brittain be appointed surveyor in the place of said Graham, and that he perform the duties required of said Graham and report to the court at the next term; and the cause was again continued. Afterwards, and before any report was made by said Brittain under the said order, this appeal was applied for and allowed to the said interlocutory decree of the 11th of November 1869.

The court is of opinion that it was most proper that the case should be proceeded in farther in the court below before an appeal was allowed therein. It can be better as-

certained after the said survey is made and reported to the court, with any facts elicited thereby or evidence connected therewith, whether the said decree is proper or not; and if not, what decree ought to be made in the case as it may then exist, which decree it will be competent for the court then to make. The court is, therefore, of opinion that the said appeal was prematurely
329 *and improvidently allowed, and it is decreed and ordered that the same be dismissed, and that the appellant pay to the said appellee, Brown, his costs by him about his defence in this behalf expended. And the cause is remanded to the court below for further proceedings to be had therein.

Appeal dismissed.

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*Pratt & al. v. Cox & als.

June Term, 1872, Wytheville.

1. **Conveyance of Lands—Fraud.**—A conveys to U a tract of land, with the intent to defraud his creditors: and U, to carry out the purpose of A, conveys the land without consideration, to C and others, infant children of A. The land is liable to satisfy the creditor of A, whether such at the date of A's deed, or becoming such subsequently.

2. **Same—Same—Bill to Set Aside.**—S, a creditor of A files a bill to set aside said deeds, and subject the land to the payment of his debt. The evidence in that case establishes the fraud, and the deeds are declared fraudulent and void as to the creditors of A, and the land is rented out to B to pay the debt. B rents it to A on the same terms, and A conveys the land in trust to secure the amount of the rent to B. The trustee sells a part of the land to P. **Held:**

1. **Same—Same—Bona Fide Creditors.**—B is a *bona fide* creditor of A, entitled to subject the land to the payment of the debt.

2. **Same—Same—Bona Fide Purchasers.**—P is a *bona fide* purchaser, and has a valid title to the land.

3. **Same—Same—Decree of Sale.**—After the decree in the case of S v. A and others, C &c., the children of A file a bill setting out the deeds, the said suit and the deed from A to secure B; insisting that the last deed is invalid, and that P acquired no title to the land by his purchase. They say there are other creditors of A who are seeking to subject the land, and they ask that it may be sold under a decree of the court; that an account may be taken of the debts of the creditors entitled to subject the land; that these may be paid; and the balance of the purchase money paid to them. The court holding that the sale to P is valid.

***Conveyance of Land—Fraud.**—Cited in Johnson v. Wagner, 76 Va. 591, as authority for the proposition that a conveyance, fraudulent as to existing creditors, is also fraudulent as to subsequent ones; also as sustaining the proposition that fraudulent intent need not be established by express proof but may be shown by just legal implication from the evidence where the circumstances are such that the intent may be justly inferred. See Lockhard v. Beckley, 10 W. Va. 101, 108, 104.

should not have decreed that A should convey the residue of the land to C &c. subject to the debts of A; but should direct an account of the debts: that the land be sold, the debt paid, and the surplus paid to C &c.

4. **Same—Same—Same—Record as Evidence.**—The record in the case of S v. A and others is referred to in the bill of C &c., and is made an exhibit with the answer of B. It is not excepted to, nor is it objected to as evidence in the Circuit court, and the decree is obviously founded upon the evidence filed in that case. This court will, therefore, regard it as evidence in the cause for all purposes.

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*In April 1856, Philip D. Cox and six others, children of A. H. Cox, two of whom were infants, filed their bill in the Circuit court of Smyth county, in which they state that A. H. Cox, on the 10th of May 1843, conveyed to Philip Umbarger, two tracts of land containing two hundred and fifty acres, in the Rich Valley on the north fork of Holston river, where said A. H. Cox resided, upon a trust expressed in an article of agreement between them dated the 1st of February 1843, that said Umbarger and his wife would make to the plaintiffs a right in fee simple to said land, on condition that said Cox pays to Umbarger all he owed him. That Cox having paid Umbarger all he owed, by deed dated the 17th of March 1852, Umbarger conveyed to the plaintiffs all the lands conveyed by Cox to him, except some small parcels which had been conveyed to other parties. That when these deeds were made the plaintiffs were of tender years, and all was fair on their part, and they knew of no unfair intent or purpose on the part of the parties who thus invested them with the legal title.

They further say, that in January 1856, David Sexton filed his bill in this court * against A. H. Cox and others, charging that said deed was voluntary, and that said land was liable to the payment of a judgment lien claimed by him against said A. H. Cox for \$266.65, with interest from the 22d of October 1853, and costs; and by a decree in said cause at the September term 1858, the said deeds were set aside as fraudulent and void, as to said Sexton; and the court being of opinion, that the rents of the land would pay the debt within five years, ordered that V. S. Morgan, as commissioner, should rent out said lands to the highest bidder, on a credit of six and twelve months, taking bond with good security. That the commissioner, on the 18th of November 1858, rented said lands to Patrick C. Buchanan, Jr., for \$418.34, upon the terms of the decree, and took the notes of said Buchanan with James Cox and
332 James H. *Buchanan as his sureties.

All of which will appear by the proceedings in that case.

That A. H. Cox retained the property under some contract with said Patrick C. Buchanan, and, without authority from the plaintiffs, executed a deed of trust upon the land to P. Campbell Buchanan, to secure

the said parties for the amount of said rent. That the trustee had advertised the land for sale for the payment of said rent, and will proceed to sell unless restrained by the court.

They say further, that one David Graham, claiming to be a creditor of A. H. Cox, has filed his bill to have the said land sold for the satisfaction of a judgment recovered in the county court of Smyth county, against said Cox and two others, for \$264.99, with interest from February 1853, and costs; and that there are other claims asserted by other persons claiming to be creditors of A. H. Cox, to subject said land to their claims.

They further say, that to sell the land as it now stands, under said deed of trust, would result in a ruinous sacrifice. That the plaintiffs have the legal title, and all that the creditors of A. H. Cox can claim is to subject the land or its rents to the payment of their debts. The plaintiffs therefore desire to arrest the sale under the deed of trust, and have the sale made by decree of the court in this case, and have the proceeds applied to the payment of the bona fide debts of the said A. H. Cox, which may be proved in the case; and to have the surplus secured to the plaintiffs. And they submit to the court whether on the supposition that the deeds were voluntary, the debts chargeable on the land are the debts due from him at the date of his conveyance to Umbarger, or include his debts to the present date; and whether the claim of P. C. Buchanan and others is equitably chargeable on said land or its proceeds.

And making A. H. Cox, P. C. Buchanan, James Cox, James H. Buchanan and 333 David Graham parties *defendants, they pray that the trustee may be enjoined from selling the land under his deed, and Graham be enjoined from selling under his judgment, until he exhaust the property of the other parties to his judgment, and that he be required to prove his debt as other creditors shall be required to prove theirs in order to participate in said fund. That if necessary, an account be directed to ascertain the amount of the debts or liens chargeable on said land, and that so far as they are so chargeable they may be paid by the sale of the land by a commissioner, and that the balance of the proceeds of the sale may be secured to the plaintiffs, and they ask for general relief.

The injunction was granted, but too late to arrest the sale under the deed of trust, though the trustee had notice of the application; and the plaintiffs filed an amended bill, in which they say that the trustee sold a part of the land, describing it, containing twenty-six acres, at which sale Nicholas Pratt and Jordon Furguson became the purchasers at the price of \$600, and they have taken possession of it. They insist that the sale is invalid, on the grounds stated in the original bill, and for others stated, among them the notice to the trustee, and that the price was grossly inade-

quate. And making Pratt and Furguson parties, they adopt the prayer of the original bill, and ask that the sale may be set aside.

Patrick C. Buchanan answered the original, and also the amended bill. He insisted that by the decree in the case of Sexton v. Cox, the deeds of Cox to Umbarger, and of Umbarger to the plaintiffs, were declared fraudulent and void, and on that account absolutely set aside; thus revesting in A. H. Cox the legal title to the land as fully and completely as before the execution of his deed to Umbarger. That the plaintiffs, therefore, had no interest in the land, and had no right to institute a suit for its sale, or to remove incumbrances that are upon it.

He says that he and James Cox rented 334 the *land, and that A. H. Cox desired to rent it, and they agreed to let him have it on the same terms, Cox to execute a deed of trust to P. Campbell Buchanan to secure the payment of the money; and this was done. He filed the record in the case of Sexton v. Cox and others, and made it a part of his answer.

In his answer to the amended bill he says: The land sold by the trustee was sold as it was and with its boundaries, at the express request of A. H. Cox, and in the presence of P. D. Cox, one of the plaintiffs.

Pratt and Furguson answered, saying that they know nothing of the circumstances under which the land was rented, nor do they know anything in relation to the deed of trust, except that such deed was executed and recorded. That they attended the sale for the purpose of purchasing the ground mentioned in the amended bill; but when the sale was commenced, fearing that some difficulty would arise in relation to said sale, they declined to bid the amount they had agreed upon for the property before they went to the place of sale; and it was crying for only \$200, when A. H. Cox stepped up to them and requested them to bid for the property. That Pratt said to him, that he and Furguson did not want to buy a law suit. Cox then remarked to them to bid up; that there was no danger of a law suit. After this was said, respondents did bid for the property, and became the purchasers at \$600 cash, which was a full and fair price for it. That P. D. Cox was present and heard his father's remarks to the respondents, and did not say a word. That they were put into possession of the property, and had held it ever since.

There was no parol evidence in the cause, and the only exhibits were the deed of trust from A. H. Cox to P. Campbell Buchanan, and the record in the case of Sexton v. Cox. The parol evidence making a part of this record proved beyond question, that the deeds from A. H. Cox to Umbarger 335 and from Umbarger to the *plaintiffs were not only without any consideration deemed valuable in law, but were fraudulent in fact, and intended to shield the property of Cox from his creditors. To this record as evidence there was no excep-

tion, and it was obviously the basis of the decree of the court.

The cause came on to be heard on the 5th of April 1861, when the court held that Pratt and Furguson were purchasers for value without notice, and entitled to hold the land purchased by them; and that the plaintiffs were entitled to hold the residue of said land, subject to any valid claims upon the same by the creditors of A. H. Cox. And it was decreed that A. H. Cox should convey the same with special warranty to the plaintiffs, subject to any valid liens against the said lands prior to the decree rendered in the case of Sexton v. Cox and others, setting aside the deeds as hereinbefore stated, &c., &c. From this decree the plaintiffs obtained an appeal to the District court of Appeals at Abingdon.

The cause came on to be heard in the District court of Appeals in April 1861, when that court held: That though the deeds from A. H. Cox to Umbarger and from Umbarger to P. D. Cox &c., may have been designed to hinder and delay the creditors of A. H. Cox, and though the latter deed was wholly voluntary as to the grantees therein, yet that as between the parties it must be held that both were valid, and that the deed from Umbarger to P. D. Cox &c. vested in them the legal title to, and absolute property in the lands therein mentioned, subject only to the claims of the prior creditors of A. H. Cox; and that the effect of the decree in the case of Sexton v. A. H. Cox and others, was simply to set aside said deeds as against the plaintiff in that suit, and to subject the land thereby conveyed to the satisfaction of his judgment; and that it did not reinvest the title thereto in A. H. Cox, nor divest the title of P. D. Cox &c., nor in any manner interfere with the rights which they had acquired to said lands under said deeds. That, therefore, at the

336 *time of the execution by A. H. Cox, of the deed of trust of the 10th of February 1859, as purchasers under which Pratt and Furguson claim, the said A. H. Cox had no title to or interest in said lands which he could convey, but the legal title thereto and the ownership thereof, were in P. D. Cox &c., subject to the leasehold interest of four years and five months, which Patrick C. Buchanan had acquired by his purchase at the commissioner's sale, made under the decree aforesaid on the 18th of November 1858. That Pratt and Furguson in purchasing under the deed of trust aforesaid, were purchasers with notice of the title of P. D. Cox &c., and acquired no rights paramount to those of said P. D. Cox &c.; and, therefore, that the Circuit court in its decree in this cause of the 5th of April 1861, instead of directing that Pratt and Furguson should hold the land purchased by them, as aforesaid, free from the claim of P. D. Cox &c., should have required them to surrender the same to P. D. Cox &c. at the expiration of the term for which Patrick C. Buchanan had purchased them, viz: on the 18th of April 1863, from which time they were entitled to hold them

in absolute property, subject only to the just claims of the creditors of A. H. Cox, who were such prior to the 5th of January 1843, the date of the recordation of the deed from A. H. Cox to Umbarger.

It was, therefore, ordered that the decree of the Circuit court be reversed with costs; that the deed from A. H. Cox to P. Campbell Buchanan, and the sale thereunder to Pratt and Furguson, be set aside, and the time of the lease having long since expired, that they forthwith surrender to P. D. Cox &c. the lands purchased by them as aforesaid.

From this decree Pratt and Furguson applied to this court for an appeal; which was allowed.

B. R. Johnston, Richardson, and Gilmore, for the appellants.

J. W. & J. P. Sheffey, for the appellees.

337 *BOULDIN, J. delivered the opinion of the court.

The only evidence assailing the validity of the deeds in the proceedings mentioned from A. H. Cox to Umbarger, and from Umbarger to the appellees, P. D. Cox and others, children of A. H. Cox, is the evidence, oral and documentary, contained in the record of the case of David Sexton v. A. H. Cox and others, filed as an exhibit with the answer of P. C. Buchanan, Jr.; but that record was referred to also in the bill, and has been read and relied on as evidence throughout the proceedings by both sides, without exception or objection thereto by any of the parties, either in the court below or in this court. It will be regarded, therefore, as evidence in the cause for all purposes. And the court is of opinion, on the record aforesaid, and the pleadings and other proofs in the cause:

1. That the deed from A. H. Cox to Philip Umbarger of the 10th of May 1842, recorded January 5th, 1843, was not only made without consideration deemed valuable in law, but was fraudulent in fact, having been executed by said Cox with the avowed intent to delay, hinder and defraud his creditors, which intent was known at the time to said Philip Umbarger; and that said deed was and is, therefore, absolutely void as to all the creditors of said Cox, then existing and subsequent.

2. That the deed of the 17th day of March 1852, from Philip Umbarger to Philip D. Cox and others, children of said A. H. Cox, having been made in furtherance of the fraudulent intent aforesaid, and without consideration deemed valuable in law, is in like manner void as to all creditors of said A. H. Cox; but that said deeds from A. H. Cox to Umbarger, and from Umbarger to Philip D. Cox and others, although void as to the creditors of A. H. Cox, are good between the parties; and by the latter deed a valid title to all the property thereby conveyed is vested and still remains (except so far as it may have been divested in

338 favor of the creditors *aforesaid, or any of them) in the said Philip D. Cox and others, subject to the claims of the creditors of said A. H. Cox.

3. That P. C. Buchanan and James Cox were bona fide creditors of A. H. Cox, and by the deed of trust of the 10th of February 1859, from said A. H. Cox to P. Campbell Buchanan, trustee for their benefit, they acquired as against the said Philip D. Cox and others a valid lien on the property thereby conveyed, and were entitled as against them, to satisfaction of their lien aforesaid out of said property.

4. That the appellants, Pratt and Furguson, were bona fide purchasers of the twenty-six acres of land sold to them by P. Campbell Buchanan, trustee, at a sale regularly made by him as trustee under the deed of trust last mentioned, and that they acquired thereby, and are entitled to hold and be quieted in, a good title to the same, as against the claims of the appellees, Philip D. Cox and others, children of said A. H. Cox.

But as said Philip D. Cox and others are entitled to the land conveyed to them by the said deed of the 17th of March 1852, subject to the just claims of the creditors of said A. H. Cox, and as they have suggested in their bill that there are or may be other creditors whose claims are unsatisfied, and have prayed that an account be ordered of all such claims against the said A. H. Cox as may be chargeable on said land, and that the same be sold and the proceeds applied to the payment of such claims as may be established as aforesaid, and the surplus, if any, be paid over to them; the court is further of opinion that proper proceedings should have been had in the Circuit court, to convene all such creditors, in order that the amount of their claims might be ascertained and paid as aforesaid—the surplus paid over to the appellees, P. D. Cox and others, children of A. H. Cox, and an end put to the litigation.

The court is of opinion, therefore, 339 that the decree of *the District court is erroneous, and that so much of the decree of the Circuit court of the 5th of April 1861, as conflicts with the principles of this opinion is also erroneous; and it is decreed and ordered that the said decree of the District court be reversed and annulled, and that so much of the said decree of the Circuit court as conflicts with the principles above declared be also reversed and annulled; and that the appellees, Philip D. Cox and others, children of A. H. Cox, do pay to the appellants their costs in this court and in the District court. And the cause is remanded to the Circuit court of Smyth county to be further proceeded in according to the principles of this decree.

Decree of District and Circuit court reversed.

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*Caldwell v. Craig.

June Term, 1872, Wytheville.

Sale of Land—Bonds for Purchase Price—"Dollars."—

On the 23d of June 1865, R C sells to N C a tract of

land, for which N C was to give him another tract and \$6,500; \$1,000 to be paid in six months from date, \$2,500 in one year, \$2,000 in two years, and \$2,000 in three years; the interest on \$2,000 for one year to be remitted. On the same day N C executes his bonds to R C for said sums of money, payable at the times specified in the agreement; thus—Twelve months after date, I bind myself, heirs, &c., to pay R C twenty-five hundred dollars in currency at its specie value, with interest from date. Two judges hold the word "dollars" is to be construed specie dollars; two that the contract is to pay currency at its then specie value; and one judge holds, that it is a contract to pay currency at its specie value at the time of payment.

This is the same case reported in 21 Grattan 132. The court being divided on the question as to the true construction of the bonds sued on, a rehearing was allowed on that question. The statement in the report presents the case.

Baxter and B. R. Johnston, for the appellant.

J. W. Johnston and J. A. Campbell, for the appellee.

BOULDIN, J. The question which has been re-argued in this cause, and the only question now open, arises on the instruction of the Circuit court to the jury, set out in the third bill of exceptions as follows: "That according to the face of the bonds the plaintiff was entitled to recover the amount named in each with interest as specified." The two bonds or covenants are substantially in the same terms, except as to time of payment, and one of them is as follows:

341 *"\$2500.—Twelve months after date I bind myself, heirs, &c., to pay R. C. Craig twenty-five hundred dollars in currency at its specie value with interest from date, for value received. Witness my hand and seal this 23d of June 1865.

N. E. Caldwell. [Seal.]"

The question is, what is secured to be paid by this instrument? What is its true construction?

It will be observed, that we are not aided in the solution of this question, by any evidence of the cotemporaneous or subsequent construction of the bonds by the parties themselves, either by act or declaration. We are absolutely without information on that subject. We may infer, it is true, from the verdict of the jury, that considerable payments were made; but neither party has thought proper to inform us, how, or in what currency, those payments were made. We are left to deal with the naked question of the construction of the papers on their face, aided only by the surrounding circumstances, so far as we are at liberty to notice them.

It will be remembered then, that the bonds in question were executed about two months after the close of the war between the United States and the Confederate States of America; when Confederate currency after great depreciation had become utterly

worthless; when specie was not in use as currency, and was rarely seen; and before the paper currency of the United States had been introduced into general use amongst us. The people of the southern States had but little knowledge at that time of that currency; but it was known to them, that it had been subject to great fluctuation in value, and had been, prior to that time, and was then, greatly depreciated. What it might become in the future, none could tell or even conjecture. Under such circumstances, it was both natural and reasonable, that both parties should desire and agree, that the character and value of the currency to be paid and received, should be distinctly understood between them.

342 This was especially *important to the covenantee, who was parting with his land; being all that was left to a great majority of the southern people. He, at least, would be naturally solicitous to guard against selling it for worthless paper.

It will be further remembered, that the people of the South knew little or nothing at that time, about the operation and effect of the legal-tender acts and national currency laws of the United States; and that there had been then, no judicial interpretation of those laws; but a disastrous experience had taught them to distrust a national paper currency. They did know, however, that the word "dollar," in the absence of some controlling statutory enactment, had, in law, always imported coin or specie; but they also knew that in the then condition of the country it was extremely difficult, in fact, well nigh impracticable, to procure specie in kind; and that no prudent man, except in exceptional cases in large cities, would promise to pay it.

Such was the state of things under which the parties contracted; and the written contract shows that the covenantee sold his land for "dollars" generally, without providing in the contract in what kind of currency those "dollars" might be paid. He knew that the word "dollars," in the absence of some controlling statutory provision, imported coin or specie. But this, he also knew, it was almost impossible to obtain in kind; and it was, therefore, highly important to both parties, to fix upon a more convenient medium of payment. Specie being unattainable, payment in "currency" became a necessity. But as J. Anderson has well remarked in his opinion in this case, 21 Gratt. 132, 144, "neither party was willing to risk the fluctuations of the currency." To avoid these fluctuations, they determined that the "dollars" mentioned in the contract—that is the coin or specie—might be discharged "in currency," not in currency generally; but in currency at a fixed and unchanging value, to be agreed on between them; and that

343 *value was "its specie value." Now, the specie value of a note is a thing well understood, and about which it would seem there should be no difference. It is the amount of specie that note will command, or for which it can be exchanged. Were I

to ask, what is the specie value to-day of a legal-tender or a national currency note for \$100, I should be told at once, about \$87; that being about the amount in specie for which it could be exchanged. It is obvious then, that a debt of \$100, payable "in currency at its specie value," could not be discharged by the payment to-day of \$100 currency. To hold such a payment a discharge of the debt, would make the nominal value of the currency the same with its specie value, and thus render wholly inoperative, the most important words of the contract; those fixing the value of the currency. The true credit in such case, would be \$87, the specie value of the currency, leaving a balance of \$13 unpaid, to be discharged in currency in like manner. It seems to me that this is the only way by which we can give full effect to all the words of the bonds, and my opinion is, that the contract is in effect a contract for specie, to be paid not in kind, but in currency rated at its specie value; that is to say, as much currency as shall be equal in value to the specie dollars promised to be paid.

But it has been objected to this construction, that it involves the necessity of an arbitrary punctuation, thereby changing the natural sense of the bonds. I do not think there is any force in the suggestion. The bonds as they appear in the printed record, are without punctuation, and to be read intelligibly, proper punctuation must be supplied. The parties had already, as we have seen, executed a covenant, by which the covenantor had obligated himself to pay to the covenantee a certain number of "dollars" for his land. In this covenant the parties had stopped at the word "dollars,"

without saying in what medium or
344 currency those "dollars" should *be paid. When they came to the execution of the bonds or covenants for the several payments, the following words were added after the word dollars, viz: "in currency at its specie value," thus giving the privilege to the covenantor of making the payment in currency, but without deducting the value of the payment. When we look to these facts, it seems to me that the true understanding of the parties, and the grammatical structure of the instruments, require, that a comma should follow the word "dollars," leaving the additional words, "in currency at its specie value, to have their full force and meaning, without" being weakened and disjointed by arbitrary punctuation.

When is the value of the currency to be ascertained? Is it at the date of the covenant or on the day of payment?

No principle of law is better established than this: that where there is a contract to pay or deliver paper currency, or any commodity on a particular day, and the day passes without payment, the day on which the contract is to be fulfilled, is the time to fix the value of the currency or commodity; and I see no reason to depart, in the case before us, from this just and well established rule.

In *Beirne v. Dunlap*, 8 Leigh 514, which was a case of a covenant to pay United States bank notes, the court say, "Paper may rise or depreciate in value before the day of payment; and if the day passes when the contract is to be fulfilled, the measure of the obligee's rights and the obligor's liabilities is the value of the notes on that day, to be ascertained by the verdict of a jury and awarded in damages."

This language was quoted and approved as law by the whole court in the recent case of *Dungan v. Hunderlite*, 21 Gratt. 149, and the principle was affirmed as settled law, by Judges Staples and Christian in the case now before us, on its former argument. *Caldwell v. Craig*, *21 Gratt. 345.

132. See also *Dearing's adm'r v. Rucker*, 18 Gratt. 426, and the numerous cases there cited by Judge Joynes in his learned and able opinion.

I think the currency to be paid should be rated at its specie value on the day of payment; and my opinion is, that there was error in the instruction, to the prejudice, not of the appellant, but of the appellee; but as the latter does not complain of the judgment, but prefers it should stand unreversed, the same should be affirmed.

ANDERSON, J. The construction that the bonds upon which this suit was brought import an obligation, by one of them, to pay the value of twenty-five hundred gold dollars, and by the other, two thousand in currency, differs from that given them by both the prevailing and dissenting opinions at the first hearing, and also from the construction given to them by the judge of the Circuit court. It is a construction not claimed for them by the plaintiff in the court below, anywhere in the record, nor by his counsel here, so far as I remember, in the argument. Though in an oral opinion, at the last term, my Brother Christian indicated, I believe, that such was his construction. If it be the correct construction, that given by my Brother Moncure and myself is erroneous and ought to be renounced. If in error, I have no pride of opinion which could induce me to adhere to it, if convinced that it is an error. The opinions supporting the conflicting construction have received, as they are entitled to, my careful and candid consideration. And if these bonds, read in the light of the surrounding circumstances, show that the parties intended an obligation on the part of the plaintiff in error to pay the value of \$4,500 gold dollars in currency, I will surrender my construction and adopt that, though it may be a hard bargain for the plaintiff in error. For if it was his bargain, fairly made, he must be held to it. But I would not give a forced or strained construction to the language,

346 *or alter the punctuation, or divide a sentence by the insertion of a comma where there was none, and in a place where the sense and the structure of the sentence did not necessarily require it, to fix the hard bargain upon him. With these pre-

liminary remarks, I come to the consideration of the question of construction.

Does the bond by its terms import such an obligation? One of them is in these words: "Twelve months after date I bind myself heirs &c. to pay R. C. Craig twenty-five hundred dollars in currency at its specie value with interest from date, for value received. Witness my hand and seal this 23d June 1865." If the intention had been to make a gold contract, such as is contended, how easy it would have been to have so expressed it thus—"the value of twenty-five hundred gold dollars in currency at its specie value." That language would have been unequivocal, and would have clearly expressed the contract which, it is contended, the bond given imports. Or if it had said twenty-five hundred gold dollars, in currency at its specie value, the language, though not so clear and explicit, might bear that construction. But it does not say "gold dollars." Or if it had only denoted a pause in reading after "dollars," by inserting a comma there, it would have given ground for a plausible argument that the intention was that the obligor should pay the value of \$2,500 gold dollars in currency at specie value. But such construction, it seems to me, in that case would be more plausible than sound. The unnatural pause after "dollars," though the comma denoting it had been inserted, does not supply the omission of the words "the value of" just preceding the words "twenty-five," or at least of the word "gold" just preceding "dollars." The former or the latter must be either expressed or understood to convey the meaning supposed. And then, in either case, the words "at its specie value" are surplusage and might be erased,

347 and the sense would be precisely the same. Thus, "to pay *the value of twenty-five hundred gold dollars in currency," where is the use of the words "at its specie value?" These words are wholly unnecessary to convey the supposed meaning. They are of no use. And so if it read "to pay twenty-five hundred gold dollars in currency," the words "at its specie value" are wholly unnecessary. And without the insertion of those words, or at least without having the word "gold" understood, just preceding the word dollars, it does not necessarily import, even by retaining the words "at its specie value," and inserting a comma after the word "dollars," an obligation to pay the value of twenty-five hundred gold dollars in currency. For you still have the amount, \$2,500 (not in gold, for that is neither expressed nor understood), enumerated to be paid "in currency," which is nothing more nor less than an obligation to pay \$2,500 in currency, except so far as it is qualified by the terms "at its specie value," the meaning of which and its use I attempted to show in the opinion which I have heretofore given in this case.

But what right have we to insert a comma after the word dollars? It is not to be found there in either of the bonds, as shown

in the printed record, and it is not the natural place for it, according to the sense or structure of the sentence. The natural place for it is after the word currency, for that is the natural and grammatical division of the sentence, according to its sense and structure, so that it would read "twenty-five hundred dollars in currency, at its specie value." But I need not press this point further. I wish to remark, however, before leaving it, that there is an error committed in the report of this case in the printed sheets of 21 Grattan, by inserting a comma after the word dollars, where none was put by the parties themselves, as shown by the printed record.

I will now proceed to show that the construction contended for does not convey the intention and meaning *of these parties. These bonds and two others were given in pursuance, or in execution, of articles of agreement entered into between the parties for the sale and purchase of land. They evidence a sale of a tract of land by Craig to Caldwell, supposed to contain 1,000 acres more or less, for and in consideration of a tract containing 150 acres, which Caldwell was to convey to Craig, and of \$6,500, payable as follows: \$1,000 in six months from date, \$2,500 in twelve months, \$2,000 in two years, and \$1,000 in three years, the interest on \$2,000 for one year to be remitted. The article bears even date with the bonds—that is, June 23, 1865. There is no question that the bonds were given for these instalments, and that the contract of Craig to convey the land aforesaid to Caldwell was the only consideration of the bonds. And although the bonds and the article are of the same date, the presumption is that the article was first executed.

According to the legal effect of that article, what was the obligation of Caldwell, and how could he discharge it? It was to pay in currency. It was an obligation to pay \$6,500, which, under the law, he could discharge in legal tender notes—in other words, the paper currency of the country—there being no difference in the commercial value of legal tenders and United States treasury notes of any issue, or national bank notes. Now, is it credible that Caldwell, on the same day, and perhaps immediately after the execution of that agreement, would have given his bonds, in the execution of it, for fifty per cent. more than he was required to pay by the articles? In other words, that he would have obligated himself to pay \$9,750, with interest thereon, when his contract was to pay \$6,500 only, with interest? But this he did, if the construction of his bonds contended for is sound. It may not be exactly in those proportions. It may be for more or less. But the construction which I oppose would place him in the category of obligating himself to *pay the \$6,500 at all events, and whatever might be the difference, at the time of payment, between the value of specie and a fluctuating and depreciated currency, in the fulfilment of

articles of agreement just entered into, which required of him, as we have seen, only to pay \$6,500 in currency. It is incredible that, in the execution of these bonds, such should have been the intention of the parties; and it is repulsive to every sense of justice and fair dealing.

But the conduct of the parties, and especially of the defendant in error, who never set up a pretense, so far as this record shows, that it was a gold contract, repels the idea that such was the understanding. Large payments have been made, so as to reduce the first three instalments of \$5,500, with the accruing interest, to \$1,902.59 at the date of the judgment, and no pretense ever heard of that it was a gold contract. Is it not too late now to set up such a pretension, and does not the conduct of the parties show, in confirmation of my interpretation of the language of the bonds, that they never designed it to be a gold contract.

The language of the bond requires no such construction, and as we have seen, it is not even plausible without giving it an unnatural punctuation, which was not given by the parties themselves. I do not think, therefore, that we should change the punctuation, supply words which were not employed by the parties, and make nugatory and unmeaning, and useless, words which they had employed, to place a construction upon the instrument which puts a hard bargain upon the obligor, repugnant to the plain terms and legal effect of the contract in the execution of which it was given, and to the whole conduct, pretensions and after dealings of the parties in relation to it.

It is true, that in the execution of the bonds there is some modification of the contract as to the medium of payment.

That is plain from the face of them.

350 And *it was entirely competent to the parties to make such modification. And it was very natural and necessary, as a precaution, to guard against the fluctuations of the currency, and was as important for one as the other, if they did not intend a contract of hazard. And according to our construction, they adopted the just and sensible standard of the then specie value of the currency. It not being a gold contract, solvable in currency at its specie value, and not being a contract solvable in currency without qualification (a conclusion in which four of us concur, and which I endeavored to maintain in my former opinion), we seem to be shut up to the conclusion that the obligation was to pay the sum named in currency at its then specie value, those words having been used with reference to the then present time, when the contract was entered into, and when the parties must be presumed to have known the value of currency in relation to specie as the standard. I am constrained, therefore, to adhere to that construction.

CHRISTIAN, J. concurred in the opinion of Bouldin, J.

MONCURE, P. concurred in the opinion of Anderson, J.

CHRISTIAN, STAPLES and BOULDIN, Js. concurred in affirming the judgment of the Circuit court. MONCURE, P. and ANDERSON, J. were for reversing it.

Judgment affirmed.

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*Moore v. Tate.

June Term, 1872, Wytheville.

Absent, STAPLES and BOULDIN, J.*

Judgment—Payment to Clerk—Acceptance.—T has a judgment against M, in February 1862, and M. who is in the army, sends Confederate money to his son, and directs him to pay T's judgment. The son applies to the sheriff, but he not having an execution, advises the son to leave the money with the clerk of the court for T, and this the son does; and the clerk deposits it in bank in his own name, with a memorandum showing for whom it is intended. A month or two afterwards, the son sees T at the place, and tells him the money is left with the clerk for him, and T makes no reply. In October, M sees T and asks him if he had been paid. T says no, but the money was deposited in bank. M leaves him believing that the debt was satisfied. T does not apply for the money to the clerk; and upon the clerk's death in 1864, his administrator pays it to the son. This was not an acceptance of the money by T, and the debt is still due.

In November 1869, A. C. Moore applied to the judge of the Circuit court of Wythe county, for an injunction to restrain the levy of the execution upon a judgment rendered against him in the County court of that county on the 14th of May 1861, at the suit of M. B. Tate, for \$750, with interest from the 2d of February 1861, and costs; and the injunction was granted. The ground on which the injunction was asked is, that the judgment had been satisfied; and the mode of its satisfaction is set out in the bill. This is denied in the answer of Tate. The only evidence in the cause is the depositions of the plaintiff, A. C. Moore, and of his son, J. Melton Moore. This testimony is stated in the opinion of the court.

At the October term, 1869, of the Circuit court, upon the motion of the defendant, the court dissolved the injunction. The plaintiff then amended his bill, and retook his own deposition; and at the May term of the court 1870, the court overruled the motion of the plaintiff to reinstate the injunction, and its dissolution was confirmed, and the bill dismissed. And thereupon Moore applied to this court for an appeal; which was allowed.

Caldwell, for the appellant.

Terry and Pierce, for the appellee.

MONCURE, P. delivered the opinion of the court.

This is an appeal from a decree dissolving

*STAPLES, J. had been counsel, and the case was heard before the election of BOULDIN, J.

an injunction to an execution upon a judgment, on the ground that the judgment had been satisfied by payment. The alleged payment consisted in a deposit in a bank at Wytheville, in July 1862, of the amount of the judgment, in depreciated bank notes and Confederate States treasury notes at their par value, of which deposit and of the purpose thereof the creditor was shortly thereafter informed by the debtor and made no objection. The depreciation of the notes, in which the deposit was made, was, at the time of the deposit, at the rate of one and a half for one, as compared with specie. Though this was a small depreciation, compared with what soon thereafter happened, in regard to such notes; and though such notes were then often received at par, in payment of old debts, and were the general currency of the country; yet a creditor was not bound to receive them at par in payment of the debt due to him; and his consent to do so, especially when his debt was undisputed and perfectly secure (as seems to have been the case here), ought to be clearly proved, in order to be binding upon him. And even if the deposit had been made in good money, current at par, yet if the deposit was made to the credit of the debtor, or on his account, and not to the credit of the creditor, or on his account; if anything remained to be done after the creditor was informed of the deposit, to invest him with the title to the money; and if, before that thing was done, the money perished, the loss would fall on the debtor; unless it arose from the default of the creditor, or some fraud on his part, by which the debtor was misled.

If the version given of this transaction in the answer of the creditor be the true one; or, if the case were tried upon the bills and answer only, there would be no doubt as to the correctness of the decree in favor of the creditor. But the case was tried, also, upon the depositions of the debtor and his son; and the question is, how upon the whole case as tried, the question ought to have been decided.

It was argued by the counsel for the appellee, that the answer, where it is responsive to the bill, must be taken to be true, because it is not contradicted by at least two competent witnesses, or one with corroborating circumstances.

Whether the answer, where it is responsive to and denies the allegations of the bill, is contradicted by at least two competent witnesses, or one with corroborating circumstances, seems to depend, upon whether the debtor, the plaintiff himself, is a competent witness within the meaning of the rule of equity on the subject: that is, whether his evidence can have any weight in disproving the responsive denials of the answer.

That is certainly a very interesting question, and seems to be an undecided and novel one. To give weight to such evidence for such a purpose, might seem to go far in annulling the equity rule of limiting its operation.

Without, however, expressing any opinion upon that question, and not giving to the answer a conclusive effect in any respect, but looking to all the evidence in the case, let us enquire whether it shows, either that the judgment has been actually paid, or that the creditor is equitably estopped from denying its payment?

354 *J. Melton Moore, the son of the debtor, testifies, that in the summer of 1862, he paid the money to the clerk of the County court of Wythe, H. S. Mathews. Witness says: "The sheriff told me to pay it to Mr. Mathews. I paid \$650 in bank notes, the remainder in Confederate money. Colonel Moore (the debtor) was sued on the amount due Mr. Tate (the creditor); therefore I went to the sheriff to know what to do with the money. He advised me to pay it to the clerk. Mr. Tate was not a resident of the county. Colonel Moore was in the army at that time; and wrote to me to pay the money due Mr. Tate. I paid the amount of the judgment." Being asked, on his examination in chief, "How soon did Mr. Tate, to your knowledge, have knowledge of your payment; how did he come to have that knowledge; and what was his conduct on learning it?" The witness answered: "I met in town (that is in Wytheville), either at the next term of the County court afterwards, or at the next but one, Mr. Tate himself, and told him I had paid the money to Mr. Mathews, and that Mr. Mathews had deposited it in the Southwestern Bank of Virginia, in Wytheville, for him. Mr. Tate made no objection and we parted. This interview was in Wytheville." Being further asked: "When did you first learn that Mr. Tate had objection to taking the money; and how did you learn it?" Witness answered: "The first I knew of his objecting was after the death of Mr. Mathews; and I think it was in the fall of 1864. Captain Gibboney, the administrator of Mr. Mathews, at that time inquired of me, whether I had ever paid such a sum to Mr. Mathews for Mr. Tate, stating that it so appeared from a memorandum of Mr. Mathews, and that he had found it on deposit accordingly, and had tendered it to Mr. Tate, who had refused it. Thereupon said Gibboney insisted, as representative of Mathews, on paying it back to me; and not seeing how else it could be saved,
355 I received it." Being asked, *on cross examination: "When you had the conversation with Tate, did he tell you that he would receive the money?" The witness answered: "I told him the money was in the bank and walked off. He, Tate, said nothing. He did not object to it; nor did he say he would receive it. I was in his company at other times afterwards during the day; he never said he would receive, nor did he say he would refuse to take it." And being further asked: "When Captain Gibboney offered you the money, did you take it; and was the money used by Colonel Moore afterwards?" Witness answered: "I took the money and kept it until after the surrender; it was then sold for specie and used."

A. C. Moore, the debtor, testifies, that he was a colonel in the Confederate service. His instructions to his son when he left home were, to pay the Tate debt out of the first funds his son should acquire during his absence. Witness went to Kentucky, and on his return drew funds from the Confederate government amounting to \$1,470 or \$1,570, and sent all except \$70 to his son. This was the last of February or 1st of March 1862. Sent the money to his son with instructions to pay the debt to Tate, not knowing whether he had been paid or not. Thinks the money sent was Confederate money. Being asked, "When and how did you first learn that Melton Moore (the son) had made the payment directed?" The witness answered: "I met with Mr. Tate at Abingdon, though he was possibly living in Smyth county. We were talking about the debt, and he informed me that the money was deposited for him in the bank at Wytheville. From his conversation I inferred that it would be all right, and knew nothing to the contrary until after the death of Mr. Mathews. My impression is, that this conversation took place a short time before I went with my regiment into Kentucky, and that it was in the fall of 1862. We started from Abingdon the 3d of

November in that year. He did not
356 merely inform me that he *had learned the money was deposited for him in the bank, but that it was so deposited." Witness says, he never knew any thing of any objection Tate had to the supposed payment until he heard it as reported by Captain Gibboney, administrator of Mr. Mathews. This witness was twice examined in the case. Being asked, on his second examination, to "state what conversation took place in that interview (meaning the one between him and Tate before referred to), and how such conversation originated," witness said: "My impression is, that meeting with Mr. Tate, and not knowing whether he had received the money or not, I made enquiry of him to learn whether he had received it or not. He informed me that he had not; but that it was deposited for him in the Southwestern Bank at Wytheville, Virginia. I have no recollection of any other conversation in regard to it. When I parted with him, I was perfectly satisfied that the debt was settled, and never learned that Mr. Tate considered it otherwise until 1864." Being asked, on cross examination, "Did Mr. Tate tell you, in hæc verba, that he would receive this money in satisfaction of this judgment?" Witness answered: "He did not, but left me under the impression that he would take it."

Now, does the foregoing testimony, especially when viewed in connection with the denials of the answer, make out a case either of payment, or of an equitable estoppel to deny payment of the judgment aforesaid?

The judgment was a debt of record, and seems to have been perfectly secure. The creditor might at any time, it seems, have made his money at once by suing out execution upon the judgment, except so far as

the stay law may have interposed a temporary obstruction. And he might have demanded specie in payment of the debt. Indeed, without his consent, nothing but specie would have been a good payment. The debtor contends that he paid the debt in a depreciated currency; which the creditor does not admit, but denies. Now 357 nothing is "more reasonable than to require clear proof of such payment under such circumstances. The burden of the proof rests entirely upon the debtor. The laboring oar is upon him. The creditor's claim is well secured; is well attested; may be easily, and readily enforced—transit in rem judicatam. Execution only, remains to be done. He may safely repose upon his rights; taking care, of course, to commit no fraud, by anything he does or says, upon the rights of the debtor.

Now, let us see what is the evidence of payment relied on by the debtor. It is not pretended that payment was ever actually received by the creditor, in whole or in part, in good or in bad money. It is not pretended that the depreciated money, which was handed by J. Melton Moore, the debtor's son, to H. S. Mathews, clerk of the court, and by the latter deposited in bank for the purpose of paying the debt, ever came to the hands of the creditor. It is not pretended that the creditor ever authorized the sheriff, or the clerk, or anybody else, to collect or receive the amount of the debt for him. He seems to have been willing, if he did not prefer, to let the debt stand as it was until the currency became better. Perhaps, like most other persons at that time, he might not have refused payment in Confederate currency, if it had been tendered to him; but he, no doubt, preferred that such tender should not be made. The only evidence of payment is, that J. Melton Moore, having received from his father Confederate notes exceeding the amount of the debt, with instructions to pay this debt, and supposing that there was an execution for it in the hands of the sheriff, offered to pay the amount to the sheriff; who, having no execution on the judgment in his hands, and no authority to receive the money, declined to do so, but advised J. M. Moore to pay the money to the clerk of the court, Mr. Mathews, who received it and put it in bank. At that time the debtor resided in Wythe, where the judgment was obtained, and the creditor in the adjacent 358 *county of Smyth, or the neighboring county of Washington, and both were in the military service of the Confederate States. It does not appear that Mr. Mathews, the clerk, ever informed the creditor, Tate, of the receipt or deposit of the money by him. The first information the creditor received of that fact was at the next term of the County court of Wythe afterwards, or the next term but one; when J. Melton Moore met the said Tate in Wytheville, and told him that he, Moore, had paid the money to Mr. Mathews, and that Mr. Mathews had deposited it in the Southwestern Bank of Virginia, in Wytheville, for him. "Mr. Tate," says the witness, "made no objec-

tion, and we parted." "I told him the money was in the bank and walked off. He, Tate, said nothing. He did not object to it; nor did he say he would refuse to receive it." The money, it seems, remained in bank, without being drawn out by any one, until after the death of Mr. Mathews, in the fall of 1864; when Captain Gibboney, the administrator of Mr. Mathews, inquired of witness whether he had ever paid such a sum to Mr. Mathews for Mr. Tate; stating that it so appeared from a memorandum of Mr. Mathews, and that he had found it on deposit in bank accordingly, and had tendered it to Mr. Tate, who had refused it. Thereupon said Gibboney insisted, as representative of Mathews, on paying it back to witness, who says he received it, not knowing how else it could be saved.

Did this witness, as the agent of his father, do enough to complete the payment of the debt, by merely telling the creditor that the money was in bank, and then walking off? "He, Tate, said nothing. He did not object to it, nor did he say he would receive it." Had the witness any right to infer from this silence of the creditor, that he was willing to receive the money deposited, and to accept the mere deposit which had been made as payment of the debt? Why did not witness tell the creditor what kind of money had been 359 deposited, and enquire *whether he would receive that kind of money in payment of the debt? Why did he not get the money from the bank, or from Mr. Mathews, tender it to the creditor, and if accepted, take the creditor's receipt in full satisfaction and discharge of the judgment? That was the plain, easy and regular mode of doing the business which the witness ought to have pursued. The witness, the creditor, Mr. Mathews and the bank were all then in the same town together. It would be time enough for the creditor to refuse the money when it should be tendered to him, and he could not be called upon to accept or refuse it until it was so tendered, much less can his acceptance be inferred from his mere silence, on being informed that the money was in bank. The debtor, or his agent, had not a right to pay the money in bank, even to the credit of the creditor, without his consent. It could only be paid to the creditor himself, or to some person by him authorized to receive it, though a subsequent assent would be tantamount to a prior authority. But in this case the money was not deposited to the credit of the creditor, but to the credit of Mathews, the agent of the debtor, and no check was ever given or offered by Mathews to the creditor, and no order on Mathews was ever given by the witness to the creditor for the money. The creditor, without such a check or such an order, had no right to demand or receive the money of the bank, or of Mathews. The money never became the property of the creditor, but always remained the property of the debtor until it perished, or was received and disposed of by his agent.

Thus stands the case upon the testimony of J. Melton Moore, the son of the debtor. Is it materially altered by the testimony of the debtor himself, the only other testimony in the case? He says that a short time before he commenced his second march into Kentucky, which was the 1st of October 1862, he met with Mr. Tate at Abingdon. The account which this witness

360 gives of *this interview is as follows: "My impression is, that meeting with Mr. Tate, and not knowing whether he had received the money or not, I made enquiry of him to learn whether he had received it or not. He informed me that he had not, but that it was deposited for him in the Southwestern Bank at Wytheville, Va. I have no recollection of any other conversation in regard to it. When I parted with him I was perfectly satisfied that the debt was settled, and never learned that Mr. Tate considered it otherwise until 1864." "He said nothing about taking or refusing the money then (at the time of the interview aforesaid) or afterwards." This testimony certainly does not prove a payment of the money, or an admission of such payment. On the contrary, it proves that the money had not been paid to the creditor. "He informed me," says the witness, "that he had not" received the money, "but that it was deposited for him in the Southwestern Bank at Wytheville, Va." This was not an agreement by the creditor to accept this deposit as a payment. He had not before accepted it as such, and there was no reason why he should make such acceptance on this occasion. He was merely asked a question of fact, which he answered to the best of his knowledge and belief. The debtor had sent Confederate money to his son, and requested him to pay this debt. The son, it seems, had never informed the father whether such payment had been made or not; and the debtor and creditor happening to meet at Abingdon, enquiry was made and answered as aforesaid. In informing the debtor that the money was deposited for him (the creditor) in the Southwestern Bank at Wytheville, Va., the creditor meant only to inform the debtor, in answer to his enquiry, of a fact of which the creditor had himself been informed by the son of the debtor. He no more intended then to accept that deposit as a payment than he intended to accept it as such at the time he

361 was himself informed of the fact of the deposit. Just as much *remained to be done to convert that deposit into a payment of the debt after the interview of the debtor and creditor at Abingdon, as after the interview of the debtor's son and the creditor at Wytheville, as before stated. Nothing was done after either interview towards the application of the money on deposit to the payment of the debt, until after the death of Mathews, when, for the first time, it was offered to the creditor by the administrator of Mathews and refused.

There is not a tittle of evidence tending to prove that Tate, the creditor, was guilty of any fraud in the transaction aforesaid,

or intended, by his conduct or his silence, to mislead the debtor or his son. He had no motive whatever to commit such a fraud, as he had an unquestionable right to receive depreciated money or not, at his pleasure, in payment of his judgment—a right of election which he, no doubt, intended to exercise whenever, if ever, such money should be tendered to him. He was not bound to make such election before. Whether the creditor, in July or August 1862, would have received depreciated State bank notes or Confederate notes in payment of his judgment, cannot now be certainly known. He never said that he would, so far as the testimony shows. Perhaps he might have done so, if the said notes had been tendered to him, but they never were. The fact that the creditor said nothing when informed of the deposit by the debtor's son, and did not, either then or during the interview with the debtor at Abingdon as aforesaid, say he would receive such notes, or accept the said deposit, in payment of his judgment, ought, it seems, to have excited an apprehension, on the part of the debtor or his son, that the creditor might be unwilling to do so, and to have admonished them of the necessity or propriety of making a tender of the notes, and if received, or taking a receipt in discharge of the judgment; if not, of having satisfaction

thereof entered upon the record. If 362 the creditor *would have been willing to receive such notes in payment of his judgment, even as late as July or August 1862, he would no doubt greatly have preferred not doing so, as was usual in such cases, and as might fairly have been inferred from his silence when informed of the deposit. Had he been anxious to do so, he would no doubt have at once gone forward and had the matter perfected by a proper application of the money deposited. But not being anxious to do so, he left it to the debtor, on whom it devolved to make a tender of the notes on deposit in payment of the judgment, reserving to himself the right to receive the money or not, according as he might think best at the time of the tender. The debtor's son, after informing the creditor of the deposit in bank and walking off, not having done anything more in the matter, the creditor may well have presumed that some other disposition had been made of the money. But however that may be, it devolved on the debtor to make a tender of the notes if he desired them to be received in payment.

The debtor and his son seem also to have acted in good faith in this transaction. They no doubt believed, as the debtor, at least, says he did, that the creditor would receive the money deposited in payment of his judgment. But this belief was not induced by any promise or fraud of the creditor, and he is not bound by any principle of law or equity to make it good. It is very much to be regretted that such a loss should have to fall upon one or the other of two parties, both of whom are innocent; but all we can do is to determine on which of them

it must fall, according to law. We think it must fall on the party whose property the money on deposit was at the time it perished, or at the time it was withdrawn from the bank. And we think we have shown that it remained then, as it had before been, the property of the debtor, Moore, and not of the creditor, Tate.

363 *We have, in considering this case, given full credit to the testimony of the debtor and his son, the only testimony in the case besides the answer. But when it is remembered that that is the parol testimony of witnesses whose relation to the controversy, however honest they may be, and doubtless are, must strongly bias their feelings, and who are testifying as to conversations which occurred many years before they gave their testimony, the force of it is very much weakened by these considerations, and we must plainly see that it is wholly inadequate to prove the payment of the creditor's judgment in this case—much less to convict him of fraud—which can never be presumed, but must always be clearly proved.

We therefore think there is no error in the decree appealed from, and that it ought to be affirmed.

Decree affirmed.

364 *Sanders v. Branson.

June Term. 1872. Wytheville.

1. *Bill for Relief under the Adjustment Act of '66-'67.*—In August 1863, S sold land to B for \$4,000, which was worth before the war \$8,000, and took his notes for a part of the purchase money, one payable on the 1st of January 1863, and the other on the 1st of January 1864. In October 1864, B tendered the money to S, who refused to receive it. S having, after the war, recovered a judgment upon the notes without defense, B filed a bill in equity under § 4 of the act of March 3d, 1866, to set up his tender of the money, and he asked for general relief. **Held:**

1. *Same.*—This was a contract with reference to Confederate States treasury notes as the standard of value.
2. *Same.*—Though the tender not having been made in time, B is not entitled to be entirely relieved, yet under the prayer for general relief he may have relief in this suit.
3. *Same—Measure of Relief.*—The just measure of relief is not the gold value of the money at the time of payment, but the value of the land at the time of the sale in good money.

In March 1868, Henry L. Branson obtained from the judge of the Circuit court of Smyth

**Bill for Relief under Adjustment Act of '66-'67.*—Principal case cited in *Penn v. Reynolds*, 23 Gratt. 523; *Bias v. Vickers*, 27 W. Va. 462.

"The statute giving the right to a defendant to defend at law or obtain relief in equity, if he avails himself of his right to make his defence at law, and a judgment is given against him, he cannot afterwards obtain relief in equity. 1 Bart. Ch. Pr. 41; *Penn v. Reynolds*, 23 Gratt. 523; *Sanders v. Branson*, 22 Gratt. 364;" *Knott v. Seamands*, 25 W. Va. 103.

county, an injunction to restrain James Sanders from enforcing a judgment he had recovered in that court against Branson. This judgment was for \$1,350, with interest upon \$675, a part thereof, from the 1st day of January 1863, and on \$675, from the 1st of January 1864; and was founded on two notes for these sums, dated the 26th of August 1862, given in part for the price of a tract of land purchased by Branson from Sanders.

The bill alleged that the understanding between the parties was, that the notes were to be paid in Confederate currency; and that the plaintiff had tendered the money to Sanders on or about the dates on 365 which the *notes became due. That the judgment had been recovered without defense at law, it being provided by statute that the only court competent to consider a plea of tender of Confederate money is a court of equity. The prayer of the bill was for an injunction to the judgment, and for general relief.

Sanders, in his answer, denied that the understanding between the parties was that the notes were to be paid in Confederate currency. He said that the land was worth more than the price at which he sold it. And he denied that the plaintiff had made him a tender of any money on these notes. He says that about the 25th of December 1864, plaintiff came to him and said that he wanted to pay these notes; and at that time Confederate treasury notes rating at about fifty for one of gold, respondent refused to take them.

It appears from the evidence that the land sold by Sanders to Branson was worth in good money, from twenty-five hundred to three thousand dollars, and it was sold to Branson for \$4,000. Nothing was said at the time of making the deed and executing the notes, as to the kind of money in which they were to be paid. It was in proof that in October 1864, Branson tendered the money to Sanders.

The cause came on to be heard on the 25th of November 1870, when the court held that the notes were executed with reference to Confederate States treasury notes as a standard of value, and that though the plaintiff made a tender of Confederate notes in payment, the tender was made after the notes fell due; and, therefore, he was not entitled to be wholly discharged thereby. And scaling the notes as of the date when they respectively fell due, it was decreed that Branson should pay Sanders \$258.75, with interest on \$225 part thereof, from the 1st of January 1863, and on \$33.75, the residue thereof, from the 1st of January 1864; and perpetuated the injunction, except 366 as to this sum. From *this decree Sanders applied to a judge of this court for an appeal; which was awarded.

Gilmore and J. W. & J. P. Sheffey, for the appellant.

B. R. Johnston and J. T. Campbell, for the appellee.

MONCURE, P. I am of opinion that the

contract of the 26th day of August 1862, between the appellant James Sanders and the appellee H. L. Branson, for the sale of a tract of land by the former to the latter, as in the proceedings mentioned, "was, according to the true understanding and agreement of the parties, to be fulfilled or performed in Confederate States treasury notes, or was entered into with reference to such notes as a standard of value," within the intent and meaning of the act passed March 3, 1866, entitled "An act providing for the adjustment of liabilities arising under contracts and wills made between the 1st day of January 1862, and the 10th day of April 1865," Acts of Assembly 1865-'6, chap. 71, p. 184; and of the act amendatory thereof, passed February 28, 1867, Acts of Assembly 1866-'7, chap. 270, p. 694.

Confederate States treasury notes were almost the only, if not the only, currency in circulation at the date of the contract, and a presumption of fact would arise from that circumstance alone, in the absence of anything tending to show the contrary, that the dealing of the parties was in reference to that standard of value. But the presumption is supported in this case by the fact, that the contract price of the land, \$4,000, bore about the same proportion to the specie value of the land at the time of the contract, the highest estimate of which was \$3,000, that the value of Confederate States treasury notes then bore to specie; and also by the evidence of witnesses for the vendor, who were present when the contract was entered into, or when the bonds were given, and who state, that though nothing was then said about the kind of money in which the bonds were to be paid, they considered *that payment was intended to be made in Confederate States treasury notes.

I am further of opinion, that under all the circumstances of this case, the amount due upon the bonds in controversy should be ascertained, not by scaling the nominal amount of the bonds, in the mode and manner prescribed by section 2 of the said act of March 3, 1866, but by regarding the fair value of the property sold at the time of the sale, as the value in good money of the consideration agreed to be paid for it, according to the mode of adjustment prescribed by the proviso embodied in section 1 of the said act of February 28, 1867; and that the amount which may appear to be due upon the said bonds according to the standard of value afforded by the proviso aforesaid, "would be the most just measure of recovery" in this case. That the mode of adjustment provided by the latter act is constitutional, that it generally affords the most just measure of recovery where it applies, and that it does so in such a case as this, is clearly shown by my Brother Christian, in an opinion delivered in *Pharis v. Dice*, 21 Gratt. p. 303, in which all the other judges concurred. See also *Carter v. Ragland*, Id. 574, and *Meredith, &c., v. Salmon*, Id. 762.

I am further of opinion, that the appellee,

Branson, is entitled to relief as aforesaid in this suit; which is a suit in equity brought by him under section 4 of the said act of March 3, 1866. That section provides, that "in any case wherein it shall appear, that on any contract made, or liability incurred, on or after the 1st day of January 1862, and before the 10th day of April 1865, the debtor, on or after the maturity of the claim against him, and within the period above mentioned, made to the creditor, his agent or attorney at law, a bona fide and actual tender of the amount due, in the said Confederate States treasury notes, or other equal or better currency, and that the creditor then refused to accept the same, a court of equity may grant relief to the

debtor unless it *appears that the creditor was justified in refusing to accept the amount tendered in consequence of a substantial and decided depreciation of such currency after the time at which payment ought to have been made, and before the time at which the tender was made, or unless it otherwise appear to be inequitable to grant such relief. The appellee averred in his bill that he tendered the amounts of the bonds on which the judgment was obtained to the appellant on or about the dates on which they became due, and that the appellant refused to receive the tender. And the appellee proved that such a tender was made, but not until October 1864, which was long after the last of the said bonds became payable, and when there had been, since that period, a very substantial and decided depreciation of the currency. The Circuit court therefore decreed that the complainant was not entitled to be wholly discharged by reason of such tender; but that court further decreed that the defendant (the appellant) recover of the complainant (the appellee) the sum of \$258.75, being the scaled value of the said two bonds at the time they respectively became due and payable, with interest on \$225, part thereof, from the 1st day of January 1863, and on \$33.75, the residue thereof, from the 1st day of January 1864. I think the Circuit court had jurisdiction to grant such relief in the suit as was equitable and just. The complainant properly came into court for relief against the judgment. It does not appear, and it is not pretended, that the tender was made and averred in the bill for the purpose of giving the court jurisdiction of the case. The tender was a real and not a colorable transaction; and the complainant had a right, under the said 4th section of the act of March 3, 1866, to go into equity upon that ground. But though he prayed for relief against the whole claim, he did not confine his prayer to that. He further prayed for "such other and general relief as is consistent with equity and adapted to his case." The Circuit court, after refusing *to relieve against the whole claim, had a right, both on the case stated in the bill and the prayer for general relief, to give such relief as was equitable and just. The court, having properly obtained jurisdiction of the case, could go on

to do complete justice between the parties. I think the court did not err in deciding that the complainant is not entitled to be wholly discharged from the claim by reason of the tender aforesaid. But I think the court erred in decreeing against the complainant only the scaled value of the bonds aforesaid; and that, instead of doing so, the court ought to have decreed against him for such sum of money and interest as would be due, regarding the fair value of the property sold as the standard by which the amount due upon the bonds is to be ascertained; according to the rule furnished by the proviso in section 1 of the act of February 28, 1867, aforesaid.

I am therefore of opinion that the said decree is erroneous, and ought to be reversed, and the cause remanded for further proceedings to be had therein in conformity with the foregoing opinion.

CHRISTIAN, STAPLES and ANDERSON, Js., concurred in the opinion of Moncure, P.

BOULDIN, J., dissented.

Decree reversed.

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*Wright v. Pucket.

June Term, 1872, Wytheville.

Absent, ANDERSON, J.

Parol Contract of Land—Specific Performance—What Three Things Must Concur.—In a suit by the purchaser, for the specific performance of a parol agreement for the sale of land, it must appear: 1st. That the parol agreement relied on is certain and definite in its terms. 2d. The acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved. 3d. The agreement must have been so far executed that a refusal of full execution would operate a fraud upon the party, and place him in a situation which does not lie in compensation. And no one of these conditions appears in this case.

This was a suit in equity in the Circuit court of Russell county, brought in July

***Parol Contract of Land—Specific Performance—What Three Things Must Concur.**—The rule laid down in the principal case in regard to the three things that must concur in order to justify the court in granting specific performance of a parol contract for the sale of land is followed in many subsequent cases as authority upon the subject. See *Pierce v. Catron*, 28 Gratt. 598; *Floyd v. Harding*, 28 Gratt. 401, and *note*; *Rhea v. Jordan*, 28 Gratt. 664, and *note*; *Lester v. Lester*, 28 Gratt. 743, and *note*; *Burkholder v. Ludlam*, 30 Gratt. 260; *Halsey v. Peters*, 79 Va. 67; *Hurt v. Prillaman*, 79 Va. 268; *Litterall v. Jackson*, 80 Va. 613; *Barrett v. Forney*, 82 Va. 277; *Edichal Bullion Co. v. Columbia, etc., Co.*, 87 Va. 646, 13 S. E. Rep. 103; *Reynolds v. Necessary*, 88 Va. 129, 13 S. E. Rep. 348; *Hale v. Hale*, 90 Va. 733, 19 S. E. Rep. 739; *Gallagher v. Gallagher*, 81 W. Va. 13, 5 S. E. Rep. 297; *Miller v. Lorentz*, 39 W. Va. 171, 19 S. E. Rep. 395.

The principal case is cited in *Boyd v. Cleghorn*, 94 Va. 783, 27 S. E. Rep. 574, as authority for the proposition that equity will lend its aid to defeat a fraud notwithstanding the Statute of Frauds if there is clear and evincing proof of the contract.

1868, by George W. Pucket against Milton Wright, the brother and only heir at law of Harvey Wright, deceased, to enforce the specific performance of a parol contract, which the plaintiff alleged was made by said Harvey Wright and himself, in relation to land. The bill sets out that Harvey Wright, the uncle of the plaintiff, a good many years since, purchased a tract of land on Jesse's mill creek, in the county of Russell. That the land was unimproved, and then of little value; and that Wright was then a feeble old man, without means to bring the land into cultivation. That plaintiff was then young and unmarried; and Harvey Wright telling the plaintiff that he would have to sell part of the land to improve the residue, and that he would rather sell it to the plaintiff than to any one else, proposed to him that if the plaintiff would come and help him to improve his land, he should have part of it at his (Wright's) death, and should be well

371 compensated out of the land for his labor. To this the plaintiff agreed. That it was not at that time agreed fully, what part of the land plaintiff should have, only he was to be well compensated for his labor in part of the land; but the said Wright was to retain the possession and control of the whole land during his life. That plaintiff entered faithfully and diligently upon the execution of his part of the contract, and continued faithfully to labor upon the land, clearing and improving it, for about eight years, and did improve the land so that it rendered to said Wright during his life a fair support.

The bill further states that the plaintiff then married and settled on land adjoining the land of Wright, on the east side of the creek; and by the direction of said Wright, enclosed within his own fence a large portion of the land lying east of the creek, and cleared and cultivated a part of it, for which he paid no rent, and he had kept it so enclosed ever since, though the said Wright used it in common with the plaintiff to turn his stock in when he chose, but telling the plaintiff that was a part of the land which he was to have as compensation for his labor as aforesaid; and the said Wright afterwards laid off and designated all that portion of the land that lies east of the creek as the part which the plaintiff was to have in fulfilment of said contract; and with this the plaintiff was satisfied. That plaintiff took no writing from said Wright, having the fullest confidence in him that he would carry out what he agreed to do; but said Wright died suddenly, without making any disposition of his property, or any writing conveying the land to the plaintiff. And making Milton Wright a party defendant, he asks for a specific execution of the contract.

The defendant appeared and demurred to the bill; but the court overruled the demurrer; and he then answered, denying the contract set up in the bill, and calling for strict proof.

372 *The evidence in the cause was

wholly parol, and somewhat contradictory. One witness says, she was present and heard Harvey Wright say to Pucket, that if he would come and help improve the farm, he should have a part of the land. And on that offer Pucket came and worked with Wright a part of the time for six or eight years. And since Pucket had so worked, she had heard Wright say that a part of his farm was to be Pucket's. Another witness said, she was present at the same interview, and she heard Wright state to said Pucket that he, the said Wright, was not able to work his farm, and that he would have to give a part of it to get it improved, and that he would rather let said Pucket have it than any one else; and that upon that offer, at the time Wright moved to his farm Pucket came with him, and worked for Wright six or eight years. And she heard Wright say, shortly before his death, that at his death Pucket would get a part of his land. Another witness says that about twelve months before Harvey Wright's death, he told witness that Pucket was always good to do anything he, said Wright, asked him to do, and that he intended Pucket to have his land on the east side of the creek. Another witness said he heard the plaintiff ask Harvey Wright where he should run a fence on the east side of the creek, and the reply of Wright was to run where he pleased—that it would all be said Pucket's some day. This was about eighteen years previous to the giving the deposition in 1869; and plaintiff has fenced up some thirty-five or forty acres of said land, and has been cultivating a portion of it some eighteen years. And another witness says, in answer to a question by the plaintiff in reference to a mill seat on the land east of the creek, that she heard Harvey Wright say to the plaintiff, after me the land is yours. On the other hand, there was proof that in 1859 or 1860 Pucket proposed to buy some of the land on the east side of the creek, and Wright refused
373 *to sell it; and that whilst Wright's grave was digging Pucket said he (Wright) had neither willed the land nor sold it. There is some other evidence, but the foregoing is all that seems to bear upon the question of the contract.

The cause came on to be heard upon the 14th of May 1870, when the court decreed that the defendant, Milton Wright, do execute a deed, with special warranty, to the plaintiff for all the land in the bill mentioned, formerly owned by Harvey Wright, lying on the east side of Jesse's mill creek, and that the plaintiff recover his costs against the defendant. From this decree Milton Wright applied to this court for an appeal, which was allowed.

Terry and Pierce, for the appellant.

B. R. Johnston and T. R. Campbell, for the appellee.

CHRISTIAN, J. This is a suit for the specific execution of an alleged parol agree-

ment for the sale of real estate, which is sought to be taken out of the operation of the statute of frauds upon the ground of part performance.

The statute of frauds was founded in wisdom and sound policy. Its primary object was to prevent the setting up of pretended agreements, and then supporting them by perjury. But besides these direct objects, there is a manifest policy in requiring contracts of so important a nature as the sale and purchase of real estate, to be reduced to writing; since otherwise, from the imperfection of memory, and the honest mistakes of witnesses, it must often happen either that the specific contract is incapable of exact proof, or that it is unintentionally varied from its original terms. The statute, therefore, requires in contracts of such a nature as are therein mentioned more satisfactory and convincing testimony than mere oral evidence affords. The wisdom of
374 permitting any deviation from the

terms of the statute has *been questioned by the most eminent chancellors of England and of this country. Courts of equity, however, in their efforts to do complete justice and prevent fraud, have in certain cases relaxed the operation of the statute; and in cases where a parol agreement for the sale of land has been clearly and distinctly proved, and part performance in pursuance of the agreement established, a court of equity will decree specific execution.

But the principles upon which courts of equity have avoided the statute of frauds, upon the ground of part performance of a parol agreement, are now as well settled as any of the acknowledged doctrines of equity jurisprudence. From the numerous decisions on the subject the following principles may be extracted and briefly stated as follows: 1st. The parol agreement relied on must be certain and definite in its terms. 2d. The acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved. 3d. The agreement must have been so far executed that a refusal of full execution would operate a fraud upon the party, and place him in a situation which does not lie in compensation. Where these three things concur, a court of equity will decree specific execution. Where they do not, it will turn the party over to seek compensation in damages in a court of law. See *Cooth v. Jackson*, 6 Ves. R. 12; *Phillips v. Thompson*, 1 John. Ch. R. 131; *Heth's ex'or v. Wooldridge's ex'or*, 6 Rand. 605; *Anthony v. Leftwich*, 3 Rand. 238; 1 Lead. Cases in Equity (*White & Tudor*), 2d Am. Ed., top p. 557-574, and cases there cited.

Applying these well settled principles of equity jurisprudence to the case before us, there are, I think, at least three sound objections to the interference of a court of equity in this case. 1st. The agreement, as stated in the bill, and as proved by the testimony (if, indeed, any agreement is proved), is too uncertain and indefinite in its terms. 2d. The acts relied upon
375 as part *performance are not shown

to be in pursuance of, or to result from, any agreement stated and proved; and 3d. The acts of part performance all lie in compensation.

The agreement, as stated in the bill, if it had not been denied by the answer, and had been sustained by the proof, was not of that certain and definite character which is peculiarly necessary in a bill for specific performance.

The bill is filed by George W. Pucket against the appellant, Milton Wright, who is the sole heir of Harvey Wright, to whom, upon the death of the latter, his land descended, in which the plaintiff seeks the aid of the court to compel the defendant to execute specifically a contract which, it is alleged, was entered into between the said Harvey Wright in his lifetime and the plaintiff, by conveying to him the title to the land purchased under said agreement. The bill alleges that the said Harvey Wright, the uncle by marriage of the plaintiff, was the owner of a tract of unimproved land, and that being "a man much advanced in years, without pecuniary means, and physically unable himself to bring the land into cultivation," approached the plaintiff, who was a young man in full strength and vigor, with the proposition "that if he would come and help him improve his land, he should have a part of it at his (Wright's) death, and should be well compensated out of his land for his labor." The bill further states, that "it was not at that time fully agreed what part of the land complainant should have, only that he should be well compensated for his labor in a part of the land; but the said Harvey Wright was to retain the possession and control of all the land during his life."

This statement is followed by the allegation that "complainant entered faithfully and diligently upon his part of the contract, and continued faithfully to labor upon the land, clearing and improving it for about eight years; and did improve the land 376 so that it rendered to *said Wright during his life a fair support." It is further alleged that "the said Wright afterwards laid off and designated all that portion of the land lying on the east side of the creek as the part complainant was to have in fulfilment of his contract." But he admits that this land was used in common by Wright and Pucket during Wright's lifetime. He admits he "took no writing from Wright, having every confidence that he would carry out to the letter what he had agreed to do, and that Wright departed this life making no disposition in any way of his property, and without making any writing conveying the land to complainant."

Taking the bill as true, and the agreement as stated by the appellee in his own way, there is such uncertainty and want of definiteness in the contract, that a court of equity on that ground alone, might well refuse to lend its aid for specific execution.

But all the material allegations in the bill are denied in the answer, and not sustained

by the proof. The evidence is conflicting and contradictory. That which is most favorable to the appellee consists of certain vague expressions, loose and casual observations, used by Wright in conversations said to have taken place many years before, to the effect that he intended to pay Pucket out of his land, or that it would all be Pucket's some day, and expressions of a like character. Nor was there any proof that there was a delivery of possession of any part of the land to Pucket. The land claimed, enclosed on the east side of the creek, was in the joint possession of Wright and Pucket, used by them in common, and according to Pucket's statement in his bill setting out the agreement, Wright was "to retain possession and control of all the land during his life;" and there was nothing in the evidence to show that the possession of Pucket was, at any time, adverse to or inconsistent with the possession of Wright.

There was clearly not such part 377 performance as would *take the case out of the operation of the statute of frauds.

Nor has there been in this case such part performance as cannot be compensated in damages. There was nothing in the situation of the appellee to prevent his recovering, in a suit at law, full indemnity and compensation for the services he rendered to the appellant's intestate; and that was his plain and adequate remedy. The tendency of all the modern cases, both in England and in this country, is to prefer giving the party compensation in damages, instead of a specific performance. Wherever damages will answer the purpose of indemnity, this alternative will be preferred, as it will equally satisfy justice, and will be coincident with the provisions and in support of the authority of the statute.

I am, therefore, of opinion that no cause has been shown for specific execution, and that the decree of the Circuit court ought to be reversed and the plaintiff's bill dismissed.

The other judges concurred in the opinion of Christian, J.

Decree reversed.

378 *Cline's Heirs v. Catron.

June Term, 1872, Wytheville.

Absent, MONCURE, P. and STAPLES, J.*

1. **Land Patents—Interlock.**—C is in possession of a tract of land under a settlement in 1771, the settlement right confirmed to him by the commissioners of the district in September 1782, and which was surveyed in April 1788, and he lives upon and cultivates a part of the land, and obtains a patent for it in March 1799. In July 1796, W obtained a patent for a tract of land, which covers a part of the tract held by C; but C's cleared land is outside of the interlock, which is in forest: W not knowing that his patent covers any part of the land held by C under his settlement right. **Held:**

1. **Same—Same.**—That C not having prevented the issue of the patent by *caveat* , and W not having

*JUDGE STAPLES had been counsel in the cause.

known that his patent covered any part of the land so claimed by C, the patent of W is valid, and vests in him the legal title.

2. Same—Same—Adverse Possession of Interlock.*—

The actual possession by C outside of the interlock, does not constitute an adversary possession by C, of the land within the interlock, so as to require W to enter upon and take actual possession of it, in order to give him possession under his patent.

3. Same—Action to Recover.—If C, on obtaining his patent in March 1799, entered on the land and ousted W, it was not necessary for W to enter upon and dispossess C, before he could maintain an action to recover the land.

2. Rights Acquired by Order of Council on No Higher Footing Than Those under Land-Office Treasury Warrant.—By an order of council of the 18th of June 1749, confirmed by a decree of the Court of Appeals in 1788, 800,000 acres of land was granted to the Loyal Company, and was surveyed in 1774. The rights under this grant, acquired by entry and survey, stand upon no higher footing than rights acquired by entry and survey under a land-office treasury warrant; and in both cases, until patented, the lands are waste and unappropriated, and liable to location by other parties.

3. Evidence—Surveyor's Report.—In an action to try the title to land, an order is made directing the surveyor to go upon it, and make a survey and report. This he does; but before the cause comes on for trial, the surveyor dies. His report is competent evidence.

4. Same—Family Tradition Incompetent to Prove or Disprove Title.†—Though family traditions are admissible in evidence upon questions of boundary, they are not admissible to prove or disprove a title.

5. Sale of Land to a Committee of an Idiot Cannot Be Impeached Collaterally.—Decree Valid Until Reversed.‡—A bill is filed by S, a committee of two idiots, for the sale of their land, and there is a decree for the sale, and a sale; and the report of the marshal of the court shows that the land was purchased by S, the committee. This report is confirmed, and the marshal is directed to convey the land to S: which

*Adverse Possession of Interlock.—As to adverse possession of interlock, see 2 Minor's Inst. (4th Ed.) 581 *et seq.*: 3 Va. Law Reg. 768, 843; 4 Va. Law Reg. 1, 8, 138, 557, 182.

See Turpin v. Saunders, 32 Gratt. 88, where STAPLES, J., in delivering the opinion of the court, discusses the doctrine laid down in the principal case. See also, a note to this same case as to an error in the reported opinion of the principal case.

The principal case is cited in Hollingsworth v. Sherman, 81 Va. 674, as authority for the proposition that a tenant cannot sustain his defence of continued adverse possession, if, within the period of limitations, the premises have been abandoned by him or those under whom he claims. See Andrews v. Roeland Iron, etc., Co., 89 Va. 306, 16 S. E. Rep. 252; Haley v. Wilson, 42 W. Va. 757, 26 S. E. Rep. 554; Garrett v. Ramsey, 26 W. Va. 356 *et seq.*

†Same—Family Tradition Incompetent to Prove or Disprove Title.—See High v. Pancake, 42 W. Va. 602, 26 S. E. Rep. 589.

‡Sale of Land to a Committee of an Idiot Cannot Be Impeached Collaterally.—See Spilman v. Johnson, 27 Gratt. 41.

Decree Valid Until Reversed.—See Lancaster v. Wilson, 27 Gratt. 630.

is done. S afterwards sells and conveys the land to C, who sues to recover the land. Though the decree confirming the sale to S was erroneous, and S is forbid by the statute to purchase or own the land during the incompetency of the idiots, yet the decree is not void but voidable, and cannot be impeached collaterally, and until it is reversed, must be held to be valid, and as passing a good title to S.

6. Possession—Must Be Adverse.—The possession which would, under the former law, render a conveyance by a party out of possession, inoperative, must have been an adversary possession.

7. Same.—What the kind of possession which will sustain the defense of adversary possession, against a plaintiff claiming under a patent.

This was an action of trespass quare clausum fregit, in the Circuit court of Wythe county, brought in March 1861, by John Catron against Jacob Cline and others.

Upon the trial the plaintiff introduced in evidence a patent from the commonwealth to Michael Walters for eighty-seven acres of land, dated the 8th day of July 1796. He then introduced a deed, dated the 17th day of February 1830, from five of the children and heirs of Walters to himself, by which, in consideration of sixty-three dollars, they convey to the plaintiff their undivided interest in said tract of land. And he then offered in evidence the report and plat of the surveyor of the county made under an order in the cause: but the surveyor having died after making his report and before the trial, the defendants objected to this report as evidence to prove any fact or statement as ascertained by the surveyor. But the court overruled the objection, and admitted the evidence, not as conclusive, but *prima facie* only; and the defendants excepted.

380 *The plaintiff then offered in evidence the record of a suit 'n the Superior court of chancery, held at Wythe in 1828, brought by Leonard Straw, jr., committee of Emanuel Walters and Sally Walters, idiots, for the sale of their undivided interest in the lands of their father, Michael Walters, deceased: in which suit there was a decree for a sale of said undivided interests by the marshal of the court, and a report by the marshal of the sale thereof to Leonard Straw, jr., the committee of the idiots: and this report was confirmed, and the marshal was directed to convey the said undivided interests to said Straw. With this record the plaintiff offered in evidence the deed from the marshal to Leonard Straw, jr., dated December 4th, 1828, and a deed from Straw to the plaintiff, bearing date the 12th of January 1830, conveying the same interests. To the admission of the record and deeds as evidence the defendants objected; but the court overruled the objection; and the defendants excepted.

The plaintiff, having introduced the evidence hereinbefore mentioned, gave evidence to prove that he had cleared, entered upon and cultivated land on that tract of eighty-seven acres (but not on the land in dispute), after he had acquired title thereto.

The defendants offered in evidence a pat-

ent and certificate to Nicholas Cline. The patent bore date the 28th of March 1799, and recites that, by virtue of a certificate in right of settlement given by the commissioners for adjusting claims for unpatented lands, &c., there was granted to said Cline a tract of land containing four hundred acres by survey bearing date the 13th of April 1783. The certificate of the commissioners bears date the 6th day of September 1786, and states that the assignee, &c., was entitled to the same by real settlement made in 1771.

The defendants also introduced in evidence another patent to Nicholas Cline 381 for four hundred and fourteen *acres of land, which bore date the 26th of February 1828. This patent was founded on a survey made on the 8th of December 1774, and the land was described to be part of an order of council granted to the Loyal Company to take up and survey eight hundred thousand acres, which order of council was established and confirmed by a decree of the Court of Appeals made on the 2d of May 1783.

The defendants then offered evidence to prove that Nicholas Cline lived on the land embraced in his patents, from the time of the Indian war, and had improved parts of it; that said lands had continued in the possession of said Cline and his heirs to the present time; and that the defendants were some of these heirs: and that there was no land cleared on the land in dispute in this cause, except about half an acre adjoining the old cleared lands of the Clines, which half acre was cleared about the beginning of the late war between the North and the South. They then introduced as a witness Henry Grubb, who stated that he was the grandson of Michael Walters, the patentee of the tract of eighty-seven acres, his mother being one of the daughters of said Walters, and that the witness inherited the interest of his mother in said tract; that after the plaintiff had purchased his interest in said land, it was divided by and between the plaintiff, Joseph Colvin, and the witness, and no portion of the land in controversy in this cause was divided; the heirs of the Walters claimed no title in it. The defendant's counsel then asked the witness, "What was the family tradition as to Michael Walters, the patentee, claiming or disclaiming title to the land in controversy in this cause?" To this question the plaintiff objected; and the court sustained the objection; and the defendant again excepted.

According to the report and plat of the surveyor the land in dispute is about thirty-two and a half acres. It is included in the patent to Walters; a small strip of it is included in the patent to Cline for four 382 hundred and fourteen *acres; and it is all included in his patent for 400 acres; both of his patents including to a large extent the same land. And the report showed that a part of Cline's land outside the interlock had been cleared and cultivated.

After the foregoing evidence had been introduced the plaintiff proved the trespass by the defendants, and that the land was an interlock; and that neither the defendants, nor those under whom they claim, had ever had actual possession of any portion of said interlock, but the same was always a forest until about the time or just before the institution of this suit, when about half an acre of it was cleared by the defendants. The defendants proved that Michael Walters, one of the heirs of the patentee, had said he had no interest in the land in controversy, and admitted it to be the land of the Clines; and said his father had never claimed it, and admitted it to be the Clines; that Michael Walters, Joseph Colvin and Henry Grubb, as part of the heirs of Michael Walters, had refused to divide the land in controversy, because they considered it was the land of Cline: that plaintiff after his purchase, had said that the Walters patent covered the land; but he supposed the Clines would hold the land; and pointed out to the witness a corner, from which witness supposed the land in controversy would fall to Cline's heirs. And thereupon the defendants moved the court to give to the jury the following instructions.

1st. If the jury believe from the evidence, that the land in controversy is embraced in the limits of the patent issued to Michael Walters, on the 8th day of July 1796; and that a part of the land is embraced in the limits of the patent issued to Nicholas Cline on the 28th day of March 1799; and if the jury shall further believe from the evidence, that the said Nicholas Cline, or those under whom he claimed, had been in possession of the tract of four hundred acres of land patented to him on the 28th day of March 1799, claiming the same under a real 383 settlement *made in 1771; and that the same was confirmed to him by the certificate of settlement right for the District of Washington and Montgomery, on the 6th day of September 1782, and was surveyed on the 30th day of April 1783: and if the jury shall further believe that the said Nicholas Cline continued in possession of the said four hundred acres of land, living on, clearing and cultivating the same, until his patent therefor issued on the said 28th of March 1799, and he and his heirs have continued living on the said tract and cultivating the same until the present time: and if the jury shall further believe, that when the patent issued to Michael Walters on the 8th day of July 1796, the eighty-seven acres embraced in the said patent was in a state of nature, and no one had cleared or cultivated any portion thereof, and so continued in a state of nature until after the 28th of March 1799, when the patent for four hundred acres issued to Nicholas Cline; that then the possession of Nicholas Cline under the said patent extended to the exterior boundaries of the said patent, and as to the conflict between the patents of the said Walters and the said Cline, the possession of said Cline became an adversary possession to the possession of said Walters,

and ousted the constructive seizin of the said Walters; unless the jury, from the evidence, shall believe said Wallace had actual possession of the eighty-seven acres by clearing and cultivating the same.

2d. And if the jury shall further believe from the evidence, that a portion of the land in controversy is embraced in the patent to Walters, and also in the patent for four hundred and fourteen acres issued to Nicholas Cline, on the 23d of February 1828; and if they shall further believe that the said four hundred and fourteen acres of land so patented to said Cline is part of the eight hundred thousand acres of land granted to the Loyal Company, by order of council, on the 12th of June 1749, and the

same was surveyed on the 8th day 384 *of December 1774, and was confirmed to the said Loyal Company by a decree of the Court of Appeals of 1783; and that at the time of the emanation of the said patent to Michael Walters, and for some years previous thereto, the said Cline was in actual possession of the said land, claiming the ownership, clearing and using the same as his own, and so continued in possession of the said four hundred and fourteen acres until his patent therefor issued in 1828; then after the decree of the Court of Appeals in 1783 the said tract of four hundred and fourteen acres was not waste and unappropriated lands, and that the seizin and possession of said Cline relates back to the said decree in 1783; and as to the said land, the patent of the said Walters is to be regarded as a junior patent, and confers no constructive seizin or possession.

3d. If the jury shall believe from the evidence, the constructive seizin of Walters to the land within the boundary of Cline's patent was ousted on and after the 28th of March 1799, and immediately thereafter, then it was necessary for Walters, or those claiming under him, to enter on the land in controversy and dispossess the said Cline before they could maintain any action therefor.

4th. If the jury shall believe from the evidence that, on the — of — 18—, when — conveyed his interest in the eighty-seven acre tract to the plaintiff, the land in controversy was in the adverse possession of the defendant, then the deed was inoperative and void, conveyed no interest to the plaintiff to the land in controversy, and he could maintain no action therefor.

5th. The fifth instruction is the same as the fourth, referring to another deed.

The plaintiff objected to the instructions asked for by the defendants, and in lieu thereof, asked for four instructions on their part.

1st. If the jury shall believe that the plaintiff has the elder patent to the land in controversy, and that the defendants,

385 *within five years next before the suit was instituted, entered upon said lands and trespassed thereon, by themselves or their agents, in the cutting of timber, they must find for the plaintiff, unless the defendants shall have shown a continual,

actual and adversary possession in themselves, or those under whom they claim, of the land in controversy, for a period of fifteen years prior to the suing out of the writ in this cause.

2d. That possession, to avail the defendants, must have been an actual, continual, adversary possession of the whole or a part of the land in controversy for the period of fifteen years aforesaid; and that the occupancy and improvement by the defendants of land outside the interlock is not a sufficient possession to defeat this action.

3d. That whilst patented land remain uncleared, or in a state of nature, they are not susceptible of adversary possession against the elder patentee, unless by acts of ownership affecting a change in their condition.

4th. If a title to the land in controversy was vested in the plaintiff by the deeds and patent under which he claims, then that such title could not be divested out of him by any parol or verbal disclaimer by him of such title; but only by deed executed in the manner prescribed by law.

The court refused to give the first, second and third instructions asked for by the defendants, and refused to give the fourth and fifth in the form asked for by them, but modified them by inserting the word "actual" before adverse "possession," and gave them thus modified. And the court gave the instructions asked for by the plaintiff. To all of which the defendant excepted.

There was a verdict and judgment for the plaintiff; and the defendants obtained a supersedeas to the judgment from a judge of the District court of Appeals at Abingdon, where the judgment was affirmed; and then they brought the case to this court.

Baxter, Crockett & Blair, for the appellants, insisted:

386 *1st. That the deeds from the marshal to Straw, and from Straw to the plaintiff, were absolutely null and void, and passed no title:

1. Because Straw, having been the committee of the idiots who brought the suit for the sale of the land of the idiots, the statute expressly forbids that he should become the purchaser, or in any manner whatever become the owner of the land during the incapacity of the idiots. They insisted that the only authority for selling the land of an idiot at the suit of the committee was 1 Rev. Code of 1819, ch. 109, § 22, p. 417; Faulkner v. Davis, 18 Gratt. 651; Pierce v. Trigg, 10 Leigh, 406; and this act prescribed that the proceedings should be in all respects as in the case of a suit by a guardian for the sale of infants' lands. 1 Rev. Code of 1819, ch. 138.

2. That the jurisdiction to sell the lands of an idiot is a special statutory jurisdiction; and the authority must be strictly pursued. And they pointed out various objections to the proceedings in the suit in which the sale was ordered. They referred to vol. 1, part 2, of Smith's Lead. Cas. p. 1101, note, to Crepps v. Durden, and authorities there

cited; *Ramson v. Williams*, 2 Wall. U. S. R. 313; *Hollins v. Patterson*, 6 Leigh, 457; *Bedinger v. Commonwealth*, 3 Call, 399; *Delany v. Goddin*, 12 Gratt. 266; *Taylor v. Stringer*, 1 Gratt. 158; *Thatcher v. Powell*, 6 Wheat. U. S. R. 119.

2d. The court erred in excluding the evidence of the family tradition as to Michael Walters claiming or disclaiming title to the land. They referred to 1 Greenl. Evi., part 2, ch. 5, § 109, p. 186; 1 Philips' Evi., ed. of 1868, ch. 8, § 10, and note; *Harriman v. Brown*, 8 Leigh, 697; *Wardens v. Hagan*, 3 Gratt. 315; *Anderson v. Harvey's heirs*, 10 Gratt. 386; *Hale v. Marshall*, 14 Gratt. 489; *Shanks v. Lancaster*, 5 Gratt. 110; *Flanagan v. Grimmet*, 10 Gratt. 421; *Robinet v. Preston's heirs*, 4 Gratt. 141.

3d. That the court should have given the first instruction asked for by the defendants. *Clay v. White*, 1 Munf. 162; *Green v. Litter*, 8 Cranch, U. S. R. 229; *Walden v. Gratz*, 1 Wheat. U. S. R. 292; *Taylor v. Horde*, 2 Smith's Lead. Cas. 520, 560; *Taylor v. Burnsides*, 1 Gratt. 165; *Overton's heirs v. Davisson*, Id. 211; *Anderson v. Harvey's heirs*, 10 Gratt. 386; *Shanks v. Lancaster*, 5 Gratt. 110; *Flanagan v. Grimmet*, 10 Gratt. 421; *Koinner v. Rankin's heirs*, 11 Gratt. 420; *Robinet v. Preston's heirs*, 4 Gratt. 141; *Hale v. Marshall*, 14 Gratt. 489; *White v. Jones*, 1 Wash. 116; 1 Rev. Code of 1819, p. 329.

3d. The court erred in refusing to give the third instruction asked for by the defendants, because upon the evidence the jury had the right to find the ouster of Walters by Cline on and after, or before the 28th of March 1799; and then an entry was necessary to bar the right of Cline's heirs. The ruling of the court prevented the jury from considering the question of ouster and its effect.

4th. That the court erred in refusing to give the fourth and fifth instructions asked for by the defendants. Though in blank they were given with an amendment by the court, and they obviously relate to the deeds of Michael Walters and others, and of Straws, to the plaintiff. *Chapman v. Wilson*, 1 Rob. R. 285. And by comparing these, as modified, with the four instructions given on the motion of the plaintiff, it will be seen that the word "actual," prefixed to adverse possession, was intended to mean the same thing as *pedis positio*, or seating, clearing and cultivation.

5th. That the court erred in giving the four instructions asked for by the plaintiff, because they confine the whole case to the comparison of the dates of Walters' and Cline's patents, unless they believed that Cline and his heirs had a *pedis positio* in the interlock by clearing and cultivation; and shut out from the jury the effect of Cline's contiguous settlement, the conduct of the parties, and the other facts in proof, all the considerations proper to be discussed and presumed from their evidence and the relative equities of the parties, and they might mislead the

jury as to the issues and evidence in the cause.

Walker and Kent, for the appellee:

1. The court did not err in permitting the report of the surveyor to go to the jury as *prima facie* evidence of its contents. 1 Gratt., 115; 1 Starkie (marginal), 298-'9; 8 Leigh, 711; 1 Phil. Evid. (top), 500, and pages following; 2 Rand. 87.

2. The deeds from Smith to Straw and from Straw to Catron were proper evidence, as showing the different links in the appellee's chain of title; and the report of the commissioner, and the decree in the cause describing the land with sufficient certainty, the record cannot be questioned by a stranger in a collateral controversy. *Smith v. Chapman*, 10 Gratt. 445, 453-'6, 465; *Cox v. Thomas*, 9 Gratt. 323-'37-'8; *Baylor's lessee v. De Jarnette*, 13 Gratt. 152; *Ballard and others v. Thomas & Ammen*, 19 Gratt. 20, 21-'2; *Voorhees v. Bank U. S.*, 10 Pet. U. S. R. 49; *Florentine v. Barton*, 2 Wall. U. S. R. 210; *Fisher v. Bassett*, 9 Leigh, 119, 131; 6 Pet. U. S. R. 279; 2 How. U. S. R. 338, 40, 41; 11 Serg. & Rawl. 426; 3 Pet. U. S. R. 207; 2 Id. 165; 2 How. U. S. R. 342; 5 Gratt. 157; 2 Wash. 116; 5 Munf. 7.

3. There can be no parol disclaimer of title to land; but the disclaimer must be in writing. 1 Rob. 105; 1 Starkie, 33, 34; 1 Gratt. 177, 178.

4. The patent of the Commonwealth passes title to waste and unappropriated lands to the grantee. The effect of the grant is to confer seizin in law to all the lands embraced in the patent; and the party holding under the senior grant is not ousted of this constructive seizin by the junior patentee, except by an actual entry upon the lands, accompanied by acts of ownership, open, notorious and habitual.

5 Leigh, 651 to 676; 1 Gratt. 188, 191 to 201; same, 223-'4; 11 Gratt. 600.

5. The land in controversy being embraced within an interlock and the patent of Walters being the oldest; and both Walters and Cline having settled outside the interlock, the settlement of Cline gave him title to no part of the interlock unless he entered on the lands embraced within the interlock, and held actual possession of the same for fifteen years before appellee's suit was brought. Vide authorities cited above in 11 Gratt., 600.

The record shows the land in controversy to have been in a state of nature.

6. The court properly refused appellants third instruction, because it was irrelevant, obscure and calculated to mislead the jury.

Vide authorities cited above in 11 Gratt. 600.

ANDERSON, J. delivered the opinion of the court.

The plaintiffs in error claim to hold the land in controversy by two grants of the commonwealth to their ancestor, Nicholas Cline. One for 400 acres, bearing date March 28, 1799, which is founded upon a settlement right, running back to 1771 and

confirmed on the 6th day of September 1782, by a certificate of the commissioners for the district of Montgomery and Washington, and surveyed April 30th, 1783. The other patent is for 414 acres, bears date February 6, 1828, and is founded upon a survey made the 8th day of December 1774, by virtue of an order of council granted to the Loyal Company to take up and survey 800,000 acres of land, which was established and confirmed by a decree of the Court of Appeals on the 2d day of May 1783. The boundaries of these patents are not coincident, yet the large body of the land covered by both is identical.

Nicholas Cline seems to have been 390 one of those hardy *adventurers who settled this country when it was a wilderness frontier, before whose advances the roving occupation of hostile savages receded, and gave place to the introduction of a Christian civilization. He settled upon the lands for which he afterwards obtained patents as aforesaid, at least as early as 1771, and lived upon them, cultivating and improving them until his death. They then descended to his heirs, who, or some of whom, have held them in possession ever since.

In 1796, one Michael Watters, or Walters, under whom the defendant in error claims the land in controversy, obtained a commonwealth's grant for eighty-seven acres of land, which is founded upon a survey made by virtue of a land office treasury warrant on the 8th day of October 1794. In describing the boundaries of the land, his patent calls for a corner of N. Cline's land, two white oaks, and thence running with his line. It appears from the survey made in this cause that the corner, two white oaks, called for is a corner of Cline's survey and patent of 414 acres, and that the line run from that corner is nearly coincident with the line of Cline's said survey, but does not at all correspond with the line of Cline's 400 acre survey, but cuts off from it a lot of land, which comprehends nearly all the land in controversy, which is described by the survey in the cause as containing thirty-two and a half acres.

At the date of Walters' patent, Cline had a clear, equitable right to the land in controversy, and could doubtless have prevented the issuing of a grant to Walters for it if he had filed a caveat. Having failed to do so, the legal title became vested in Walters by the commonwealth's grant, unless the equitable right of Cline was of such a character as exempted his land from a location and grant under a land office treasury warrant, as waste and unappropriated lands. But in *French v. Loyal Company*, 5 Leigh, 627, this court held that such rights were 391 upon no higher footing than rights acquired *by entry and survey under a land office treasury warrant, and that in both cases, until patented, the lands were waste and unappropriated, and liable to location by others. Cabell, J. says that the same policy applied to both classes of claims, and both should be subject to the

same law, making the lands liable in both cases to subsequent location. "This liability, while it advanced the public interest, would do no injury to the diligent prior claimant, for his right might be always secured by a resort to the court of caveat—tribunals wisely provided for the adjustment of conflicting claims to land before the emanation of grants." Cline, then, not having resorted to his caveat, the legal title became vested in Walters by the emanation of the commonwealth's grant. And even a court of chancery could give him no relief against the patent, unless he had been prevented from filing a caveat by fraud, accident or mistake, or unless Walters, who got the first patent, had been guilty of actual fraud. "And he is guilty of actual fraud who, knowing another's prior equity, proceeds to get a grant for the land." *Supra*, p. 648, and *McClung v. Hughes*, 5 Rand. 453.

There is nothing in the record to show that Walters, in making the location and getting a patent, had been guilty of any fraud. On the contrary, it is inferable from the calls of the patent that he did not intend to invade the rights of Cline, as he calls for his corner and runs with his line; which is the corner and line of Cline's survey of 414 acres, and which, we think, is the true boundary of Walters' patent. It does not appear that he knew of Cline having any other survey. But from what does appear, it is fair to presume that he was entirely ignorant of Cline's survey of 400 acres.

The legal title being vested in Walters to the land in controversy, by the elder patent, the defendants in the court below relied upon an adversary possession in 392 *themselves and their ancestor, Nathaniel Cline, to defeat the better title.

It is a well settled principle that there can be no adversary possession against the commonwealth. But a junior patentee may show that he had possession of the land in controversy prior to the emanation of his patent, under a claim of title, legal or equitable, good or bad; and also, in order to explain the character of his possession anterior to the emanation of the elder patent. But his possession cannot be adversary until the emanation of this elder patent, for it is consistent with the rights of the commonwealth, in whom the legal title resides. After the title passes from the commonwealth to the patentee it instantly becomes adverse to him. *Shanks and others v. Lancaster*, 5 Gratt. 110; *Koinner v. Rankin's heirs*, 11 Gratt. 420. But it must be an actual and exclusive possession. To be actual, the visible occupancy and improvement of a part of the land in controversy is an actual possession of the whole to the limits of the claim under which it is held, and ousts or intercepts the legal seizin incident to the patent. Such possession of the junior patentee is exclusive, unless the elder patentee enters and takes actual possession of a part of the land in controversy. In that case the possession of the junior

patentee will be restricted to his actual close.

It is now also well settled, that where there is an interference of the patents, so that they lap or interlock, the occupation or residence of the junior patentee upon a part of his tract outside of the interlock does not give him possession of that part of his tract which is embraced within the limits of the elder patent, but his possession is restricted by the boundary of the elder patent. But if he has an actual occupation and improvement of a part of the interlock, and the elder patentee has actual possession of no part of it, the actual possession of the junior patentee is co-extensive with the limits of his *patent,

and is exclusive and adversary, and if continued uninterruptedly for the period of limitation, defeats the elder patentee's right of entry, or his better title, as the case may be. *Taylor's devisees v. Burnside*, 1 Gratt. 165; *Overton's heirs v. Davison*, Id. 211; *French v. Loyal Company*, 5 Leigh, 627; *Koinner v. Rankin's heirs*, 11 Gratt. 420. These being the well established principles of law as applicable to this case, we are of opinion that the Circuit court did not err in refusing to give the first and second instructions prayed by the defendants, as set out in their fourth bill of exceptions.

The court is of opinion that there is no error in the refusal of the court to give the third instruction prayed for by the defendants, because in the case supposed the Walters right of entry would not have been tolled, and he could have had recourse to his writ or action of ejectment.

The fourth instruction, which was given, we think is correct. If the devisee before making entry, die intestate, and his heirs make a conveyance of the premises, at a time when they are not in possession thereof, as the law then was, their conveyance will pass nothing. But it is not every possession in another which will render a conveyance void. To have this effect it must be adverse. We think the instruction good without inserting the word "actual." But the insertion of that word did not vitiate it or change its meaning.

We are of opinion also, that there is no error in the rulings of the court, to which the first and second bills of exception apply. The first was not insisted on in argument; and as to the third, whilst reputation and tradition are admissible in evidence, upon questions of boundary, we know of no case, where it has been admitted to prove or disprove title; and to allow it, we think, would be to violate well established principles of evidence.

The question raised, by defendant's second bill of exceptions, *is one of greater difficulty. Did the deed of the marshal pass the title, of the idiot heirs of Michael Walters, to Leonard Straw? The conveyance was made by authority of, and in obedience to, a decree of the Superior court of Chancery, which was a court of general jurisdiction, and by statute had jurisdiction of the subject. But the sale

was made to one whom the statute expressly declares, "shall not be admitted a purchaser, either by himself, or by another, or become the owner of the land, in any manner," during the period of the disability of the heir, or devisee. It is a plain error of the chancellor, and is apparent upon the decree, and the deed made in pursuance of it.

In *Cox & al. v. Thomas' adm'x*, 9 Gratt., 323, 326, Judge Allen says, "If the court has cognizance of the cause, advantage cannot be taken of an erroneous judgment collaterally; for although the error be apparent, the judgment remains in force until reversed." And cites *Drury's case*, 8 Coke, 141b, and *Tarleton v. Fisher*, Doug. R. 671. And again, in commenting on *Prigg v. Adams*, 2 Salk. R. 674, he says "the principle of that case is decisive of this. There, although the act of Parliament declared the judgment void, yet as a court of competent jurisdiction had rendered it, though the error appeared on its face, it could be corrected only in an appellate tribunal." The same principle is affirmed in the case of *Fisher v. Bassett*, 9 Leigh, 119. From these decisions, and others which might be cited both in this court, and in the United States Supreme court, it would seem, that although the conveyance was made to one whom the statute forbids to be admitted a purchaser, and incapacitates to become the owner during the period of disability, it being authorized by the decree of a court of competent jurisdiction, the deed is not void, but only voidable; and is in force until set aside, by a reversal of the decree, by authority of which the conveyance was made.

This cannot be done collaterally, but only in the same court *which pronounced the decree, by review; or in a proceeding before an appellate tribunal, to revise or reverse. We are, therefore, of opinion that there is no error in the ruling of the Circuit court on this point.

It now only remains to say, that for reasons already assigned, which need not be here repeated, we think the instructions given by the court to the jury, on the motion of the defendant in error, are substantially correct. Upon the whole, we are of opinion, to affirm the judgment of the District court.

Judgment affirmed.

396

**Campbell v. Prestons.*

June Term, 1872. Wytheville.

Absent. STAPLES and ANDERSON, Js.*

Devise of Real Estate—Conveyance by the Cestui.†—P. by her will, devised to T certain real estate, in trust for her daughter S, the wife of F, with instructions to T "to permit her said daughter to occupy and enjoy said property, should she prefer doing so;" and, should she survive her husband T "shall convey the said property in fee simple to her and her heirs." S was put into possession

*JUDGE STAPLES had been counsel in the cause.

†*Devise of Real Estate—Conveyance.—Distinguished in* *Pepper v. Barnett*, 23 Gratt. 406.

of the property, and, in the lifetime of her husband, conveyed the property to H. the husband not joining in the deed; and after his death she re-acknowledges the deed, and H received possession of the property. H afterwards conveyed to C. And then T brings ejectment against C to recover the property. **HOLD:**

By the will of P, S acquired at once, on the death of P, an equitable estate in fee simple in the property, with the absolute right of possession for her own use; and, on the death of her husband, to an absolute conveyance thereof to herself in fee simple, which it was a breach of trust in the trustee to withhold; and she could have enforced this right at any moment after the death of her husband. That her rights passed by her deed to H, and by the deed of H to C, who stood thereafter in the shoes of S, and he could no more be ejected at the suit of T, the trustee, than S could before her conveyance.

This was an action of ejectment in the Circuit court of Washington county, brought in January 1869, by John S. Preston and Thomas L. Preston, claiming to be trustees of Mrs. Sarah B. Floyd, against Joseph T. Campbell, to recover a tract of thirty-three acres of land, known as the King's mountain tract. The parties dispensed with a jury, and submitted the whole matter of law and fact to the court. Whereupon the
397 court rendered *a judgment in favor of the plaintiffs for twenty acres of the land. The defendant then excepted, and spread all the evidence upon the record, and obtained a supersedeas to the judgment from a judge of this court. The case is fully stated in the opinion of the court.

J. W. Johnston and J. A. Campbell, for the appellant.

Watts, for the appellees.

BOULDIN, J. delivered the opinion of the court:

This is an appeal from a judgment of the Circuit court of Washington county in an action of ejectment brought in that court by the appellees against the appellant, in January 1869. The case was substantially as follows:

Mrs. Sarah B. Preston, of Washington county, died in July 1846, having first made her last will, which was duly admitted to probate by the County court of Washington county. By a paragraph of the third clause of the will she devised to her three sons, Wm. C., John S. and Thomas L. Preston (who were constituted her executors), certain real property therein mentioned, in trust for her daughter, Mrs. Sally B. Floyd, with instructions to them to permit her "said daughter to occupy and enjoy said property should she prefer doing so;" and "should she survive her husband, they shall convey the said property in fee simple to her and her heirs."

William C. Preston and John S. Preston were both non-residents of the State, and neither of them having at any time qualified as executor or acted as trustee; Thomas L. Preston alone qualified and acted as such. At his mother's death, as was his plain

duty by the imperative terms of the will, he permitted his sister, Mrs. Floyd, to take possession of and enjoy the property devised to her as aforesaid; and she and her alienees have continued to hold it down to the institution of this suit in January 1869.

In the meantime—to wit, on the 23d day of June 1862—by an order of the County
398 court of Washington *county, made on the motion of Mrs. Sally B. Floyd, William B. Byars was appointed trustee of Mrs. Sally B. Floyd in the place of said Thomas L. Preston, who appeared in court, as the order recites, and declined to act longer as trustee; and from that date William B. Byars alone acted as such trustee. Before that time, however, William C. Preston had died without having accepted the trust, or in any manner interfered with its execution.

Soon after the appointment of William B. Byars as trustee as aforesaid, the said Byars, as trustee of Mrs. Sally B. Floyd and Mrs. Floyd, filed their bill in the Circuit court of Washington county, on the chancery side thereof, against the said Thomas L. Preston, praying a settlement of his account as trustee as aforesaid; to which bill said Preston filed an answer, under oath, in which he admits that he had been removed as trustee by order of the County court of Washington county, and said William B. Byars appointed in his place.

On the 15th day of June 1863, William B. Byars, trustee as aforesaid, and Mrs. Floyd, by deed of that date, undertook to convey to A. L. Hendricks, in consideration of the sum of thirty thousand dollars, certain real estate in Abingdon, Washington county, Virginia, being a portion of the trust subject aforesaid, or property for which that subject had been duly exchanged, and the deed was acknowledged by both grantors before a notary public and duly certified and recorded; but John B. Floyd, husband of Mrs. Sally B. Floyd, being then alive and not being a party to the deed, the same was deemed void as to Mrs. Floyd. On the 26th day of August 1863, the said John B. Floyd died; and on the 2d day of December thereafter Mrs. Sally B. Floyd, being then a feme sole, re-acknowledged the deed aforesaid to Hendricks, before the same notary who had taken her previous acknowledgment, and by whom her said re-acknowledgment was duly certified.

399 *Before that time, however—to wit, on the — day of October 1863, John S. Preston, who had individually made an exchange of property with his sister, Mrs. Floyd, and her trustee, retaining a lien on the property passed to her, which was the same sold to Hendricks, executed to Hendricks a deed of release, and endorsed thereon a receipt in the following terms: "Richmond, 11 Jan'y 1864. Received of Wm. Byars, trustee of Mrs. Sally B. Floyd, on account of this deed, six thousand two — and thirty-two dollars fifty cents (\$6,232.50), in full. John S. Preston." This deed, with the receipt aforesaid en-

dorsed thereon, was duly recorded in Washington County court.

Hendricks held the property thus acquired until October 1868, when by deed of that date, he conveyed it to the appellant Joseph T. Campbell, trustee; and on the 11th of January 1869, John S. Preston and Thomas L. Preston, claiming to be trustees of Mrs. Sally B. Floyd, instituted an action of ejectment against Campbell, seeking to set up a legal title in themselves, and to recover possession of the land. The defendant Campbell demurred generally to the declaration, and pleaded "not guilty."

The demurrer was overruled, and the parties waiving a trial by jury, submitted the case upon the law and the facts to the judgment of the court; whereupon judgment was entered for the plaintiff: and the case comes to this court on an appeal from that judgment, all the facts of the case having been spread on the record.

Without deciding whether the appellee, John S. Preston, is not estopped by deed and by matter in pais, and Thomas L. Preston by matter of record, from claiming at this time to be trustees of Mrs. Sally B. Floyd; and without deciding whether, conceding the said John S. Preston and Thomas L. Preston, against all the facts and circumstances of the case, and against their solemn acts and admissions to the contrary, to be still the trustees of *Mrs.

Floyd, the court should not have presumed, on well established principles of law, that they had discharged their duty by making to Mrs. Floyd the conveyance in fee simple, to which she had been clearly entitled for nearly six years prior to the institution of this suit; questions which have been ably and earnestly argued by counsel on both sides—waiving the consideration of these questions as unnecessary to be decided in this case—the court is of opinion, that under the provisions of the will of Mrs. Sarah B. Preston, her daughter Mrs. Floyd acquired at once, on her mother's death, an equitable estate in fee simple in all the property devised to her use, with the absolute right to hold and occupy the same—to the use and possession thereof as her separate estate—against her said trustees and all other persons; that at the death of her husband, John B. Floyd, she became entitled, in addition to the use and possession of said property, to an absolute conveyance thereof to herself in fee simple, which it was a breach of trust in her said trustees to withhold: and so far from said trustees having the right to sue for said land and eject her therefrom, that she had the right from the moment of her husband's death to demand from them, unconditionally, a conveyance of said property to her in fee simple; which right she could, at any moment, have enforced against them by suit.

The court is further of opinion, that having thus the right to possess, and the actual possession of the property aforesaid, and holding also the equitable estate in fee with the right to an immediate conveyance of

the legal estate, all these rights passed to and were vested in the said A. L. Hendricks, by the deed of Mrs. Floyd to him of the 2d of December 1863; that being the date of the re-execution aforesaid; and that by the deed of the 15th of October 1868, from A. L. Hendricks and wife to Joseph T. Campbell, trustee, all the interest and estate aforesaid was vested in the said Campbell, who stood thereafter in all respects in the shoes of the said Sarah B. Floyd, and could no more be ejected from said premises at the suit of said trustees—conceding them to be such—than Mrs. Floyd herself could have been, had the suit been instituted against her, before her conveyance to Hendricks.

The court is, therefore, of opinion, that the judgment of the Circuit court is erroneous and should be reversed; and that judgment should be now entered for the appellant, the defendant in the court below.

Judgment reversed.

402

*Smith v. Penn.

June Term, 1872, Wytheville.

Absent, STAPLES, J.*

Scaling—Agreement between the Parties—Conclusive.

—Within six months after the act for scaling debts was passed, S recovered a judgment by default against P. Afterwards, P being about to move the court to scale the debt, the parties, with the assistance of their counsel, agreed that the debts should be scaled as of the value at the date of the bond, which was one for three, and this is entered of record upon the judgment. Afterwards, P files his bill to have the debt scaled as of the date the bond fell due. Held the agreement between the parties is conclusive, and the debt is not to be further scaled.

This was a bill for an injunction to a judgment filed in the Circuit court of Patrick county, in December 1868, by Jackson Penn against Madison T. Smith. The judgment was by default in September 1866, and was upon a bond executed on the 5th of January 1863, and payable on the 5th of January 1864. The Circuit court enjoined the judgment, and rendered a decree for a balance which Penn, according to the views of the court, had overpaid upon it. The case is stated in the opinion of the court.

Lybrook, for the appellant.

Dillard, for the appellee.

BOULDIN, J. delivered the opinion of the court.

In September 1866, Madison T. Smith, as trustee for the children of Adeline M. Smith, obtained a judgment by default in the Circuit court of Patrick county, against Jackson Penn and G. M. Hylton for \$4,210, with interest thereon from the 5th of January 1864, until paid, and costs, on a bond executed for the purchase of slaves on the 5th day of January 1863.

*He was related to some of the parties.

403 *After this judgment was obtained,

Penn employed counsel to proceed by motion to have this judgment scaled. It will be observed, however, that the judgment had been rendered more than six months after the passage of the act of the General Assembly for the adjustment of Confederate liabilities, known as the scaling act, and it was not then known—nor has it yet been directly decided—whether any relief could be afforded to a party who, in the absence of fraud, accident or surprise, or other equity, had allowed a judgment to be rendered against him without availing himself of the benefit of the statute. Under these circumstances, the counsel for the defendants prepared a notice for a motion to scale said judgment, which he showed to the counsel for the plaintiff; and thereupon, without service of said notice, and to avoid litigation, it was agreed between said counsel, by the authority and with the consent and approbation of both parties, that the question of difference between them should be adjusted by scaling the judgment as of the date of the contract. The calculation was made, and accurately made, by the counsel of the defendant, Penn, in the presence of the plaintiff and his counsel. The amount of the judgment was reduced to the sum of \$1,403.33 of principal, being just one-third of the nominal debt; and by consent of parties, it was entered of record that the judgment should be discharged by the payment of that sum, with interest from the 5th of January 1864, until paid, and the costs. This was deemed at the time a final settlement of the question; but afterwards, to wit: on the 14th day of December 1868, when it was supposed that a new and different construction of the scaling act from that which had previously prevailed had been established, the said Penn filed his bill in the Circuit court of Patrick county, on the chancery side thereof, alleging that there had been a mistake of law in the adjustment aforesaid, by scaling the judgment at the date of the contract, instead of

404 the *maturity thereof, and praying an injunction to the judgment, and that the same be again scaled, &c., &c.

The injunction was awarded, the cause regularly matured and heard, and the debt again scaled to \$210, instead of \$1,403.33½; and the defendant having already paid more than \$210, the Circuit court rendered a decree in his favor for \$26.50, the excess of payments, with interest and costs. From that decree Smith appealed to this court.

The only ground of equity alleged in the bill for disturbing the adjustment solemnly entered into between the parties, aided by counsel on both sides, is that there was a mistake of law in scaling the debt as of the date of the contract, instead of the maturity thereof. Whether this be a mistake of law or not, may perhaps be considered a question of some doubt; but as that question does not necessarily arise in this case, no opinion thereon will be now expressed. The differences between the parties involved other questions; and it is enough to say,

that the parties themselves, with the aid of counsel, have carefully and deliberately adjusted these differences, and made a settlement deemed just and reasonable by themselves at the time, and deemed just and reasonable now by this court; and even had they fallen into a mistake of law, it was not such a mistake as equity should have relieved against. The questions involved in the adjustment were at the time, to say the least of them, doubtful questions; and it is well settled that "if the question be a doubtful one, and the doubtfulness of that question is made the basis of an arrangement or agreement, the court will give no relief." *Adams' Eq.*, top. p. 444, marg. 189.

We are of opinion, therefore, that the decree of the Circuit court is erroneous, and that the same should be reversed, the injunction dissolved, and the bill dismissed.

Decree reversed.

405

*Pepper v. Barnett.

June Term. 1872. Wytheville.

Absent. STAPLES, J.*

Comparison of Hands—Competency of Witness.—M, a witness called to prove the signature of B, a party to an instrument, said that he was not familiar with the handwriting of B, never having seen her write but once, and then only to make her signature; that he would not be able, from his knowledge of her handwriting, to distinguish it from that of others; but that he was of opinion, from having compared the present signature with the one he had seen her make, it was her handwriting. M was a competent witness, and the evidence was admissible.

This was an action of ejectment in the Circuit court of Montgomery county, brought in August 1856, by John Pepper against George W. Barnett. On the trial

*He had been counsel in the cause.

+Comparison of Hands—Competency of Witness.—The court in *Flowers v. Fletcher*, 40 W. Va. 103, 30 S. E. Rep. 871, citing the principal case and others said: "The law is that a witness who has any personal knowledge of a signature in controversy, however slight, has the right to give his opinion, and the weight of that opinion is a question for the jury, and not for the court. A witness who has seen a person write but once, and then only his abbreviated signature, may testify regarding the same; or if he has seen a signature admitted by the owner to be genuine."

The court then continues by saying, "But he must have some knowledge, and the mere fact that he has received letters purporting to be from the person whose signature is in controversy is not sufficient, unless there has been some admission or acquiescence equivalent to an acknowledgment on the part of the supposed writer, other than the letters themselves, that said letters are genuine and in the handwriting of the person from whom they purport to come."

See also, *Hanriot v. Sherwood*, 82 Va. 14, 17, where the principal case is cited upon the said proposition.

of the cause, after the plaintiff had introduced his evidence, the defendant offered in evidence an agreement in writing, purporting to be between Ann R. Barnett, executrix of C. L. Barnett, deceased, and George W. Barnett; and to prove the signature of the paper by Ann R. Barnett, introduced a witness, Montague, who said, "that he was not familiar with the handwriting of the said Ann R. Barnett, never having seen her write but once, and then only to make her signature; that he would not be able, from his knowledge of her handwriting, to distinguish it from that of others; but that he was of opinion, from having compared the present signature with the one he had seen her make, it was in her handwriting." To the introduction of the evidence the plaintiff objected; but the court overruled the objection, and admitted the evidence; and the plaintiff excepted.

406 *The jury found a verdict for the defendant, and the court entered a judgment accordingly. And thereupon the plaintiff obtained a supersedeas to the District court of Appeals, where the judgment was affirmed; and he then applied to this court for a supersedeas; which was allowed.

Crockett and Blair, for the appellant.

J. W. Johnston and Wade, for the appellee.

CHRISTIAN, J. This case presents a single question, and one easy of solution upon well settled principles, established by repeated decisions of this court, as well as by all the best writers on the law of evidence.

When it is laid down as a rule that comparison of handwriting is not admissible, it must be remembered that "by comparison is now meant the juxta position of two writings, in order by such comparison to ascertain whether both were written by the same person. 2 Starkie's Ev. 654, and cases there cited. But where the witness has seen the party write, and is able to swear to his belief, that the writing in question is the hand of that person, such evidence is clearly admissible as legal proof of handwriting, and is considered as distinct from evidence by comparison. Greenl. on Ev. §§ 576-577; Redford's adm'r v. Peggy, 6 Rand. 316. In the case before us, the witness, Montague (who was called to prove the signature of Mrs. Barnett to the title bond sought to be given in evidence), stated that "he had never seen her write but once, and then only to make her signature; that he would not be able from his knowledge of her handwriting to distinguish it from that of others; but that he was of opinion from having compared the present signature with the one he had seen her make, and from other circumstances not disclosed by the witness, he was of opinion it was in her handwriting." The question is, was this evidence admissible? However

407 *little or however much credit may be given to it, is not the question. It may be entitled to very little weight; but the weight of the evidence is one thing, its

competency is another. The point upon which courts have differed in opinion is upon the source from which the knowledge of the handwriting is derived, rather than as to the degree or extent of it. All the authorities agree that a witness is competent to testify to the genuineness of a controverted signature if he has the proper knowledge of the party's handwriting. The difficulty has been in determining what is proper knowledge, and how it has been acquired. One mode of acquiring this knowledge, and certainly one of the best, is having seen the party write. Whether he has seen him write once or many times, goes rather to the degree and extent of his knowledge than the source from which it is derived, and does not affect the question of his competency, but only the weight to be given to his evidence, which is a question for the jury.

It has been well settled in numerous cases, and is laid down as settled law in all the standard works upon evidence, that a witness who has seen the party, whose signature is controverted, write but once, and that only his signature, is competent to testify, although he may have to compare the signature which he knows to be genuine with the one in controversy, in order to refresh and strengthen his recollection.

The case (cited by the counsel for the appellee) Burr v. Harper, 3 Eng. C. L. R. 168, is one exactly in point, and is strikingly like the one under consideration. In that case the witness, whose competency was questioned, stated, when called to prove the signature of Harper, that he once saw him sign his name to a paper, which he then had in his possession; that the fact made so slight an impression upon his mind that, judging from that single occurrence, he was not able to say whether the handwriting to the agreement was the defendant's or

408 *not; that he would not venture, upon the mere inspection of the paper, to form a belief on the subject; but that, by comparing the signature of the agreement, to which he was required to speak, with that which was subscribed to the paper then in his possession, he was able to swear that he believed it to be the defendant's writing. It was held in that case, and its authority has never been questioned, that the witness was competent to prove the handwriting. The court in that case says: "The mere fact of having seen a man once write his name may have made a very faint impression upon the witness' mind; but some impression, however slight in degree, it will make, and surely as the standard exists, and the witness possesses the genuine paper, he may recur to it to revive his memory upon the subject. Here a basis is laid in the fact of his having seen the defendant sign his name once. But his memory is defective. He then recurs to a paper which he knows to be an authentic writing. He uses it to retouch and strengthen his recollection, and not merely for the purpose of comparison. The evidence, therefore, is admissible."

In a case recently decided by the Supreme court of the United States, Mr. Justice Davis, speaking for the whole court, says: "It has been settled everywhere that if the witness has seen the party (whose signature is controverted) write his name but once, he is competent to testify." *Rogers v. Ritter*, 12 Wall. U. S. R. 322.

I am of opinion that there is no error in the judgment of the Circuit court, and that the same ought to be affirmed.

The other judges concurred in the opinion of Christian, J.

Judgment affirmed.

409 *Fugate v. Honakers' Ex'ors & als.

June Term, 1872, Wytheville.

Absent, STAPLES, J.*

Executor Not Liable for Investments in Confederate Bonds.—Testator died in 1863, and by his will directs his executors to sell his property, and to hold the money in their hands or to loan it out as they think best, and to pay the children as they come of age. The executors, with the concurrence of the adult children, sell for Confederate money, and they pay over to all the legatees who are of age. Two, however, are infants having no guardians, and the executors, under an order of the court, invest \$5,000 in Confederate bonds, which are lost. The executors are not liable for the loss.

This was a suit in equity in the Circuit court of Pulaski county, brought in September 1867, by Letitia Fugate against Henry Honakers' executors, devisees and legatees, to surcharge and falsify the account of the executors' administration settled in the Court of Probate, and if that was not done, that the devisees and legatees might be required to contribute to make her share as legatee equal to the others. The only objection made to the account of the executors was to an item of \$5,000, which they had invested in Confederate bonds, under an order of the judge of the Circuit court of Pulaski county. The Circuit court made an interlocutory decree, holding the executors justified in making the investment, and directing a commissioner to take an account of any assets of the testator, which had come to the hands of the executors since their last settlement, and also an account between the devisees and legatees; and thereupon the plaintiff applied to this court for an appeal from that decree; which was allowed. The only error
410 alleged in *the petition is as to the allowance to the executors of the said sum of five thousand dollars; and this is the only question decided by this court. The case is sufficiently stated in the opinion of the court.

Terry and Pierce, for the appellants.

Gilmore, for the executors.

*He had been counsel in the cause.

ANDERSON, J. delivered the opinion of the court.

This is an appeal from an interlocutory decree of the Circuit court of Wythe county. The only error assigned in the decree is that it allows the executors a credit for \$5,000, which was invested in Confederate securities, and is wholly lost to the estate.

Henry Honaker, the testator of the appellees, departed this life in January 1863. By the ninth clause of his will, he directs his executors to dispose of all his personal property not otherwise disposed of by his will, other than the slaves, to the best advantage, either publicly or privately, as they may choose; and his slaves he authorizes to be sold to masters of their own choosing, and at prices below their appraised value, if necessary to carry out his humane purpose of allowing them to select their masters, &c.

The will was admitted to probate on the 5th of February 1863, and on the 19th of that month the executors made sale of the property. It had been appraised with reference to Confederate values, and the purchasers were privileged to pay in Confederate money. That constituted the only circulating medium; and it may well be presumed, from the facts in the record, was the currency which it was contemplated by the testator would be received by his executors for the property which he directed them to sell; and upon no other conditions could the sale have been effected, and the purposes and wishes of the testator, as indicated by his will, carried out. The insecurity of the property, in the dis-
411 turbed *state of the country, seemed also to impress upon the minds of the executors the importance of an early sale; and it was the unanimous opinion and wish of the adult legatees that the sale should be made for Confederate money. The proceeds of the sale, together with cash on hand, of which \$2,301 was Confederate money, and \$609.40 received on debts due the estate, amounted to \$32,535.13.

On the 2d of December 1836, the executors made a settlement before a commissioner of the County court of Pulaski, showing that they had disbursed of that sum \$23,855.38, leaving a balance in their hands of \$8,679.75. In November 1864, less than a year after the first settlement, they made another before the same commissioner, in which they receive a credit for \$5,000, "invested in Confederate bonds, under an order of the judge of the Circuit court of Pulaski." This credit is allowed by the interlocutory decree aforesaid, and is the ground of the complaint and appeal.

The executors, in their answer, say "they have fully and fairly, so far as they know or believe, accounted for and disbursed to parties legally entitled to receive it, all the funds which have come to their hands, except the sum of \$5,000, which is about the amount the infant legatees were entitled to. There being no person to whom respondents could safely pay their funds, they applied to the judge of the Circuit court of Pulaski

county for authority to invest this sum for the benefit of the persons entitled to it. That an order was made by the said judge, authorizing them to invest it in Confederate States bonds; which they did: and that they deposited the money and obtained a certificate from the proper repository, entitling them to demand a bond for the amount invested. But before the bond was obtained the war ended, and the authority to issue bonds terminated. These statements of the answer are well supported by the proofs in the record.

412 *The will, if it does not make it the duty of the executors to sell, clearly invests them with power to sell. And in exercising the discretion, they acted with as much prudence and judgment as the most prudent and judicious would have been likely to exhibit in the same circumstances. It is evident that, in perfect good faith, they discharged the trust reposed in them with a view to the good of the estate. They may have erred; if so, it was an error into which the wisest might have fallen. We cannot say they did err. It is impossible to say that, under the circumstances, they could have acted differently with better results. They sold the personal property as directed by the will, and as was desired by all the adult legatees, paid the debts and expenses of administration, and the legacies to those who were capable of receiving payment, retaining only the sum of \$5,000—about what was necessary to pay the infant legatees. And this sum they invested in Confederate securities, under the direction of the Circuit court, as authorized by an act of the legislature, that it might be kept at interest, ready to be paid to the infant legatees as they respectively arrived of age to receive it. The authority of the court was not necessary to warrant the investment, as they were expressly authorized by the will "to hold the money in their hands, or to loan it out, as they may think best, and to pay the children as they become of age." But it shows with what scrupulous care and fidelity they desired to do right, and to conform to all the requirements of the law in the administration of their trust; and it strengthens their claim to the protection of the courts.

Five thousand dollars of the assets of the estate, which could not be disbursed in consequence of the infancy of some of the legatees, without fault of the executors, but as a consequence of the result of the war, has been lost. Should the loss fall upon them? The case is not now prepared to decide upon whom the loss should

413 *fall. But upon well settled principles, which have been recently declared by this court in *Davis' commissioner v. Harman & al.*, 21 Gratt. p. 194, and which need not be repeated, we are clearly of opinion that it should not fall upon the executors. We are of opinion, therefore, to affirm the decree of the Circuit court.

Decree affirmed.

414 **Buchanan & als. v. King's Heirs.*

June Term, 1872, Wytheville.

1. **Dismissal of Suit by Clerk—Waiver by Defendant.**—It is the duty of the clerk to dismiss a suit, when the process is served, and the bill is not filed in the time prescribed by the statute. But if the bill is filed before an order of dismissal is entered, and the defendant answers without insisting upon the dismissal of the suit, and consents to a hearing of the cause, he thereby waives the objection.
2. **Revival of the Cause against the Heirs at Law.**—The record stating that by the consent of parties the cause is revived against the persons therein named, heirs at law of the defendant who had died, and no objection having been made on this ground, in the Circuit court, the appellate court must presume the revival regularly entered with the consent of the proper parties.
3. **Proof That One Is Heir at Law Waived.**—Plaintiffs sue as heirs at law of K. The defendant answers, and does not question their right to sue in that character, and no question is made or suggested in the court below of their right to sue as such heirs: and throughout the proceedings it is implied by, if not expressly conceded, that they are properly before the court as such heirs. It is too late to object in the appellate court, to the decree for the want of proof of the fact.
4. **Right to Claim Benefit of Adverse Title Purchased by Co-Tenant—When Waived.**—As a general rule a joint-tenant or tenant in common is not to purchase in an outstanding adverse title to the common property, for his own benefit, to the exclusion of his co-tenant. But the co-tenant must, within a reasonable time, make his election to claim the benefit, and to contribute to the expense incurred in the purchase of such title. If he unreasonably delays until there is a change in the condition of the property, or in the circumstances of the parties, he will be held to have abandoned all benefit arising from the new acquisition.
5. **Same—Same—Knowledge of Purchase and Claim of Co-Tenant Essential.**—In such case, before the co-tenant can be held to have abandoned his claim to the benefit of the purchase of the outstanding title, it should appear not only that he has been apprised of the purchase, but of the claim set up by his co-tenant. He may reasonably presume the acquisition was made in support of the common title, and may act on that presumption.
- 415 *6. **Same—Same—Same—Burden of Proof.**—In such a case the burden is upon the purchasing tenant to show that his co-tenant had notice of the purchase, and of the exclusive claim asserted by him.
7. **Grantee of Joint Tenant Is Tenant in Common with the Co-Tenant.**—C and K are joint-tenants of land. C purchases a large tract which includes the land

*Dismissal of Suit by Clerk—Waiver by Defendant.—Approved in *Hinton v. Ellis*, 27 W. Va. 424.

†Right to Claim Benefit of Adverse Title Purchased by Co-Tenant.—The principal case is cited with approval in *Forrer v. Forrer*, 20 Gratt 134: Va. Coal. etc., Co. v. Kelly, 98 Va. 336, 24 S. E. Rep. 1030; *Pillow v. Southwest, etc., Co.*, 92 Va. 153, 23 S. E. Rep. 32.

‡Knowledge of Purchase and Claim of Co-Tenant Essential.—See *Rust v. Rust*, 17 W. Va. 905.

On the general subject of joint-tenancy, see 2 Min. Inst. (4th Ed.) 465, *et seq.*

held jointly, and takes the conveyance to himself; and he sells and conveys part of the large tract including the land held jointly. The grantee in this deed is tenant in common with the co-tenant of his grantor; and his possession is in presumption of law, the possession of all, and is to be deemed in support, and not in derogation of the common title.

8. *Ouster under the Code of 1860.*—The acts of C in taking the conveyance to himself and conveying to his grantee, are not such acts as are equivalent to an actual ouster, under the Code of 1860, chap. 135, § 15.

In September 1852, Wm. King and others, claiming to be heirs of Wm. King the elder, instituted a suit in equity, in the Circuit court of Smyth county, against Andrew F. Buchanan, for partition of a tract of two hundred and seventy acres of land of which the plaintiffs claimed they, as the heirs of Wm. King, were entitled to one undivided moiety. Though the process was served in September 1852, the bill was not filed until November 1854; and in April 1855, Buchanan answered, without having taken any steps to have the suit dismissed for the failure to file the bill in time, nor did he allude to the fact in his answer.

The bill set out a patent, issued in 1801, to William King and John Campbell, for two hundred and seventy acres of land, in the county of Washington (now in the county of Smyth), which is filed; that partition had never been made of this land between Wm. King, or his heirs, and said Campbell, or the purchasers from him.

The bill also sets out the grounds on which the defendant claimed the land. That after the death of Wm. King—viz: on the 5th September 1834—Campbell purchased of Leonard Straw a tract of eighteen hundred acres of land, part of a large survey called the Fendall survey, embracing a part of the tract of two hundred and seventy acres; for which Campbell paid to Straw \$200. On the 18th of the same month Campbell sold and conveyed to Richardson a part of said eighteen hundred acres for \$100; and on the 20th of June 1834, he sold and conveyed to the defendant Buchanan six hundred and fifty-five acres, part of the same tract of eighteen hundred acres, and including the portion of the two hundred and seventy acre tract, included, or said to be included, in the Fendall survey. To so much of the land as is included in this Fendall survey he claims under both titles.

They insist that Buchanan stands in the shoes of Campbell; that Straw had no title, or, if he had, the purchase of Campbell enured to the benefit of King's heirs. They insist further, that Buchanan is responsible for rents and profits; and they say they are willing that their proportion of the money paid by Campbell to Straw may be paid out of these rents and profits. The prayer of the bill is for a partition, for an account, and for general relief.

Buchanan, in his answer, admits the grant to King and Campbell, and his purchase from Campbell of six hundred and fifty-five acres of land, which he supposed

included about two hundred and thirty-one acres of the two hundred and seventy acre grant; and that Campbell also sold him one undivided moiety of thirty-nine acres, the residue of the said grant. And he believes it is true that no partition had been made between King and Campbell. He claims that the Fendall title, derived to Campbell through the purchase from Straw, is an elder and better title than that under which plaintiffs are seeking partition. He says that Campbell held an adversary possession of the land from the time of his purchase from Straw until he conveyed it to the respondent; and from that time respondent had held continual adversary possession ever since. He denies that the purchase of the land by Campbell enured to the benefit of King's heirs. He took possession of the land in 1843, and since then had been at great expense in clearing, enclosing and improving it.

At the March term, 1866, of the court, the death of A. F. Buchanan having been suggested, it is ordered by consent that this cause be revived in the name of P. C. Buchanan, jr., the personal representative of A. F. Buchanan, deceased. And at the March term 1867, it is said, "By consent of parties, this cause is revived against Martha Buchanan and four others, naming them, heirs at law of A. F. Buchanan."

The cause came on to be heard the 23d of June 1870, on the bill, answer and replication thereto, and exhibits filed, when the court held that the plaintiffs were entitled to partition of the tract of land of two hundred and seventy acres; and commissioners were appointed to make the partition. And one of the commissioners of the court was directed to take an account of the rents and profits of the land, based upon its condition in June 1843; and also to ascertain the just proportion of the complainants of the sum of \$200, paid by Campbell to Straw in September 1834, for the eighteen hundred acres of the Fendall survey, embracing a part of the two hundred and seventy acre tract; the court holding that the purchase of Campbell enured to the joint benefit of Campbell and King's heirs.

The commissioners appointed to divide the land made their report. The commissioner also reported the account. He ascertained the proportion of the \$200 which the plaintiffs should pay at \$15.75, with interest from the 5th of September 1834, to 5th September 1870—\$34.02=\$49.77; and the rent from 1853 to 1870, at \$20 a year, \$340, interest \$173.40. The commissioner states that he did not allow rents from 1843 to 1853 for the reason that the property was wholly unimproved at that time. These reports, though filed, were not acted on by the court.

418 *The defendants applied to a judge of this court for an appeal from the decree of 23d of June 1870, which was allowed.

Gilmore and J. W. Johnston, for the appellants.

J. W. & J. P. Sheffey, for the appellees.

STAPLES, J. delivered the opinion of the court.

This is a suit for partition of a tract of land claimed by the appellees, as tenants in common with appellants. The court below rendered a decree in accordance with the prayer of the bill; and from this decree an appeal has been taken to this court. Various errors have been assigned, some of which relate merely to the regularity of the proceedings in the Circuit court, and will be first noticed.

It is objected that the clerk ought to have dismissed the suit, because of the plaintiffs' failure to file their bill for more than two years after the execution and return of the original process. It certainly is the duty of the clerk to enter the suit dismissed if three months elapse after process is returned executed without the bill being filed. If, however, the bill is filed before an order of dismissal is entered, it is entirely competent for the defendant to waive the objection. In this case he will be held to have made such waiver by filing his answer and consenting to a hearing upon the merits.

It is also objected that the suit was not regularly revived against the appellants. The record states that by consent of parties the cause is revived against the persons therein named, heirs at law of Andrew Buchanan. No objection on this ground having been made in the Circuit court, this court must presume the revival regularly entered with the consent of the proper parties.

It is further objected that the appellees have offered no proof that they are representatives of William King the elder. It

does not appear that this objection was
419 *ever suggested, or even hinted at, in the Circuit court. The answer of

Andrew Buchanan, under whom appellants claim, does not question the right of the appellees to sue in the character they assume. The ground therein taken in opposition to the partition is that the Fendall title, derived through purchase from Straw, is superior to the King and Campbell title, under which appellees claim; that the said Buchanan and those under whom he claims have held adversary possession of the land in controversy a sufficient time under the statute to prevent a recovery; and further, that the purchase of the outstanding title by Campbell did not, in point of law, enure to the benefit of the appellees. Throughout the proceedings it is impliedly, if not expressly, conceded, that the appellees are properly before the court as heirs or devisees of William King. Under these circumstances, I think it is too late to object to the decree for the want of proof of these facts.

These points being disposed of, it remains to consider the objections to the decree upon its merits. It is conceded by the counsel for the appellants that, as a general rule, a joint tenant, or tenant in common, is not permitted to purchase in an outstanding

adverse title to the common property for his own benefit to the exclusion of his co-tenant. He insists, however, that the co-tenant is required, within a reasonable time, to make his election to claim the benefit and to contribute to the expense incurred in the purchase of such title. If he unreasonably delays in this until there is a change in the condition of the property, or in the circumstances of the parties, he will be held to have abandoned all benefit arising from the new acquisition. I think this is a correct statement of the principles of law governing in such cases. It does not, however, cover the whole ground. If the co-tenant is to be considered as forfeiting, by his delay, every advantage arising from the purchase of the outstanding title, it should appear not only that he was
420 *apprized of the purchase, but also of the claim set up by his companion.

The co-tenant may reasonably presume the acquisition was made in support of the common title, and he may act upon that presumption. He has the right to consider the outlay in such case as a joint charge to be settled and accounted for as any other necessary expense incurred in protecting the joint estate. When, however, he is otherwise informed, it is then his duty, within a reasonable time, to claim the benefit of the new title and offer to contribute his share of the sum expended in its acquisition.

It seems to me, moreover, in such case the burden is upon the purchasing tenant to show that his companion had notice of the purchase and the exclusive claim asserted by him. As every joint tenant, or tenant in common, occupies a position of trust and confidence towards his companions, he who seeks to change these relations, and to expel the others from the enjoyment of the common property, must establish the facts which make such expulsion just and equitable.

Tested by these principles, the questions arising in this case are easily solved. The outstanding adverse title was acquired by John Campbell on the 4th of September 1833, and was by him conveyed to Buchanan on the 20th June 1843. It is not pretended—at least, it is not charged—that the appellees or their ancestor, Wm. King, had any notice of this purchase and sale by Campbell. The deed to the latter from Straw being for a larger tract, of which the land in controversy is part, furnished no such notice. And the same may be said in respect to the deed to Buchanan. There is not a line or word in it to show that it embraces the land in dispute. There was nothing in the character of the transaction calculated to give it notoriety. Campbell's purchase from Straw amounted to eighteen hundred acres, the consideration of which was two hundred dollars. The land in con-

trovery contains three hundred and
421 *sixty-three acres. The amount, therefore, of appellees' contribution to the new purchase would have been fifteen dollars and seventy-five cents.

It is reasonable to suppose that a sum so inconsiderable scarcely attracted the attention of the parties. In itself it affords a strong presumption that neither King nor his devisees, in failing to advance it, were actuated by any improper motives. Certainly it is repugnant to any notion of equity, that the non-payment of such a sum shall be permitted to work the forfeiture of an estate.

It is to be observed also, that the appellants do not raise this question in any form in the court below. They rest their defense there on entirely different grounds. If the point had been suggested in the Circuit court, the appellees might have accounted for the delay, and thus removed a difficulty now presented for the first time in the argument here.

It is, however, argued by appellant's counsel that the taking of a conveyance to himself by Campbell, the recording of that conveyance, and the sale by Campbell to Richardson, was an actual ouster by the former of the heirs and devisees of King. At all events the acts of Campbell are such acts as are made by section 15, chapter 135, Code of 1860, equivalent to actual ouster. The cases cited in support of this proposition, do not sustain it. The acts mentioned, considered singly or together indicate a mere claim of title to the whole estate. But a claim of title can never change the possession and without such change there can be no disseisin. In *Peaceable v. Read*, 1 East. R. 568, a tenant in common levied a fine of the whole premises, and afterwards took all the rents and profits for nearly five years, without account; but it did not appear he held adversary possession at the time of levying the fine. It was decided, this was not sufficient evidence from which the jury might presume an ouster. And although one tenant in common takes

422 *the whole profits, yet this does not divest the possession of his companion. There must be an adversary possession; such acts as if done by a stranger would be acts disseisin; and they must be shown to have been done adversely to the rights of the co-tenant, and with intent to oust him, and to assert the actual and exclusive ownership of the entirety. 1 Green's Cruise, on real property, page 393; Adams on ejectment, 55; 1 Lomax Digest, 504. The taking a conveyance by Campbell and its recordation did not, therefore, operate as an ouster of the appellees, or those under whom they claim; nor did the deeds to Richardson and Buchanan respectively have any such effect.

It is well settled that a conveyance by metes and bounds of part of an estate held in common, though valid against the grantor, cannot prejudice the rights of the co-tenant, unless followed by entry and adversary possession. The grantee becomes thereby merely a tenant in common with the co-tenants of his grantor; his possession is in presumption of law, the possession of all, and is to be deemed in support and not in derogation of the common title. *Robi-*

nett v. Preston's heirs, 2 Rob. R. 273; *Hannon v. Hannah*, 9 Gratt. 146.

It is equally true that if the purchaser takes a conveyance of the whole estate from one tenant in common, and enters into exclusive possession under such conveyance, claiming title to the whole, this is an ouster of the other tenants; and the grantee so entering and claiming title may rely upon his adversary possession, if continued a sufficient period, as a bar to a recovery by the other tenants. *Town v. Needham*, 3 Paige's R. 549; *Clapp v. Bromagham*, 9 Cowen. R. 530. How do these principles affect the appellants? Andrew F. Buchanan, under whom they claim, purchased the land on the 20th of June 1843. This suit was instituted in November 1852; constituting an adversary possession, if it existed at all, of

about nine years. But, in fact, there 423 is not the slightest *foundation for supposing there was any such possession. The record contains no evidence bearing upon the point, except the report of the commissioner, which states that no rents are allowed by him from 1843 to the year 1853; for the reason that the property was wholly unimproved at that time, and of no rental value. This would seem to exclude the idea of any such occupation as amounts to a disseisin of the appellees or those under whom they claim.

The provision in the Code of 1860, relied on by counsel, has no such effect as is claimed for it. It has been the established doctrine of the courts, that a tenant in common cannot maintain ejectment against his companion without proof of an actual ouster. Difficulties often occur in determining whether certain acts constitute an ouster. Parties otherwise entitled to recover are defeated from an inability to prove it. It was, therefore, provided it should be sufficient for the plaintiff to prove some act amounting to a total denial of the plaintiff's right as co-tenant.

It was not intended to alter well established principles of law governing the relations of joint-tenants or tenants in common to each other, but simply to enlarge existing remedies. *Doe, lessee of Taylor, v. Hill*, 10 Leigh, 457.

For these reasons, I think the decree of the Circuit court should be affirmed. But I am of opinion the appellees are not entitled to recover any rents or profits against the appellants, upon the principles settled by this court, in *Early v. Friend*, 16 Gratt. 21.

Decree affirmed.

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*Hale v. Wall & al.

Wall v. Slusher.

June Term, 1872, Wytheville.

Absent, STAPLES, J.*

1. Payment to Agent in Confederate Money.—W held two bonds of S. given for the purchase money of

*He had been counsel in the cause.

land in 1859—one due April 1st, 1861, and the other April 1st, 1862—for which a lien was retained in the deed. In 1860 W removed to the State of Missouri, and left the bonds with H for collection. H acted in the matter, as the friend of W, without any expectation of compensation, and without any knowledge of the lien reserved in the deed. In October 1860, S, at the request of W, paid in advance on the first bond \$500, W allowing him a premium of 12½ per cent. After the first bond fell due, H wrote to W asking specific instructions as to the mode of remitting the money to him; but received no reply. In February, or March, 1862, S paid to H the balance of the first bond in notes of solvent banks; and H, having received no instructions, he deposited the whole amount in his own name in the Bank of the Valley at C, and took from the teller a certificate of deposit. When the second bond became due, S paid the amount to H in notes of solvent banks and confederate currency; and on the same day H made a special deposit of the same money he received in the branch of the Farmers Bank at B, and took a certificate of deposit. At the times these moneys were received it was very little depreciated, and was universally received and paid out by business men. H never used the money, nor does it appear that he mixed it with his own, or had an account at the bank. Upon the failure of the Confederacy these banks failed, and the money was lost. **Held:**

1. **Agent of an Alien Enemy.**—An alien enemy may have an agent in the enemy's country, to collect debts due him and to preserve his property there.
2. **Same—Authority Not Suspended by Want of Inter-course.**—The authority of H to collect the debts was not suspended because it was illegal to remit it to W; but it was his duty to receive, and the duty of S to pay them.
- 425 *3. **Confederate Money.**—The receipt of the payments in bank notes and Confederate money, at the time they were received, in the absence of instructions from W not to receive such money, was not improper.
4. **Deposits in Agent's Name.**—The deposit of the money in the banks, though in his name, having been intended by H for the benefit of W, was not a conversion thereof to his own use, so as to make him the debtor of W for the amount; but was under the circumstances not improper, and H is not responsible for the loss.
5. **Valid Payments.**—The payments by S to H were valid payments, and he is not responsible to W.

These were appeals, the first by John Hale from a decree of the Circuit court of Montgomery county, in a suit in equity, brought in February 1866, by James Wall against said Hale and John B. Slusher, by which there was a decree against Hale, and the bill was dismissed as to Slusher; and the second was an appeal by Wall from the same decree dismissing the bill as to Slusher. A question was made whether Wall's appeal was in time, but this court did not notice it. The case is fully stated in the opinion of the court.

The case was argued by Ronald for Hale, Wade for Wall, and Taylor & Phlegar for Slusher.

Wade, for Wall:

1. The agency, if any, was constituted for the purpose of transmitting the funds; and, under the circumstances in this case, it is insisted by the appellee, that all authority to Hale was revoked, or at least suspended, during the war. *The Rapid*, 8 Cranch. R. 155. See note to *Willison v. Patten*, 7 Taunt. R. 439 (2 Eng. C. L. R. 167); *Billgerry v. Branch*, 19 Gratt. 393; *Griswold v. Waddington*, 16 John. R. 438, 483, 485, 486, 487 and 488. Colyer on Partnership, p. 188, sec. 195. Of this revocation or suspension both Hale and Slusher were bound to take notice.

2. Hale had no right to receive payment in depreciated currency; and Slusher could not thereby discharge his obligation. *Ward v. Smith*, 7 Wall. U. S. R. 447.

3. If it had been a good payment, Hale's subsequent dealings with the funds would render him liable for its loss. 2 Story Eq. Jur. 704, sec. 1270; *Redfield on Wills*, part 2, p. 880, 886. He deposited it in bank in his own name. *Story on Agency*, p. 246, sec. 208, and p. 241, sec. 202; *McDonnell v. Harding*, 7 Simm. R. 178, 10 Cond. Eng. Ch. R. 5; *Robinson v. Ward*, 2 Car. & Pay. R. 59 (12 Eng. C. L. R. 28); *Smith's Mercantile Law*, p. 103; *Wren v. Kirton*, 11 Ves. R. 377 and 380; *Hays v. Stone*, 7 Hill's R. p. 128 and 135; *Johnson v. O'Hara*, 5 Leigh, 456; *Pidgeon v. Williams*, 21 Gratt. 251. The special deposit was in his own name and at his risk. *Angell & Ames*, p. 255, 256, 259, secs. 243 and 246, 260, § 247; *Foster v. Essex Bank*, 17 Mass. R. 479; *Manhattan Co. v. Lydig*, 4 John. R. 377 and 382. Although Hale neither contracted for nor expected compensation, still he is liable for the loss of this fund. *Smith's Lead. Cas.* p. 286, 289 and 290; and cases cited in *Bacon's Abr.* p. 608; *Wilson v. Brett*, 11 Mees & Welsh. R. 113; *Rutgers v. Lucet*, 2 John. Cas. 92 and 96; *Elsee v. Gatward*, 5 T. R. 143 and 150; *Thorne v. Deas*, 4 John. R. 84, also 94, 95, 96, 97 and 98.

BOULDIN, J. delivered the opinion of the court:

In the year 1859, James Wall, then of Montgomery county, Va., being about to remove to the State of Missouri, placed in the hands of his friend and neighbor, John Hale, of the same county, for collection when they should become due, two bonds of one John B. Slusher, dated April 6th, 1859, for \$1,302 each; one payable the 10th of April 1861, and the other the 10th of April 1862. These bonds were given by Slusher to Wall for the purchase money in part, of a tract of land in said county, sold by Wall to Slusher, and a lien was retained on the face of the deed to secure their payment. The fact, however, of the lien being retained, did not appear on the face of the bonds, nor does it anywhere appear, that it was ever communicated to Hale or was known by him. Soon after the bonds had been placed in the hands of Hale, Wall left the State of Virginia for the State of Missouri, where he has ever since resided.

In October 1860, at the solicitation of Wall, J. B. Slusher paid him in advance, the sum of \$500, for which Wall agreed to allow him a premium of 12½ per cent.; and by his instructions a credit of \$538.58, payment and premium, was endorsed by Hale on the bond first falling due, as of the 10th of April 1861, being the maturity thereof. This payment was made by deposit in the Branch of the Farmers' Bank of Virginia, at Blacksburg. No other payment was made until about the last of February or first of March 1862, when the sum of \$811, being the balance then due on the first bond, was tendered and paid by Slusher to Hale in notes of solvent banks, the most of it in Virginia State bank notes. Prior to this time Hale had written to Wall, asking for definite instructions as to the mode of transmitting his money, when collected, but had received no reply, nor did he at any time thereafter, receive any instructions from him. Wishing to place the money in some secure place he deposited the entire amount collected, \$811, to his own credit in the Bank of the Valley at Christiansburg, on the 28th of March 1862, and took from the teller a certificate of the deposit.

The other bond fell due on the 10th of April 1862; and on the 3d of May thereafter, the full amount thereof, principal and interest, being the sum of \$1,307.24, was also paid by said Slusher to Hale—about \$520 of it in Confederate States treasury notes, and the residue in the notes of solvent banks—chiefly notes of Virginia banks. On the same day—the 3d of May 1862—Hale deposited the notes thus received, \$1,307.24, on special deposit in the Branch of the Farmers' Bank at Blacksburg, taking

428 *from the cashier a certificate thereof. This deposit was to be returned to Hale or his order on return of the certificate. Both of these certificates were carefully preserved by Hale for Wall, until the close of the war between the United States and the Confederate States of America.

At the dates of the collections, it is well known to us as a matter of history, that the notes of the banks of Virginia and of other solvent banks, and Confederate States treasury notes were but little depreciated, not more perhaps, than the paper currency of the United States, if so much; that they then constituted the only currency in Virginia, and were universally paid out and received by the banks of the State, and by prudent men of business, in all their transactions.

Both of the banks in which Wall's funds were deposited, seem to have failed, and the deposits have thus been lost.

Hale is a plain man of but little culture, and, as charged by Wall in his bill, of weak and feeble intellect; and he acted in this matter wholly without compensation, merely to accommodate his friend and neighbor, Wall. He has not derived, and never expected to derive, the smallest personal advantage from the transactions.

After the close of the war, to-wit: in October 1865, Wall came to Virginia to look

after his money, and Hale then tendered him the two certificates which he had taken and preserved as aforesaid, but Wall declined to receive them; and in January 1866, instituted his suit in the Circuit court of Montgomery county on the chancery side thereof, against Hale and Slusher, seeking to hold them responsible for the debt. The bill, after alleging that the bonds had merely been left in the custody of Hale, denied in the first place, his authority to collect, and Slusher's authority to pay the money. It charged, in the next place, that if such authority at any time existed, it was suspended by the war; and if not 429 suspended did *not justify Hale in receiving in discharge of the debt, the paper currency of Virginia. It alleged ignorance of what had been done and prayed a discovery.

There was an amended bill filed, which, after repeating the allegations of the original bill, charged among other things, that the deposits made by Hale as aforesaid, being made in his own name, amounted to a conversion and appropriation of the funds to his own use, and that he thereby became responsible for the full amount deposited, with interest.

Hale and Slusher severally answered the original and amended bills, setting forth in substance the facts above detailed; and both affirming directly and unequivocally, that full authority was given to Hale by Wall to make the collections. This authority was, in addition to the sworn statements of the answers, abundantly proved by the testimony in the cause, and has been conceded at the bar.

Upon the hearing of the cause, the Circuit court dismissed the bill as to Slusher, but held Hale responsible for the several amounts deposited by him as aforesaid, with interest from the dates of the deposits, and decreed accordingly.

From this decree both Hale and Wall have appealed to this court. Hale because he was held responsible for the deposits; Wall because the bill was dismissed as to Slusher.

We will consider first the decree against Hale. Was it proper to hold him responsible for the sums of money deposited in the banks at Christiansburg and Blacksburg? It has not been contended before this court, and could not be successfully contended, that Hale was not the agent of Wall, duly authorized by him to collect the funds in question. That is conceded.

But it is insisted in support of the decree:

1. That the agency of Hale was not confined to the collection and preservation 430 of the fund, but that it extended *also to its transmission to Wall in Missouri; and as the war between the United and Confederate States put a stop to all communication between the citizens of the States of Virginia and Missouri, and rendered it unlawful, the right to transmit the funds became unlawful, and was suspended, and with it the right to collect was also suspended.

2. Conceding his authority to collect, Hale

had no authority to receive in discharge of the debt the depreciated paper currency of Virginia.

3. By depositing the funds in bank in his own name, and leaving them there without further attention, Hale had converted and appropriated them to his own use, and thereby became debtor to Wall for the entire amount.

We will consider these propositions in their order.

1. Was the agency to collect the fund suspended by the war?

That an alien enemy may keep an agent in the enemy's country during the existence of war, with full power to collect money and preserve property, is a proposition too well established to require citation of authority. The question has very recently undergone a careful examination by this court, and the proposition was affirmed by all the judges, that whilst the authority of an agent to transmit money to his principal would be suspended by war, because such transmission would involve direct intercourse with the enemy, which is unlawful; the authority to collect and preserve remains unimpaired; and the debtor cannot, in such case, lawfully refuse to pay to the agent, nor the agent refuse to receive payment. *Manhattan Life Insurance Company v. Warwick*, 20 Gratt. 614, p. 635 to 638, and cases there cited by Judge Anderson, delivering the opinion of the court. Two of the judges, it is true, dissented on the merits—Judges Christian and Moncure—but both of them concurred with the majority, in affirming the principle above stated. Judge

Christian, with whom Judge Moncure 431 concurred, speaking "at page 653 of the cases on this subject, says: "These cases decide that it is lawful for an alien enemy to keep an agent in the enemy's country to receive money or to take care of his property during war."

The case furnishes a complete answer to the argument of the learned counsel for the appellee on this question. That argument was, that it was the duty of Hale in this case not merely to collect the fund, but also to transmit it to Wall in Missouri; that the right to transmit was clearly suspended by the war; and as the authority to collect was conferred for the purpose—and only for the purpose—of transmitting the fund, when the latter right fell the former necessarily fell with it. The view is plausible, but is completely answered by the case of the *Manhattan Life Insurance Company v. Warwick*. In that case it was the duty of the Virginia agent of the New York company to collect the premiums due the company in Virginia; but it was essentially his duty also to transmit those premiums to his principal in New York. This court held, that whilst the war necessarily suspended the right to transmit the premiums to New York, the right of the agent to collect them was not only not suspended, but that it was his imperative duty to receive those premiums if tendered at the proper time.

The Supreme court of the United States in the case of *Ward v. Smith*, 7 Wall. U. S. R. 447 (cited by appellee's counsel for another purpose), affirm the same principle. Speaking of a like case, they say, p. 452: "When an agent appointed to receive money resides in the same jurisdiction with the debtor, the latter cannot justify his refusal to pay the demand, and of course the interest which it bears. It does not follow that the agent, if he receive the money, will violate the law by remitting it to his alien principal."

But it is wholly unnecessary to multiply authorities on the question. We are of opinion that the right and duty of Hale to collect of Slusher the debt in question, 432 *and the right and duty of Slusher to pay, were not impaired by the war.

2. Had Hale, as agent, the right to receive the paper currency of Virginia in discharge of the debt?

It will be remembered that when the debt was contracted, both debtor and creditor were citizens and residents of Virginia; that the contract was made in Virginia; that when the creditor left the State he appointed, as his agent to collect the debt, a citizen and resident of Virginia, with whom he left the bonds, and that both agent and debtor continued to reside in Virginia. As a matter of course, all parties expected the debt to be paid in Virginia currency, unless that currency should become so depreciated as to render its reception an act of obvious impropriety. Such certainly was not the case when the payments in question were made. The currency received by Hale was the very same which we know, as matter of history, was everywhere received and paid out at that time by business men of the State, and which they were always glad to receive. It was, in fact, but little depreciated at that time—not more than the paper currency of the United States, if so much. It was, in fact, substantially the same kind of money which Wall himself had been glad to receive of Slusher in October 1860. Slusher's payment was made by a deposit in the branch bank at Blacksburg, and was, therefore, in effect, a payment in bank paper, and in paper of the same bank in which Hale made his special deposit of \$1,307.24. Collecting them as Hale did—a Virginia debt from a Virginia debtor—in funds everywhere in the State received and paid out as money; charging not even the smallest commission for his services and his risk; making no use whatever of the fund, but depositing it at once in bank, to remain, as he supposed, secure and intact for his friend, and utterly ignorant, as he appears to have been, that there was other security for the debt than the single 433 obligation of *the debtor; it would be unkind and unreasonable, to the last degree, to impute bad faith or breach of trust to this illiterate and feeble-minded old man: and without such imputation, having full power to collect as he did, his act cannot be impeached. *Myers, &c., v.*

Zetelle, 21 Gratt. 733, and cases cited by Judge Christian.

But this court has recently decided the precise question in the case of Pidgeon v. Williams, 21 Gratt. 251. That was a case in which the professional firm of Barton & Williams, lawyers, of Winchester, Virginia, had been employed in 1860, or early in 1861, to collect an old debt for a client who was sometimes in Virginia and sometimes in Maryland. On the 21st of February 1862, just about the date of Hale's first collection, they collected for their client, in Confederate States treasury notes, \$1,028.50; and on the same day they deposited in bank to the credit of their own "collection account," not the full amount collected, as Hale did, but the sum of \$932.95, being net amount after deducting fee and commissions. They had not seen their client for a long time, did not write to him, and the sum remained in bank uncalled for until the close of the war, and was lost like that in controversy in this case—not by the negligence or misconduct of the agents, but by the disastrous results of the war. Williams, the surviving partner, was sued for the amount of the deposit in January 1866, as Hale was, and a verdict and judgment was rendered for the defendant. This judgment was approved and affirmed on appeal to this court. The court say, p. 254: "And first as to receiving Confederate money. The proof is, that at the time the money was received, Confederate treasury notes were worth only ten per cent. less than gold, including exchange; that it was almost the only currency of the country, as good as any, and better than greenbacks, and that it was received and paid out by the banks,

434 and *was the currency generally, if not universally, used in all the transactions of life; that gold had ceased to be a currency, and was sold as a commodity, and that the attorneys could not have collected the debt at all, if they had refused to receive Confederate currency. The claim had been placed in their hands for collection, and it was their duty to collect it. They had not been instructed by their client not to receive payment in Confederate currency; and we are of opinion that it would be unreasonable to hold them responsible, under the circumstances, for having done so." Every word in this extract applies "a fortiori" to the case before us. If it would be unreasonable to fasten a loss, under such circumstances, upon learned counsel of large experience and much ability, rendering a service for compensation, much more unreasonable would it be to fasten a loss, under precisely the same circumstances, on an illiterate and feeble-minded old man, who supposed he was doing an act of kindness to a neighbor, and acted without expectation or desire of reward. We are of opinion that Hale should not be held responsible for receiving bank notes and Confederate States treasury notes in discharge of the debt.

3. Nor do we think that the deposit in bank in his own name should render him

responsible. Banks have always been regarded by the courts in Virginia as the safest places of deposit for money. The funds of married women, infants, lunatics and suitors of every character, are there deposited under orders of court; and in the case just cited of Pidgeon v. Williams, the court held that it was a proper and the best place, even during the war and on the border; and that the deposit was good, although not in the name of the client. Had the deposits been made in the name of Wall, or in the name of Hale for Wall, there could not be a question about them. But it is said, and truly said, that they were 435 not so *made, but in the name of Hale.

They do not appear, however, to have been mixed with any money of his own; nor does it appear that he kept a bank account at all. But it does appear that he did what is rarely done, except when a person is depositing money for another—he took formal certificates for both deposits, and kept them until the war was over, and then tendered them to Wall. The court is well satisfied that he did not use the money in any manner or for any purpose, and it was not lost by reason of being deposited in bank in his own name. Precisely the same result would have followed had the deposit been made in the name of Wall himself. It was the result of an overwhelming disaster, which involved not only individuals, but communities and States, in a common ruin. In the expressive language of Judge Christian, in Davis' commissioner v. Harman, &c., 21 Gratt., 194, p. 203: "It was not the failing of a bank, or the insolvency of a banker, but it was the sudden and irretrievable destruction of the whole currency of a country by the termination of a civil war, which had destroyed the very power that created it." And we approve and adopt the concluding paragraph of the opinion in that case as strikingly apposite to the case before us:

"It would be too rigorous and unjust; it would be in violation of those well settled principles, founded in reason and conscience, which control the action of courts of equity, to hold that though the appellant has been guilty of no mala fides, no misconduct, no negligence, yet he is to be held responsible for a loss which he had no part in creating and no power to prevent. But that loss, we think, ought to fall upon those who were entitled to the fund that has perished."

The court is of opinion that so much of the decree of the Circuit court as holds Hale responsible for the loss is erroneous, and should be reversed, and the bill dismissed.

436 *On the cross-appeal, the court is of opinion, for the same reasons, that there is no error in so much of the decree of the Circuit court as dismissed the bill as to Slusher, and that the same be affirmed, with costs, &c., to the appellee.

The decree as to Hale, reversed; as to Slusher, affirmed.

437 *Va. & Ten. R. R. Co. v. Campbell's Ex'or.

June Term, 1872, Wytheville.

1. **Compensation for Land—Removal to Circuit Court.**—Under the act, ch. 174, § 1, Code of 1860, the case of a railroad company asking the County court to ascertain the compensation to a land owner for the land proposed to be taken for its purposes, which has remained in the court for more than one year without being determined, may be removed to the Circuit court.
2. **Same—Same—Jurisdiction.**—In such a case, if the Circuit court sets aside the report of the commissioners, that court should not send the case back to the County court, but should take jurisdiction of the case, and proceed in it with the same powers that are vested in the County court by the statute.
3. **Same—Same—Land Owner Cannot Apply to County Court.**—A land owner, or his executor, whose land has been taken by a railroad company for its purposes, cannot apply to the County court for the appointment of commissioners to ascertain the compensation of the land owner for the land so taken.
4. **Same.**—After the company has made a motion for commissioners to ascertain the compensation due to a land owner, and the commissioners have reported, and the court has allowed the money to be received by the clerk, and directed him to pay it to the land owner, or hold it until the further order of the court, the executor of the land owner applies to the same court for commissioners to ascertain such compensation, and this case is removed to the Circuit court. The removal of this case does not bring up the first, and neither the Circuit court, nor this court, can enquire whether there is error in the action of the court in the first case.
5. **Evidence—Record.**—The record in the first case may be used by the company in their defence upon the second motion.

On the 24th of November 1851, on the motion of The Virginia & Tennessee Railroad Company, James Edmondson and four others were appointed by the County court of Washington county, commissioners to ascertain a just compensation to the owners of land upon the line of their improvement within the said county, for such

438 *lands as are proposed to be taken by the company for its purposes.

The commissioners returned a report, which bears date the 11th of December 1851, in relation to the land of David Campbell, amounting to three acres, three roods and eighteen poles, and they fixed his compensation at one hundred and forty-four dollars and fifty cents. And at the March Term 1854, the court made an order reciting the report, and that the attorney for the company had that day paid the money into court, and directing the clerk of the court to receive the money and hold the same until applied for and received by Campbell, or until the further order of the court.

In December 1857, upon the motion of David Campbell, five commissioners were appointed to ascertain a just compensation

to him for his lands through which the line of the railroad passes, and which had been taken by the said railroad company for its purposes.

Nothing appears to have been done under this order: and in March 1861, David Campbell being dead, upon the motion of his executor, commissioners were again appointed to ascertain what will be a just compensation for the lands of which David Campbell died seized, and is proposed to be taken, or is taken, by the railroad company.

These last commissioners acted on the 13th of April 1861, and fixed the compensation for the land taken at \$1,200. Nothing seems to have been done further in the case until December 1866, when the railroad company offered a special plea of the statute of limitations, which was objected to by the plaintiff; and thereupon, on the motion of the company, and with the consent of the plaintiff, the cause was removed to the Circuit court of Washington county.

The record does not show when the cause came on to be heard in the Circuit court, though the petition states that it was at a special term of the court in July 1870, 439 *when the court set aside the report made under the order of the 24th of July 1851, and also the report made in pursuance of the order of March 1861, because the record does not show that they were returned in the proper time, and that it is not shown that notice was given to the owner of the land; and for the further reason that the record does not sufficiently connect the proceedings on the motion of the defendants with those on the part of the plaintiff. And the court being of opinion that other commissioners should be appointed to ascertain a just compensation for the lands of said David Campbell, deceased, &c., and that the Circuit court had no jurisdiction to make the appointment, it was ordered that the cause be remanded to the County court to be further proceeded with. To this order the railroad company obtained a supersedeas from this court.

J. W. Johnston, J. W. & J. P. Sheffey, for the appellants.

J. A. Campbell, for the appellee.

ANDERSON, J. delivered the opinion of the court.

This case is rather anomalous. It is a motion in a County court by the owner of land against a railroad company, to appoint commissioners to ascertain his just compensation for the lands through which the railroad passes, and which have been taken by the said railroad company for its purposes, and for damages, &c. The commissioners were appointed and reported, and on motion of the defendant, with consent of the plaintiff, the cause was removed to the Circuit court of the county in which it was depending.

The first question we will consider is as to the jurisdiction of the Circuit court.

This case had been depending and undetermined in the County court for several years. The first section of chapter 174 (Code of 1860) provides that where any suit, motion, or other proceeding, has been depending 440 in the County or Corporation *court more than a year, on motion of any party it shall, without notice, be removed to the Circuit court having jurisdiction over such county or corporation. The language is certainly broad enough to embrace this case.

But it is argued that the statute gives the County courts exclusive jurisdiction to appoint the commissioners, and requires their report to be returned to that court. And that if good cause be shown against the report, or if the commissioners report their disagreement, or if they fail to report in a reasonable time, the court (the County court) may, without further notice, as often as seems to it proper, appoint other commissioners, and the matter may be proceeded in as before prescribed. All these provisions, they say, are made with reference to the County court, and cannot originate in the Circuit court. It is true they cannot originate in the Circuit court. But if the legislature thought proper to pass another act authorizing, in express terms, the removal of such motion and proceeding from the County to the Circuit court for specified causes, surely such act could not be regarded as repugnant to the former. But such an act could not more clearly embrace this case than the language which is used, to wit: "any suit, motion, or other proceeding, pending in a County or Corporation court." Any motion, or other proceeding, depending in the County court, in the case stated, shall be removed to the Circuit court; and when removed, the fourth section provides, "shall be proceeded in, heard and determined by the court to which it is removed, as if it had been brought and the previous proceedings had in said court." The Circuit court is clothed with all the powers as to the case removed, which the statute vests in the County court, to enable it rightly to decide the case. Consequently, when the motion is removed to the Circuit court, it has full jurisdiction of the subject, and may hear and determine objections to the report of the commissioners, and for

441 "good cause shown, may set it aside and appoint other commissioners; just as the County court could do. The jurisdiction of the County court is transferred to the Circuit court over the cause removed, and with it all incidental powers necessary and proper to the complete and full exercise of jurisdiction. And the statute makes it imperative upon the County court to remove the cause, in the case stated, on the motion of any party to the proceeding; consequently, it is equally obligatory on the Circuit court to take jurisdiction, to proceed in, hear and determine it, as if it had been brought and the previous proceedings had in said court.

We are of opinion, therefore, that the Circuit court of Washington, the cause hav-

ing been removed to it from the County court, had jurisdiction of it, and was required by the statute to proceed in, hear and determine it, just as the County court should if the cause had not been removed. Consequently, the judgment of the Circuit court, that it had no jurisdiction of the cause, and remanding it to the County court, was erroneous.

We are also of opinion that it was competent for the defendant to rely upon the record of the proceedings of the County court, had upon its motion to ascertain the compensation to which David Campbell was entitled, &c., in its defence to the motion of said Campbell's executor. But without deciding (which we are not authorized to do, as the cause is not before us,) whether that proceeding in the County court was final, or was still depending, and could be removed to the Circuit court by motion, we are of opinion that it was not competent for the Circuit court to decide any questions involved in that proceeding, as it was not before it by way of appeal or removal, and not then subject to its jurisdiction; and that, consequently, the judgment of said Circuit court is erroneous, so far as it sets aside the report of the commissioners in that proceeding, and directs other commissioners to be appointed.

442 *The court is further of opinion that the motion of the executor of David Campbell, in the County court, to have commissioners appointed, was unwarranted by law. If it could be regarded as a motion made in the proceeding instituted in that court, for the same purpose, by the railroad company (and we think it cannot be so regarded), it ought not to have been entertained until the report of the former commissioners had been set aside for good cause shown. We do not mean to intimate an opinion that that could have been done, or that it could not have been done, for the reason before assigned. But we are of opinion that the motion of Campbell's executor is an independent motion, not connected with the proceeding instituted by the railroad company; and that the statute does not give to the land owner the right, by motion, to ascertain his compensation for his lands through which the railroad passes, and have been taken by the railroad company, or to recover damages from the said company.

The court is, therefore, of opinion, for the foregoing reasons, that the judgment of the Circuit court be reversed.

It is, therefore, considered by the court that the said judgment of the said Circuit court be reversed and annulled; and that the plaintiffs in error recover against the defendant in error their costs by them expended in the prosecution of their writ of supersedeas here: and this court proceeding to render such judgment as the said Circuit court ought to have rendered, it is considered that the motion of David Campbell's executor be dismissed with costs.

Judgment reversed.

June Term, 1872, Wytheville.

1. **Special Term of Court—What Suits Heard.**—In a suit in equity, brought in February 1869, against an absent and home defendant, the bill is taken for confessed at the May rules, and at the July term of the court the home defendant answers. At a special term of the court, held in December 1869, a decree is made in the cause, the decree reciting that publication had been made as to the absent defendant. As the regular term of the court was on the Wednesday after the third Monday in October, the cause might have been heard then, and therefore might be heard at the special term. Code, ch. 158, § 33.

2. **Sale of Real Estate by Joint Tenants to Co-Tenant—Lien Reserved—Interpretation.**—W, Z and Y are partners and joint tenants of real estate. W and Z sell their two-thirds interest in the real estate to Y. W receiving \$400 in cash for his interest, and Y executing to Z three notes, payable at different dates, amounting to \$700, for his interest. The deed from W and Z to Y, which conveys the two undivided thirds of the property, reserves a lien as follows: "And the said Z hereby retains a lien on the property hereby conveyed as security for the payment of the above recited notes received in payment of his interest; the said W has been paid up in full for his interest." The lien is reserved on the two-thirds of the real estate conveyed in the deed.

On the 16th of February 1869, John H. Hoge sued out of the office of the clerk of the Circuit court of Bland county a subpoena in chancery against James E. Young and Russell Patton, returnable to the first Monday of the next March, and on the 5th day of April he filed his bill in the cause.

The bill charges that on the 9th of October 1865, George H. Williams and wife and Wm. Zimmerman and wife conveyed to James E. Young their interest, being two-thirds, in a certain tan-yard property, which had been purchased by Williams,

444 Zimmerman and *Young from James Boyd, for the sum of \$450 cash paid by Young, and the further sums of \$100 payable on the 1st of January 1866, with interest, of \$200 payable on the 1st of January 1867, with interest, and \$400 payable the 1st of January 1868, for which different payments Young executed his three several bonds to Wm. Zimmerman, according to an obligation between the said Williams and Zimmerman, the whole price for the two-thirds of the property being \$1,150, all which would more fully appear by a deed which he exhibits. That Zimmerman assigned the two last bonds, the one for \$400 to the plaintiff, and the one for \$200 to G. A.

The principal case is cited in *Coles v. Withers*, 38 Gratt. 195 (and 191) as authority for the proposition that reservation of a lien in the deed to the vendee is as much notice to purchasers from him as if the lien were by deed of trust or mortgage.

*Interpretation.—In *Patterson v. Grottoes Co.*, 33 Va. 532 *et seq.*, 25 S. E. Rep. 602, the court quotes at length from the principal case and applies the principles therein stated to the case at bar.

Catron, who assigned it to the plaintiff for value. That Young is a non-resident of the State, and has no other property here out of which these bonds can be satisfied, except from the property conveyed as aforesaid, on which the vendor's lien was retained for the payment of the purchase money.

The bill further states that Russell Patton is in possession of the property, and claims title to it. And making Young and Patton parties defendants, he prays that the property, or two-thirds of it, may be sold to satisfy his debt, and for general relief.

The printed record does not contain any process, except the subpoena, and the return upon that is not given; nor is there any proof of publication as to Young, the absent defendant; but at the May rules the bill was taken for confessed.

At a special term of the court, held on the 26th of July 1869, Patton appeared and filed his demurrer and answer to the bill. The demurrer is for want of equity; and the answer insists that if the plaintiff is entitled to any lien on the property, the lien only extends to one-third of it, because Zimmerman alone retained a lien, and only retained it upon his interest, which was one-third.

The cause came on to be heard on the 17th of December *1869, at a special term of the court, as the decree states, upon the bill taken for confessed as to Young, (it appearing that he is a non-resident of this Commonwealth, and has had due notice thereof by publication according to law), the answer of Patton and the exhibits filed, when the court held that the lien reserved by Zimmerman was upon all the property conveyed by the deed to Young; and decreed that unless the defendants, within sixty days from the date of the decree, paid to the plaintiff the amount of his claim, as shown by the exhibits filed, with interest and the costs of the suit, that J. M. French, who was appointed a commissioner for the purpose, should sell the undivided two-thirds of said property, or so much as might be necessary, in the mode and on the terms stated in the decree, and make report to the court. From this decree Patton obtained an appeal to this court. The deed referred to is stated in the opinion of Moncure, P.

Williams, for the appellant.

Kent, for the appellee.

MONCURE, P. delivered the opinion of the court.

There are three assignments of error in this case, which I will notice in their order; and

First, "that it was error to render any decree in the case at a special term of the court without the consent of parties."

The Code, ch. 158, § 33, among other things, provides that "at any special term, any civil cause may be tried which could lawfully have been, but was not, tried at the last preceding term that was, or should have been, held; and any motion cognizable by such court may be heard and determined,

whether it was pending at the preceding term or not," &c. "And any cause or matter of controversy in chancery then ready for hearing may be heard and determined,

with the consent of the parties
446 *to such cause or controversy, although it could not lawfully have been heard at the next preceding term that was, or should have been, held."

The decree complained of in this case was rendered at a special term of the Circuit court of Bland county, on the 17th day of December 1869. The cause was not then heard "with the consent of the parties" thereto. But it "could lawfully have been, but was not, tried at the last preceding term that was, or should have been, held." By an act passed February 23, 1867, Acts of Assembly 1866-7, p. 668, chap. 234, § 2, it was declared that the Circuit court of Bland county should be held on the Wednesday after the third Monday in May and October. This act, it seems, so far as it fixed the time for holding the said court, continued in force until and after the said decree of the 17th day of December 1869, was rendered. Therefore, a regular term of the said court was, or should have been, held on the Wednesday after the third Monday in October 1869, which was the last term that was, or should have been, held preceding the said special term at which the said decree was rendered. It appears that this cause could lawfully have been, but was not, tried at the said term of the said court that was, or should have been, held on the third Wednesday after the third Monday in October 1869, as aforesaid. The subpoena was issued on the 16th day of February 1869, returnable on the first Monday in March next thereafter. The bill was filed at April rules next thereafter. There were but two defendants in the case, James E. Young and Russell Patton, the former of whom was a non-resident of the State. It appears that the process was duly executed on the home defendant, and that the non-resident defendant was duly proceeded against by publication. The home defendant appeared at a special term of the said court on the 26th day of July 1869, and filed his answer, to which the plaintiff replied generally, and the cause was then continued.
447 *There is no copy of the order of publication in the record, which is very meagre. But the said decree of the 17th of December 1869, recites that there had been due proceedings against the non-resident defendant by publication according to law. The presumption is, that the proceedings in the case were regular, and that the publication was completed in full time for the case to have been tried at the last preceding term that was, or should have been, held as aforesaid. Consequently, it was not error to render a decree in the case at the said special term of the court on the 17th of December 1869.

The next assignment of error is more substantial, and is the one mainly relied on in the case, viz:

Second, "It was error to render a decree

for the sale of two-thirds of said tan-yard property, instead of the one-third conveyed by Zimmerman, upon which the lien was reserved by the deed."

Whether this was error or not, depends upon the true construction of the deed of the 9th day of October 1865, exhibited with the bill, whereby George H. Williams and wife and William Zimmerman and wife conveyed their interest in the said tan-yard property to the said James E. Young.

It is now, as it always has been, perfectly competent for a vendor expressly to reserve on the face of the conveyance a lien on the property conveyed, or any part thereof, for the purchase money remaining unpaid, or any part thereof. Formerly he had an implied lien on the property for the purchase money remaining unpaid, though he conveyed the property to the purchaser without reserving a lien thereon in the conveyance, and without taking a mortgage or deed of trust on the property, unless the implication was repelled by circumstances showing an intention on the part of the vendor not to retain such a lien. The taking of a mortgage or deed of trust, or other security, for the purchase money was held sufficient to repel the implication.

448 This implied *lien was called the "vendors' equity" or the "vendors' lien," and was good, not only against the vendee himself, but also against purchasers from him with notice, and volunteers claiming under him. There were many inconveniences and uncertainties attending this implied lien, which induced the legislature to abolish it, in the Code of 1849; it being declared in the first section of chapter 119 of that Code, that "if any person hereafter convey any real estate, and the purchase money, or any part thereof, remain unpaid at the time of the conveyance, he shall not thereby have a lien for such unpaid purchase money, unless such lien is expressly reserved on the face of the conveyance."

This provision, it is thus seen, leaves unaffected a lien "expressly reserved on the face of the conveyance," which lien continues to have the same force and effect it always had. The reason of this is obvious. None of the evils growing out of the vendor's implied lien resulted from a lien expressly reserved on the face of the conveyance. Being set forth in the very first link of the vendee's chain of title, purchasers from him had just as much notice of it as they would have had of a lien upon the land by deed of trust or mortgage.

The question then is, What is the true construction of the deed? Did the grantors thereby retain a lien on the whole of the property conveyed, or only one-half of it, as a security for the payment of the purchase money remaining unpaid? They had, undoubtedly, a perfect right to retain a lien on the whole or the half of said property, according to their pleasure, even though that part of the purchase money remaining unpaid may have been due and payable only to one of the vendors. Then which of these two things did they intend to do? The deed

itself must answer that question, and we think it does plainly answer it. There cannot be a doubt about it, if we look only to the words by which the lien is retained, and that certainly is the most material
 449 part of the deed to be looked to in making the present enquiry. Those words are: "And the said William Zimmerman and Sallie E. his wife, do hereby retain a lien on the property hereby conveyed, as security for the payment of the above receipted notes received in payment of their interest; the said George H. Williams has been paid up in full for his interest." The lien is thus retained on the property conveyed by the deed—that is, the whole property, and not half the property thereby conveyed, or the interest which belonged to Zimmerman in that property. If that had been the intention, it would, as it easily could, have been plainly so expressed. The intention to retain a lien on the whole property being thus plainly expressed, if a different intention can be shown by the context, it ought to be very plainly shown to counteract the natural import of the words by which the lien is retained. Now let us look at the context and see how they affect the meaning of those words.

The deed is between George H. Williams and Martha E. his wife, and William Zimmerman and Sallie E. his wife, of the first part, and James E. Young of the other part; and the grantors, "for and in consideration of \$450 paid to the said George H. Williams, the receipt whereof is hereby acknowledged, and also in consideration of three several notes this day executed by the said James E. Young to the said William Zimmerman, as follows: one note for \$100, payable on the 1st day of January 1866, one other note for \$200, payable on the 1st day of January 1867, both of said notes bearing interest from date, and also a third note for four hundred dollars, payable on the 1st day of January 1868, without interest, the receipt of which several three notes to Zimmerman is hereby acknowledged; and the further sum of one dollar cash in hand paid by said Young to said Williams and Zimmerman," &c., "grant, bargain, sell and convey unto James E. Young their interest in a certain tract or parcel of land upon which
 450 there is a tan-yard *improvement, lying and being in Bland county, Va., containing about five acres, being the same land bought from James Boyd and wife by James E. Young, William Zimmerman and Henry Williams, and the interest hereby conveyed is one-third of the said property owned by the said Williams, and one-third owned by the said Zimmerman, both of which also hereby convey all their interest in the stock in said yard, teams, tools, fixtures and property belonging to said tan-yard, also all debts owing to the partnership conveyed in said tan-yard due to said Young, Zimmerman and Williams, he, the said Young, paying all debts due from and owing by said partnership." The grantors then "warrant and defend the title to the said property hereby conveyed against the

claims of themselves and their heirs, or any person claiming by, through or under them."

We have thus recited substantially, and almost literally, the entire deed, and we see nothing in it which is inconsistent with the construction we have put upon the words by which the lien is retained. On the contrary, we think that construction is supported by the other parts of the deed. The three parties, the two grantors and the grantee, held the property not only as co-partners, but as joint-tenants also. "With respect to unity of possession, joint-tenants are said to be seized, per mi et per tout—that is, each of them has the entire possession as well of every part as of the whole. They have not, one of them a seizin of one-half, and the other of the remaining half; neither can one be exclusively seized of one acre and his companion of another; but each has an undivided moiety of the whole, not the whole of an undivided moiety. From which it follows that the possession and seizin of one joint-tenant is the possession and seizin of the other." Thus is the law laid down in 1 Lom. Dig. p. 612, § 8, marg. p. 476. "A tenancy in common differs from a joint tenancy in this respect:

joint-tenants have one estate in the whole and no estate *in any particular part; they have the power of alienation over their respective aliquot parts; and by exercising that power may give a separate and distinct right to their particular parts. Tenants in common have several and distinct estates in their respective parts. Hence the difference in the several modes of assurance by them. Each tenant in common has, in contemplation of law, a distinct tenement, a distinct freehold." Id. p. 641, § 1, marg. 498. A release, and not a feofment, is the proper form of conveyance by one joint-tenant to another. "A feofment, and not a release, is the proper assurance between tenants in common." Id. Though the common law right of survivorship in estates of joint tenancy has been abolished in Virginia by statute, yet many of the common law incidents of the estate still remain, and especially the entirety of possession of each tenant, as well of every part as of the whole. When, therefore, two of these three joint-tenants conveyed, or rather released, their interest in the joint subject to the other, they released an interest which pervaded the whole subject, and the lien which was expressly retained on the property conveyed by the deed naturally and properly, as well as literally, bound the whole property conveyed, embracing the interest of both of the grantors. Suppose the three joint-tenants had joined in a conveyance of the whole property to a stranger, for a consideration payable to them all, and had expressly retained in the deed a lien on the property thereby conveyed for the security of the purchase money. Would not that lien have bound the whole property, and every part of it, for the payment of the whole consideration and every part of it? Certainly it

would. Suppose one of the three grantors had received in cash his third of the purchase money; would not the same lien have existed in regard to the remaining two-thirds due to the other two grantors? Certainly it would. What difference can it make that two of the joint-tenants release their interest to the *third, and retain a lien on the property released for the payment of that part of the purchase money not paid in hand, though it be due and payable to one only of the releasors? What reason can there be for confining the lien to one-third only of the property, instead of extending it to the two-thirds conveyed? In this case, the whole consideration of the deed was \$1,150, of which only \$450 was paid to Williams, while the remainder, \$700, was secured to Zimmerman. Why was this unequal division made of the purchase money, if they were equally interested in the subject conveyed? In law they were jointly and equally entitled; but in equity they may and must have been unequally entitled. The three had been partners, and we do not know what was the state of their accounts when the deed was made. It was such, however, between Williams and Zimmerman as that the latter was entitled to nearly two-thirds of the purchase money of their interests in the property. And if so, then in equity Zimmerman was entitled to nearly two-thirds of the property conveyed. We see in this a special reason for retaining a lien on the whole property conveyed for the payment of the purchase money due to Zimmerman. Then again, the subject conveyed embraced other property besides the tan-yard, and the purchaser, Young, was to pay off the debts of the concern. Those debts, for aught we know, may consume the whole assets of the concern, besides the tan-yard, and thus leave a subject for the operation of the lien in favor of Zimmerman not more than sufficient to discharge it. We see in this also a special reason for extending the said lien to the whole property conveyed.

Whether, therefore, we look only to the words of the clause retaining the lien, or look also to the context of the deed, we think the lien is upon two-thirds of the tan-yard property; and therefore, there was no error in rendering a decree for the sale of two-thirds instead of one-third.

453 *The remaining assignment of error is—

"Third. It was error in enforcing any lien in favor of Williams, as he had made a full conveyance and failed expressly to reserve a lien."

The question presented by this assignment of error has already been sufficiently answered. No lien in favor of Williams was enforced by the decree. The only lien thereby enforced was in favor of Zimmerman.

We think there is no error in the decree, and that it ought to be affirmed. But as there may be some uncertainty in regard to the property belonging to the tan-yard and now subject to the said lien, which might

tend to produce a sacrifice at the sale made under the said decree, it is proper, if either party require it, that before such sale is made, an account should be taken of the said property, and of the kind, nature and quantity thereof; and also, if either party so require, it is proper that before such sale is made, an account should be taken of the amount remaining due and unpaid of the debts secured by the said deed of the 9th day of October 1865. The said affirmance ought, therefore, to be with instructions to the court below to conform to the foregoing opinion in regard to the taking of the said accounts, if required as aforesaid, before sale is made under the said decree.

BOULDIN, J. dissented.

Decree affirmed.

454

*French v. Noel.

June Term, 1872, Wytheville.

Absent, STAPLES, J.*

1. Certificate for License to Retail Ardent Spirits—Discretion of County Courts.†—A county court has a discretion to grant or refuse a certificate for obtaining a license to retail ardent spirits, to a person who has obtained a license to keep an eating house; and the action of the county court is final and conclusive on the question.
2. Same—Circuit Court No Jurisdiction.—In such case if the judge of the Circuit court allows an appeal from the order of the County court granting the certificate, and reverses and annuls the order, with costs, the said action of the judge and the court, is *coram non judice*, and of no effect.
3. Same—Same—Writ of Prohibition—Court of Appeals.‡—After the judgment of the Circuit court has been rendered, as well as before, the person injured by the judgment may apply to the Court of Appeals for a writ of prohibition, to restrain the appellant and the judge from proceeding to enforce said judgment.

This is a case of prohibition. In October 1870, William L. French applied to the

*He had been counsel in the case.

†Discretion of County Courts.—See *Allstock v. Page*, 77 Va. 390, 391; *Ex parte Lester*, 77 Va. 671. In *Welch v. County Court*, 20 W. Va. 63, 1 S. E. Rep. 342, the court, citing the principal case and others, said: "But when the subject, upon which the inferior court has acted, is one within its absolute or pure discretion, its action cannot be reviewed."

‡Writ of Prohibition—Court of Appeals.—In *Hogan v. Guilgon*, 20 Gratt. 718, a note is appended by the judge citing the list of cases of prohibition. See also, *foot-note* to *Hogan v. Guilgon*, 20 Gratt. 718, as to when writ of prohibition lies. In *Ensign Manuf'g Co. v. McGinnis*, 20 W. Va. 532, 4 S. E. Rep. 790, the court said: "In *French v. Noel*, 22 Gratt. 454, it was held by the court of appeals of Virginia that after the judgment of the circuit court has been rendered, as well as before, the person injured by the judgment may apply to the court of appeals for a writ of prohibition to restrain the appellant and the judge from proceeding to enforce the judgment. And this court, in *Hein v. Smith*, 13 W. Va. 358, announced the same doctrine." The court then proceeded to apply this doctrine to the facts of the case at bar.

County court of Montgomery for a certificate for obtaining a license to retail ardent spirits at an eating house, then kept by him, in Christiansburg, in said county. The application was resisted in said court by Jesse A. Noel, whose only interest in the matter was, that he was then the keeper of a hotel in said town. The County court granted a certificate accordingly. The said Noel then applied to A. Mahood, judge of the Circuit court of said county, for a writ of supersedeas to the said order of the County court; which writ was awarded on the 8th day of October 1870: and at the May term, 1871, of the said Circuit court a judgment was rendered, that the said order

455 of the County *court be reversed and annulled, and that the said French pay to the said Noel his costs expended in prosecuting said writ. And an execution having been issued upon said judgment, and being in the hands of the sheriff of said county, the said French on the 1st day of July 1871, presented his petition to this court, then in session at Wytheville, praying for a writ of prohibition to be issued to the said judge and the said Noel, to restrain and prevent the said proceedings by and before the said judge and the said Circuit court, as unlawful usurpations of power and jurisdiction. Accordingly, on the same day, a rule was entered, that the said judge and said Noel should be summoned to appear before this court on the 8th day of the same month, and show cause why a writ of prohibition should not be issued according to the prayer of the petition. The rule was duly served on both defendants, and on the return day the defendant Noel appeared in court and filed his answer, in which he insisted that the said County court had erred in granting the certificate aforesaid; and that the Circuit court had jurisdiction to correct the error and reverse the order of the County court. He further insisted, that if no such jurisdiction existed, this application for a writ of prohibition came too late; being after the proceedings sought to be prohibited had been consummated, and when nothing remained to be prohibited. He also said, that after the service of the rule upon him, he had released the costs recovered by him against said French in the Circuit court; and he filed the release with his petition. The case was then continued until the next term of the court at Wytheville. At the next term of the court, to wit: on the — day of July 1872, the case was argued by counsel, Mr. Phlegar appearing for the plaintiff, and Mr. Wade for the defendant.

MONCURE, P. delivered the opinion of the court:

The court is of opinion that under 456 the act of the General *Assembly, approved June 29, 1870, Session 1869-'70, chap. 174, sections 3 and 27, pp. 229 and 239, the County court of Montgomery county, on the 3d day of October 1870, on the motion of the plaintiff William L. French, had a discretion to grant or refuse to him a certificate for obtaining a license

to retail ardent spirits at his eating house, in Christiansburg, in the said county, in addition to his license to keep an eating house; and the said court having accordingly, on that day, on his motion, granted him such a certificate, the judgment of the said court in that respect was final and conclusive.

The court is further of opinion that the order of the defendant, A. Mahood, judge of the Circuit court for said county, dated the 8th day of October 1870, awarding, on the petition of the defendant, Jesse A. Noel, a supersedeas to the said judgment of the said county court, and all the proceedings which were afterwards had upon the said supersedeas, and especially the judgment rendered upon the same by a Circuit court held for said county on the 9th day of May 1871, pronouncing the said judgment of the said County court to be erroneous, and considering that the same be reversed and annulled, and that the said Noel recover against the said French his costs by him expended in prosecuting the said supersedeas; and especially also the execution issued upon the said judgment of the said Circuit court, were all coram non jndice, and null and void; the said judge having no authority to award the said supersedeas, and the said Circuit court having no authority to entertain jurisdiction of the same.

The court is further of opinion, that prohibition is the proper remedy for the plaintiff in such a case as this, to prevent and arrest the said unauthorized proceedings, and to have them declared null and void; and that the said remedy still continues to exist, notwithstanding the said judgment of the said Circuit court was rendered before the rule was awarded in this case, and 457 notwithstanding *it appears that since the said rule was executed, and pending the proceedings thereon in this court, the said Noel has released the said French from the costs recovered against him by the said judgment of the said Circuit court.

Therefore it is adjudged and ordered that the motion to discharge the said rule be overruled, and that a writ of prohibition be awarded, according to the prayer of the said petition, directed to the said defendants, commanding them to proceed no further upon the said supersedeas awarded by the said A. Mahood, judge as aforesaid, nor upon the said judgment of the said Circuit court; and superseding the said supersedeas, and all proceedings which have been had under the same, and especially the said judgment of the said Circuit court; so that the said judgment of the said County court will continue and remain in full force and effect, as if no such supersedeas had ever been awarded, and as if no such judgment of the Circuit court had ever been rendered, as aforesaid. And it is further adjudged and ordered, that the service of an office copy of this order upon the said defendants shall have the same force and effect as the execution upon them of a writ of prohibition issued in pursuance hereof. And it is fur-

ther adjudged and ordered, that the plaintiff, William L. French, recover against the defendant, Jesse A. Noel, his costs by him expended in the prosecution of this proceeding. Which is ordered to be certified to the said Circuit court of Montgomery county.

Prohibition awarded.

458

***Cowan v. Doddridge.**

June Term, 1872, Wytheville.

Absent, STAPLES, J.*

1. **District Court of Appeals—Transfer of Case to Circuit Court—Constitutional.**—When, in pursuance of the act of 1869-'70, ch. 171, § 5, p. 227, this court sent a cause which had been pending in a District court of Appeals, to a Circuit court, that was a decision of this court, that the act was constitutional, and that the Circuit court had jurisdiction to rehear and decide the same.
2. **Same—Same—Mandamus.**—If in such a case the judge of the Circuit court refuses to rehear and decide the same, and directs it to be struck from the docket, no appeal can be taken from his judgment. The remedy is by application to this court for a *mandamus* to the circuit judge, to compel him to rehear and decide the case.
3. **Same—Same—Same—Equivalent to Service of the Writ.**—In such case this court will make an order for a writ of *mandamus nisi* to the judge, and direct that the service of a copy of the order shall be equivalent to the service of the writ.

At the August term, 1869, of the County court of Pulaski, C. E. Doddridge recovered a judgment in an action of covenant against John T. Cowan for four hundred and ninety dollars, with interest from the date of the judgment. Cowan thereupon applied to the judge of the Circuit court of Pulaski for a supersedeas; which was awarded; but when the case came on to be heard the judgment was affirmed. Cowan then carried the case by supersedeas to the District court of Appeals; and it was pending in that court when the present constitution was adopted, and the District courts of Appeal were abolished. In pursuance of the act of June 23, 1870, in relation to the Court of Appeals, Sess. Acts of 1869-'70, ch. 182, § 29, clause 2, p. 227, the case was sent to the Supreme court of Appeals at Richmond; and that court holding that it did not have

jurisdiction of the case, in *pursuance of the same act, § 29, clause 5, directed it to be sent to the Circuit court of Pulaski; and it was received by the clerk of that court, and put upon the docket.

In the Circuit court of Pulaski the appellee objected to the jurisdiction of the court to hear and decide the case as upon appeal, on the ground that the act of Assembly

*He had been counsel.

†**District Court of Appeals—Transfer of Case to Circuit Court—Constitutional.**—In *Cowan v. Fulton*, 22 Gratt. 581; *Kent v. Dickinson*, 25 Gratt. 820; and *Richardson v. Farrar*, 88 Va. 767, 15 S. E. Rep. 117, the court quotes at length from the principal case, as authority for the constitutionality of this statute.

which authorized it was unconstitutional; and the case coming on to be heard on the 20th of September 1861, the judge—Fulton—being of this opinion, it was ordered that the cause be dismissed and stricken from the docket. Cowan thereupon applied to a judge of this court for a supersedeas from this order; which was awarded. And then Doddridge moved the court to dismiss the appeal as improvidently awarded.

Gilmore, for the motion.

Ronald, against it.

MONCURE, P. delivered the judgment of the court.

This day came the parties by their counsel, and the court, having maturely considered the motion of the defendant in error to dismiss the writ of error and supersedeas awarded in this case to a judgment rendered by the Circuit court of Pulaski county in this cause, on the 20th day of September 1871, upon the ground that the said writ was improvidently awarded, is of opinion—without now deciding whether in any case an appeal will lie from the judgment of a Circuit court sitting as an appellate court under section 5 of chapter 171 of the Acts of Assembly, 1869-'70, page 227—that, whether the said Circuit court intended by the said judgment to decide the question of the constitutionality of the said section of the said act or not, an appeal does not lie from the said judgment; because, if the said court did not intend so to decide, then the matter in controversy, exclusive of costs, was less in value or amount than \$500 on the 23d day of September 1869, when the judgment was rendered by the said Circuit court affirming the judgment of the

County court of said county in this cause; and if the said Circuit court did intend so to decide, and therefore declared that it had "not jurisdiction to review, reverse or affirm" the said judgment of the 23d day of September 1869, then the said Circuit court intended to decide a question which had already been decided by this court, in pursuance of the said section of the said act—this court having, on the 6th day of March 1871, ordered the said cause to "be transferred and docketed in the said Circuit court of Pulaski county, whence the appeal was originally taken, there to be heard and finally disposed of, as by an appellate court, according to law." Therefore it is considered and ordered that the said motion be sustained, and the said writ of error and supersedeas be dismissed, as having been improvidently awarded, and that the plaintiff pay to the defendant in error his costs by him about his said motion expended.

And on the motion of the plaintiff in error, it is ordered that a writ of *mandamus nisi* be issued, commanding the Hon. John H. Fulton, judge of the said Circuit court of Pulaski county, to proceed to hear and finally dispose of, as by an appellate court, in pursuance of section 5 of chapter 171 of the Acts of 1869-'70 aforesaid, and in pur-

suance of the said order of this court of the 6th day of March 1871, the said cause which was thereby ordered to be transferred and docketed in the said Circuit court as aforesaid; unless he shall, on or before the 10th day of the next term of this court, appear here and show good cause to the contrary. And it is further ordered, that a copy of this order be duly served upon him, and returned to this court, or the clerk thereof, on or before that day, with evidence of such service thereon endorsed; and that such service shall have the same force and effect as the execution upon him of a writ of mandamus nisi, issued in pursuance hereof.

Appeal dismissed, and rule for mandamus awarded.

461

*James & als. v. Johnston.

June Term, 1872, Wytheville.

1. **Setoff.**—In suit upon a bond given by M and others to the person who was administrator of the estate of their intestate, for the amount due him upon a settlement, they cannot setoff moneys subsequently received by him as administrator, the claims not being in the same character.
2. **Same.**—Though the administrator has made a statement of assets received and payments made by him since the bond was given, and finding a balance of the estate in his hands, endorses it as a credit on the bond, yet as the obligors do not acquiesce in that statement, they are not to be allowed the credit endorsed, but the balance due by the administrator must be ascertained by a correct settlement of his administration account.
3. **Confederate States Notes—Scaling.**—The bond bears date on the 14th of May 1863, and is payable on demand, and the balance found due to the administrator at that date is almost wholly made up of his commissions on receipts and disbursements prior to the 15th of November 1863. The bond having been given with reference to Confederate States treasury notes as a standard of value, is to be scaled as of its date.

This was an action of debt in the Circuit court of Roanoke county, brought in November 1869, by Frederick Johnston against Mary A. James and others, the widow and children of Fleming James, deceased, to recover the amount of a bond for three thousand five hundred and twenty-five dollars and twenty-two cents, bearing date the 14th of May 1863. The defendants appeared and filed the plea of payment, on which issue was joined; and they filed an account of setoff.

When the case was called the parties dispensed with a jury, and submitted the whole case to the judgment of the court.

The plaintiff had been the administrator of Fleming *James, who died in April or May 1862. He had sold the personal and, under a decree of the court, a part of the real estate, and had collected the outstanding debts, all being received in Confederate money, and he had paid off many of the debts, which were generally ante-war debts, prior to May 14th, 1863, and at that time he was in advance to the estate

in the sum of \$3,525.22; and for this sum the bond was given.

On the bond two credits were endorsed, one dated March 15th, 1864, for \$1,666.66, which the proofs showed was correct, and another dated February 10th, 1869, credit this bond by \$121.06, balance of \$630, is received for twenty-one shares stock in Battersea Manufacturing Company, Petersburg, after paying F. J. a balance of \$508.94 due on last settlement of his administration account.

The account of setoffs filed by the defendants was for \$2,000 paid March 14th, 1864, for \$630, the proceeds of the stock referred to in the second endorsement, and \$100 received by plaintiff for ten other shares of the stock in the same company on the 1st of September 1869.

After the plaintiff had introduced the bond, the defendants, to prove their setoff, introduced a statement made out by the plaintiff, showing the receipts and payments, including his commissions, made by him. This statement shows the amount due to him on the 14th of May 1863, and it shows a further balance due to him on the 15th of August 1869, of \$383.32. On the 10th of February 1869, he charges himself with cash received from sale of twenty-one shares of stock of Battersea Company \$630, and bringing in the balance due to him of \$383.32 August 15th, 1864, with its interest, and crediting himself with some payments made by him, he balances the account by \$121, credited on the bond of Mrs. James and others.

At the foot of this account he says:
463 This statement *will close the administration account of F. Johnston as administrator of Fleming James. There is no other personal estate to come to administrator's hands, except ten shares of Ettrick Manufacturing Company's stock, which is valued at ten dollars per share, making \$100, and no debts known to the administrator, except that due to himself. The real estate belonging to the heirs of Fleming James, worth from thirty to thirty-five thousand dollars, has been turned over to them by the administrator from the beginning of his administration, and they have had the use and benefit of it all the time.

The defendants also introduced the receipt of the plaintiff, dated March 14th, 1864, for \$2,000 in Confederate money, which he is to credit for the whole amount on their bond, if he can use the said money before the 1st of April next without loss. If he could not so use it, the bond was to be credited with \$1,666.66; that is, each party losing one-half of the legal discount on that day.

It appears by the statement above referred to, that the administration to the plaintiff commenced in August 1862, and by the 25th of September he had collected \$41,322.40, and in November he received the further sum of \$3,704. The whole amount received by him up to May 15th, 1863, was \$59,286.69. On this sum his commissions amounted to \$2,964, for which, with the amount he was

then in advance to the estate, he took the bond.

It appeared from the evidence that nothing was said at the time the bond was executed, or afterwards, as to the kind of money in which it was to be paid, and plaintiff admitted that Confederate money was the basis of the bond; and that the Ettrick stock had been sold for \$100.

The court held that the defendants were not entitled to be allowed against the plaintiff's demand, the items of \$630 and \$100 in their bill of setoffs filed, because they are not mutual and due in the same right; the
464 demand *of the plaintiff being against them in their individual capacity, and the setoffs being in the hands of the plaintiff, due the estate of his intestate; and further, that they were not entitled, for the same reason, to the credit of \$121 endorsed on the bond; but they were entitled to the credit of \$1,666.66.

And being of opinion, that the bond was entered into with reference to Confederate States treasury notes as a standard of value, which notes were due to the plaintiff in September and November 1862, and the bond was the evidence of such indebtedness, the court scaled the debt at the rate of three for one, that being the rate of scale in November, and rendered judgment for the plaintiff for \$678.19, with interest from the 14th of March 1864, till paid. To this opinion and judgment of the court, the defendants excepted, and obtained a supersedeas from this court.

Hansbrough, for the appellants.

J. W. Johnston, for the appellee.

BOULDIN, J. delivered the opinion of the court.

The court is of opinion, for the reason assigned by the judge of the Circuit court, that there is no error in so much of the judgment of that court as refused to allow to the appellants (the defendants in the court below) credit for the sums of \$630 and \$100, claimed by them as setoffs against the demand of the appellee; said sums being assets in the hands of said appellee as administrator, of F. James, deceased, to be administered by him according to law, and for which he is yet accountable to the appellants.

The court is also of opinion, that the Circuit court did not err in disallowing the credit of \$121.06 endorsed on the bond of the appellants, that being a sum claimed and endorsed by the appellee as the true balance of said sum of \$630, on an ex parte
465 statement made by himself, *but not

accepted or acquiesced in by appellants. The real balance due from said administrator, if any, should be ascertained by a correct settlement of his administration account, embracing all items from and after the 14th day of May 1863, when the bond in suit was executed. It was proper, therefore, to strike off the credit aforesaid to abide that settlement. Nor did the court err in holding that the bond was executed

with reference to Confederate States treasury notes as the standard of value.

But this court is of opinion that the judgment of said Circuit court is erroneous in ascertaining the value of said Confederate States treasury notes as of the month of November 1862, instead of the 14th day of May 1863; that being both the date and maturity of the bond. It is therefore considered by the court that the judgment of said Circuit court be reversed and annulled, and that the appellee do pay to the appellants their costs in this court expended.

And proceeding to render such judgment as should have been rendered by said Circuit court, it is further considered by this court that the appellants (defendants in the court below) do pay to the appellee (the plaintiff below) the sum of \$421.87, that being the true value of the debt in question in currency, with interest thereon from the 15th day of March 1864, till paid, and his costs in the Circuit court expended.

Which is ordered to be certified, &c.

Judgment reversed.

466

*Henderlite v. Thurman.

June Term, 1873, Wytheville.

[12 Am. Rep. 536.]

1. *Bond for Price of Slaves Valid—Enforceable after the War.*—A bond given in October 1863, for the price of slaves purchased at a judicial sale, is valid and binding; and may be enforced after the war, and after the adoption of the 13th amendment to the constitution.

2. *Same—Scaling.*—Though judgments have been recovered upon bonds given for purchases at a judicial sale, made in October 1863, without any question as to the scaling of them, yet the cause being still pending, the claim to have them scaled may be made and adjudicated in that cause.

Thomas Thurman, of Smyth county, died, leaving a will which was admitted to probate in the Circuit court of the county on the 6th of April 1863. By his will he gave his estate, which consisted of houses and lots in the town of Marion and slaves, to his three sons, William, Thomas and Edward, and the two children of his son John, living in Memphis, Tennessee, they to take one share.

On the 27th of April 1863, the three sons living in Virginia, two of whom were the executors of the will, filed their bill in the Circuit court of Smyth county against the two children of John Thurman, who were infants, alleging that partition could not be made of the property, and asking for a sale of it. A guardian ad litem was appointed for the infant defendants, who answered; and a decree was made on the 8th of September 1863, appointing James H. Gilmore a commissioner to sell the property, and directing him to ascertain the distributive shares of the plaintiffs and defendants. Gilmore

The principal case was approved and sustained in *Rives v. Farish*, 24 Gratt. 125.

made his report, showing that he sold the property in October 1863, and the amount of the sales, of which \$5,950 was the proceeds of the real property *and \$13,110 of the slaves; that all the property was purchased by the three plaintiffs; that the share of each, after deducting expenses of sale, would be \$4,409.95, subject to the costs in the cause; that the purchasers had executed their bonds, which had been so arranged that bonds to the amount of the share of the infant defendants might be transferred to them, and George W. Henderlite was the security.

On the 5th of April 1864, the cause came on again to be heard, when the court confirmed the report, directed that the bonds should be returned to the respective parties, except certain bonds named, which were to be taken as for the share of the infant defendants; and these Gilmore was directed to hold as receiver until the further order of the court. And a commissioner was appointed to convey the real estate to the purchasers: which he did.

On the 20th of August 1867, the court made an order directing J. H. Gilmore to proceed to obtain judgments upon the bonds which he had been directed to hold for the defendants: and this was done in March or August 1868.

At the August term 1868, Henderlite and Thomas Thurman, in his own right and as administrator of Edward Thurman, applied to the court to be permitted to file a bill to rehear, and review and set aside the decrees entered in the cause on the 8th of September 1863, and the 5th of April 1864. The ground on which they relied for reversing the decrees was, that by the emancipation proclamation of the president of the United States and acts of Congress the slaves, for the price of which the bonds were principally given, had been emancipated, and therefore, the bonds given for the price of them were null and void. That the Alexandria constitution, adopted in April 1864, abolished slavery, and on that ground also the bonds were illegal and void: that they were also illegal and void by virtue of the act of Congress *of July 17th, 1862, to punish treason and rebellion: and they insist that the sales were made for Confederate money, and the price of the real estate should be scaled, or the property again sold.

This application was continued until the 28th of August 1869, when the court overruled it and refused to allow the bill to be filed. And thereupon Henderlite applied to a judge of the District court of Appeals at Abingdon for an appeal: and the case was afterwards transferred to this court.

Baxter, for the appellant.

Gilmore, for the appellees.

STAPLES, J. delivered the opinion of the court.

This case has been twice ably and elaborately argued before this court. As the first argument was before three judges only, a

re-argument before a full court was requested. That argument was heard at the last term held in Wytheville—all the judges being present. It becomes my duty now to announce their unanimous decision, and the reasons upon which that decision is based.

The controlling question in the case is as to the effect of the proclamation issued by President Lincoln on the first day of January 1863, and known as the emancipation proclamation. On the one hand, it is maintained, that this proclamation from the time of its emanation, in connection with the various acts of Congress authorizing and confirming it, conferred a right to freedom upon all slaves within the States therein designated. On the other, it is insisted, that it was limited in its practical effect, to such slaves individually as came under its operation while it was in active exercise as a war measure. In order to discuss properly these questions, it becomes necessary to recur briefly to a few familiar principles. It has never been maintained by any respectable authority, that the Federal

government was authorized *under the constitution, in any manner to interfere with the institution of slavery in the several States. The right of property of the master in a slave was recognized not only in the constitution, but by every department of the government, from its foundation down to the commencement of the war between the States. If any proposition could be regarded as settled beyond all cavil and controversy, it was that this institution was entitled to the benefit of all the provisions and guarantees provided for the protection of any other property. See *Prigg v. Commonwealth of Pennsylvania*, 16 Peters, U. S. R. 539. But a very brief period before the commencement of hostilities the Congress of the United States, by a resolution unanimously adopted, declared that neither the Federal government, nor the people, nor the governments of the non-slaveholding States, have the right to legislate upon, or interfere with, slavery in any of the slaveholding States of the Union.

It cannot be necessary by argument to maintain that a power denied to all the departments of the Federal government combined, cannot be exercised by the executive alone. His powers are plainly defined in the constitution and the acts of Congress, and to these we must look to ascertain the measure of his authority. In neither can any warrant be found for the extraordinary powers assumed in the proclamation. If any act or resolution was ever passed by the Federal Congress, authorizing that proclamation or sanctioning it after it was issued, I have been unable to find it. The learned counsel for the appellant insisted there was some such legislation, but he did not produce it, nor tell us where it was to be found. I think it very clear that no such laws were ever enacted by Congress.

It was argued, however, that the President was empowered to issue the proclamation in virtue of his authority as commander-in-

chief of the army and navy of the United States. According to Mr. Hamilton, 470 the "authority of the president under this clause of the constitution, is nominally the same with that of the king of Great Britain, but in substance it is much inferior to it. It amounts to nothing more than the supreme command and direction of the military and naval forces as first general and admiral of the Confederacy. The doctrine now advanced, however, engrafts upon the executive department new, undefined, ideal powers not enumerated in the constitution, and contrary to the genius of republican government. It assumes that a state of war utterly abrogates every guarantee provided for the security of property, at the discretion of an irresponsible executive. When combinations are formed to resist the execution of the laws, too powerful to be suppressed by the ordinary course of judicial proceedings, the president is authorized to call forth the whole military and naval power of the country. In such case the war is still against individuals, and not against communities and States. Confiscation and forfeiture may follow trial and conviction of the citizen. But it cannot be denounced against entire communities and States—the innocent equally with the guilty—without trial and conviction.

The Supreme court of the United States, in a late case, in unmistakable terms repudiates the idea, that any department of the government, in war any more than in peace, can exercise powers not expressly granted by the constitution. In *ex parte Milligan*, 4 Wall. U. S. 121, the court uses this strong and patriotic language: "The constitution is a law for rulers and people in war and peace, and covers with the shield of its protection, all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the art of man, than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism. The theory of necessity, on which it is based, is false;

471 for the government within the "constitution has all the powers granted to it, which are necessary to preserve its existence."

The supporters of the president's proclamation, however, invoke another principle in its support, which has an important bearing in this case. They maintain, what is undoubtedly true, that the parties to a civil war stand precisely in the same predicament as two independent nations, who, acknowledging no superior, have recourse to arms; and that the late struggle between the two sections being of that character, it was competent for the Federal authorities to exercise belligerent powers, and to treat the people of the Southern States as public enemies engaged in a national war; and consequently, that all persons of every age, sex and condition, residing within the territory occupied by the Confederate forces, might be justly considered, and were, in

fact, considered as public enemies, and subject to all the laws of war: one of these is, that the Federal government had the right not only to coerce the Southern section by force, but to cripple its resources by the seizure and confiscation of every species of property which might have been made useful in the struggle. And in the case of slaves, they might be justly emancipated as a means of weakening the enemy and terminating the struggle.

In the first place, it is by no means certain that this principle of belligerent occupation applies to the emancipation of slaves. There is very high authority for a contrary doctrine. At the close of the Revolutionary war a claim of indemnity for slaves taken away by the British forces, was instituted by the United States in behalf of the owners, and was successfully maintained. And in the negotiations after the close of the war of 1812, Mr. Adams, then secretary of State, took the ground that emancipation of slaves was not a legitimate mode of warfare, and the British government ought to restore the property or to indemnify the sufferers by its loss. *American State Papers*, vol. 11, p. 245.

472 *Conceding, however, this right of emancipation, and giving to the proclamation all the effect of a war measure between independent nations, it is clear it could not operate in regions beyond the control of the Federal authorities. It is laid down by all the writers on international law, that the right of appropriating or confiscating the property of the enemy depends upon belligerent occupation. The proclamations and manifestoes of one power can never have any effect within the dominions or possessions of the other not embraced by the lines of conquest and occupation. The authority of the invader extends no further than his possession. His title rests upon force, and is measured by it. This is an universal principle acknowledged by all.

As a war measure then, the proclamation of President Lincoln could only have the effect of emancipating such slaves as came within the control of the Federal armies. The authorities upon this point are abundant. In his notes to Wheaton, Mr. Dana uses the following language: "It will be observed, that this order of emancipation was not a legislative act of the law-making power of the Union; but an act of the president, in his character as commander-in-chief, and a military measure. Although the language of the proclamation is general, and in the present tense, as if giving a legal status of freedom from its date to all slaves in the designated States; still from the nature of the case, it would seem that, being a military measure by a commander-in-chief, who had no general legislative authority over regions of country not in his possession, it could not operate further than as a military order. From that time all slaves coming under the control of the forces of the United States, in the manner recognized by the law of belligerent occupation, were to be free.

And in the case of *Cornett v. Williams*, in the Circuit court of the United States for the State of Texas, Judge Duval held substantially the same views. He said:

473 "I *have always regarded the proclamation of the president, issued on the 1st of January 1863, declaring the negroes free, as a war measure. The president did not base his right to issue that proclamation upon any clause of the constitution, or even any act of Congress. It was justified by the necessities of war; and as commander-in-chief of the army and navy of the United States, he resorted to it, as he himself declared, as a war measure. Its operation and effect depended wholly upon the success of the national arms. The negroes were set free not by the mere declaration of the president that they were so, but by force of arms. Hence I have always supposed that slaves who occupied certain sections of the country, say in Virginia and Tennessee, and who first fell under the armed control of the Union, were free sooner than those in Texas or the extreme south." These views are supported by numerous cases. *United States v. Rhodes*, 7th Circuit for the State of Kentucky; *Slabach v. Cushman*, 12 Florida R. 472; *Leslie v. Langhorn's ex'or*, 40 Ala. R. 524; *Harrell v. Watson*, 63 North Car. R. 454; *Dorris v. Grace*, 24 Ark. R. 326; *Hall v. Keese*, 31 Texas R. 504; *Pickett v. Wilkins*, 13 Rich. S. C. Eq. R. 366; *Haslett v. Harris*, 36 Georgia R. 632.

We have the most satisfactory evidence that Mr. Lincoln himself entertained the same opinion in regard to the effect of his proclamation. In a message to the Federal Congress, he said: "I repeat the declaration made a year ago, that while I remain in my present position, I shall not attempt to retract or modify the emancipation proclamation; nor shall I return to slavery any person who is free by the terms of the proclamation or any act of Congress." And in the Hampton Roads Conference, being asked by Mr. Stephens what effect that proclamation would have upon the institution of slavery in the States therein designated, he said that was a judicial question. His own

474 *proclamation was a war measure, it would be held to apply only to such slaves as had come under its operation while it was in active exercise.

Upon the whole, I think we may safely conclude, both upon reason and authority, that as the negroes sold under the decree in this case were, at the time of said sale, occupying a territory exclusively under the control and within the lines of the Confederate government, the rights of the owners were in no manner impaired or affected by the proclamation. They were slaves, to every intent and purpose, at the time of their purchase by the appellant's intestate—so treated and recognized by the laws and authorities of the country. They were the property of appellant's intestate at the time of their emancipation, and the loss resulting therefrom must fall on him. This

principle was distinctly affirmed in *Mittelholzer v. Fullarton*, 6 Adol. & Ellis N. S. 989, 51 Eng. C. L. R. That was an action for the recovery of the price stipulated to be paid for fifty-three apprenticed laborers. The defence was that the laborers had been set free by act of the Colonial government in British Guiana, where the apprentices were. The court held the plaintiff entitled to recover, though the apprenticeship was determined by the Legislature before the purchase money became due. And this upon the ground that the property having passed, and being destroyed by a vis major, the loss must fall upon the proprietor when it occurred.

Another ground taken by appellants is, that contracts for the sale of slaves made since 1st of January 1863, are void upon reasons of public policy. I do not understand it is claimed that such contracts are founded in moral turpitude, but that they are opposed to the national policy and institutions, and for that reason should not be enforced. It is a general rule that the validity of a contract is to be determined by the law of the place where it is made.

If valid there, it is by the law of

475 *nations held valid everywhere. The exceptions to this rule are found in those cases in which the contract is immoral or injurious to the State or its citizens. Contracts, however, for the sale of slaves, entered into in States which allow slavery, are enforced in countries which regard slavery as contrary to the principles of justice, humanity and natural right. This rule is founded upon the idea that as slavery is not in violation of the general laws of nations, if any State thinks proper to establish and continue its existence by its own laws, every State will take notice of and give effect to contracts sanctioned by such laws. There are numerous decisions in support of this principle. Thus in *Madrazo v. Willea*, 3 Barn. & Ald. R. 353, 5 Eng. C. L. R. 313, it was held, that a foreigner who is not prohibited by the laws of his own country from carrying on the slave trade, may, in a British court of justice, recover damages sustained by him by reason of the wrongful seizure by a British subject, of a cargo of slaves on board of a ship employed by such foreigner in carrying on the African slave trade. It was so held, although British statutes at the time denounced the traffic as inhuman and unchristian, and inflicted the severest penalties upon British subjects engaged in it. Best, J., with whom the other judges concurred, said: "It was impossible to say the slave trade was contrary to the law of nations. Most of the States of Christendom had consented to its abolition; but Spain had reserved to herself a right of carrying it on in that part of the world where this transaction occurred. Her subjects could not be legally interrupted in buying slaves in that part of the globe, and have a right to appeal to the justice of this country for any injury sustained by them from such an interruption." And in the *Commonwealth v.*

Aves, 18 Pick. R. 193, Chief Justice Shaw declares, that in pursuance of a well known maxim, that in the construction of contracts the *lex loci contractus* shall govern, if a note of hand made in *New Orleans were sued on in Massachusetts, and the defence should be that it was a bad consideration, or without consideration, because given for the price of a slave sold, it may well be admitted that such a defence could not prevail, because the contract was a legal one by the law of the place where it was made.

These principles apply with peculiar force to contracts for the sale of slaves entered into at a period when the institution was recognized and protected by the fundamental laws, and sanctioned by the public sentiment of the State. It would be monstrous to hold that a contract, perfectly fair and legal when made, can become illegal, or be held contrary to public policy, by reason of a subsequent alteration of the laws and constitution of the State. At the time of the purchase in this case slavery was still an established institution of Virginia, recognized and sustained both by the Richmond and Wheeling Government. Nor was its existence contrary to the public policy of the United States government. It still prevailed in the States claiming to be loyal to that government. Congress had not attempted to interfere with it anywhere. Its legislation related only to such slaves individually as came under federal control. It is true that the proclamation asserted the emancipation of all the slaves within the designated States. In this respect, as has been seen, it was utterly without authority. The powers therein assumed were not conferred, nor were they confirmed by the legislative department. The proclamation was issued not because slavery was believed, or even asserted, to be unjust or opposed to public policy, but avowedly as a war measure—a military necessity essential to the success of the federal arms. In regions of country under Confederate control it had no more effect than a manifesto confiscating all the real and personal property in the Southern States. In all these regions slaves were treated as property by the laws, by the government, and by the people.

477 They *were administered by executors; they were sold under executions and decrees of courts; they passed by bequest and distribution; they were the subject of purchase and sale amid all classes of society, in every form of investment, traffic and speculation. It would not be extravagant to say, that during the four years' war alone the investments in slaves amounted to millions. We are now told that public policy requires the courts to annul any and every contract entered into during this period, based upon the sale of property thus recognized and sanctioned for generations by the sentiments, the laws and the tastes of the people of Virginia. The proposition involves, in my judgment, an admission derogatory to our whole previous history. Notwithstanding the insti-

tution was recognized as lawful and constitutional by both State and Federal government, was sustained by public sentiment, was interwoven with the entire framework of society, and was believed by men eminent for wisdom and piety to be in accordance with the principles of religion, humanity and justice; notwithstanding all this, because it has been destroyed by paramount force, we are expected not only to give it up without a murmur, but to surrender all our previous convictions, to yield our faith and consciences to the keeping of others, and henceforth to believe that slavery was wrong in itself—a curse upon our country—a moral leprosy which corrupted the life-blood of the nation. The proposition now advanced means this, or it amounts to nothing. If slavery was lawful—if it was not opposed to good morals and national honor—it is idle to say that the destruction of the institution can impair or affect contracts made during the period of its legal and constitutional existence.

It is worthy of notice, that in nearly all the States in which this question has been raised, the validity of this class of contracts has been fully sustained. Georgia, Arkansas and Louisiana are exceptions.

478 But in these *States the decisions were based avowedly upon the provisions in their State constitutions prohibiting the courts from rendering judgment of recovery in such cases. The Supreme court of the United States reversed the decisions rendered by the Georgia and Arkansas courts, upon the ground that these provisions impaired the obligation of contracts. I understand three of the judges dissented upon the ground the contracts were void upon reasons of public policy. A large majority of the court sustained the validity of the obligations given for the purchase money, though the reasoning of the court on this branch of the subject is not given. It was argued, however, that as the purchaser was deprived of his slaves by the act of the State, so by the act of the State he should be relieved of the obligation to pay for them. The gross injustice of the government, in requiring the citizen to pay for property wrested from him by the sovereign power, has been strongly pressed upon our consideration. In the first place, the emancipation of slaves in Virginia was not the act of the State, nor in any manner effected by its agency. It did not depend upon, nor was it the result of, the ratification of the Thirteenth Amendment by the State. The effect of that amendment was merely to prohibit the institution for the future in Virginia. The slaves in the State were as absolutely free at the close of the war without as with that amendment. They were emancipated by force of arms by the conquest and subrogation of the South. All men knew the fact, and all acquiesced in the result. The State is, therefore, not in the predicament of compelling her citizens to pay for property of which she has deprived them.

But the argument upon this point is

founded upon some confusion of ideas in respect to the functions of the judicial and legislative departments. The constitution declares that the citizen shall not be deprived of his property without due
 479 process of law; nor shall private *property be taken for public use without just compensation. If, however, by an act of sovereign power, private property is seized and confiscated, the question of compensation or indemnity is addressed not to the judicial, but to the legislative department. Whether the citizen is entitled to redress, and the measure of such redress, involve political considerations with which the courts have no concern. They may pronounce the act of seizure unconstitutional, and they may decree restitution in cases falling within their appropriate jurisdiction. But they cannot annul a contract and relieve a purchaser of his obligation to pay, because the government by usurpation and violence has confiscated the property purchased, without making just compensation. They can no more discharge an obligation to pay for a slave emancipated than for a horse, or any other chattel taken by the government agents, or seized by invading armies. The purchaser of a slave long before the war may with equal propriety claim an abatement of the purchase money, upon the ground of a failure of title and consideration by act of the government. If he has already paid, he would, for the same reason, be equally entitled to recover back such share or proportion of the purchase money as would compensate him for the loss sustained.

To these results we are inevitably conducted by the proposition of appellant's counsel. The entire argument is based upon a misconception of the effect of a warranty. Take the case of the sale of a slave made during the war, with the usual covenant that "he is a slave for life." What is the effect of these words? Simply that the negro sold had then no valid claim to freedom, with either a present or future right of enjoyment; that his political and personal status was that of a slave under the constitution and laws as they then existed. The vendor did not mean to warrant that the laws allowing slavery would never be changed. Whether emancipation
 480 *was effected by the conquest and subrogation of the South, or by operation of the constitutional amendment, it was an act of supreme power—of sovereign authority. It can scarcely be supposed the vendor intended to give, or the vendee to require, a warranty against the exercise of such sovereign authority. It was doubtless upon this principle the case of *Osborne v. Nicholson* was decided. Here the plaintiff sued on a note given in 1861, the consideration of which was a negro slave, warranted a slave for life. Art. 15, § 14, of the constitution of Arkansas, which went into operation in 1868, forbids any recovery on such contracts, and accordingly the Supreme court of that State gave judgment for the defendant. Upon an appeal to the Supreme

court of the United States, it was held that the contract being valid when made, was enforceable in the courts, and that the emancipation of the slave being an exercise of sovereign power by the State, was not a breach of the warranty, and did not invalidate the contract.

Let it be conceded, however, that a citizen may insure against the act of his government. It is not to be presumed that he intended to do so. To warrant such an interpretation of the contract, the language should be plain and unequivocal. It ought to appear that he had reference to such a contingency. To construe the ordinary formulas used in contracts of sale as constituting such warranty, would be to violate the settled rules of construction, and to impose upon the vendor a liability never contemplated by either of the parties. No one will seriously maintain that in a conveyance of real estate a warranty of title or covenant for quiet enjoyment, will be held to be broken by the exercise of the right of domain on the part of the State. The reason is, that in the sale and purchase of property parties are presumed to contract with reference and in subordination to the sovereign authority to divest the title of the owner when the public interests require it. Such conditions are always

481 *implied in every sale, and must be presumed to be known to all, and recognized by all, and are, therefore, never inscribed in the agreement of the contracting parties. Whether the power in any case has been constitutionally exercised or not; whether the property of the citizen has been arbitrarily wrested from him by violence and wrong without compensation, are questions between him and the government. They cannot affect or alter the liability of the vendor and convert his warranty into a policy of insurance against the act of the government.

These considerations apply with peculiar force to the sale of slaves after the date of President Lincoln's proclamation. After that period it was well understood in the South, that the success of the Federal arms would be the doom of slavery. All classes of society appreciated this peril to which they were exposed. Parties bought and sold and partitioned estates in view of this contingency. With many confident in the expectation of ultimate success, this species of property was considered the best investment which could be made. By others who held to the idea, that when the cause was lost all else was lost worth having, slave property was regarded as safe and valuable as any other in the States south. Others again made large purchases from the necessities of their position or a desire for speculation and gain. Whatever may have been the motives of purchasers, it is impossible to say, that either party understood that the loss of the slaves by the results of the war would effect the obligation of the contract. If it was so understood it was expressed in the agreement by words of plain and unambiguous import. These

considerations, it seems to me, effectually dispose of the argument in respect to the failure of consideration. If there has been such failure, it was not because of any defect in the title of the vendor at the time of sale. It is the title of the purchaser that was destroyed, not that of the seller. If

the slave had escaped, or had been taken from the possession of the purchaser by superior numbers within a short period after the sale, the result would have been the same. In either case the purchaser acquired all he contracted for, but his enjoyment was not commensurate with his expectations. His title was perfect, but it furnished no security against the might of conquering armies.

In the present case there cannot be the shadow of a difficulty. The slaves were purchased at a judicial sale, as to which the doctrine of caveat emptor applies in all its strictness. The appellants purchased with full knowledge of all the facts, and they assumed all the risks attending the acquisition of this species of property in the then existing condition of the country. The appellant's intestate was one of the parties plaintiffs in this suit, asking for a sale of the slaves upon the ground that partition could not be conveniently made. The appellees were infants and non-residents at the time, taking no part in the suit, and probably ignorant of its existence. In no view can they be held responsible for the loss sustained by the purchaser. I think, therefore, the Circuit court did not err in refusing to vacate the bonds executed by appellant's intestate for the price of the slaves sold under the decree of September 1863.

Although not entitled to all the relief asked for by him, the appellant has the right to have adjudicated the question as to the amount actually due by his intestate upon said bonds. It is true that judgments have been recovered thereon. The suit, however, is still pending in the Chancery court, which has complete jurisdiction to ascertain and settle the rights of all the parties before the court. It cannot be precluded from so doing by the fact of the rendition of judgments upon the bonds given by the purchaser under its own decree. It is claimed by the appellant, that contracts were entered into with reference to Confederate States treasury notes as a standard of value, and the bonds are payable in that currency; and this is denied by the appellee.

483 *As the latter have the evidence afforded by a judgment in their favor, and as there is no positive proof in the record showing the kind of currency stipulated to be paid, or with reference to which the purchase was made, it would be premature in this court to undertake now to decide these matters of controversy. The appellant should, however, have an opportunity of establishing this ground of defence. As this point was not distinctly presented in the court, nor any claim to relief based upon it, this court can only affirm the decree

with costs, with directions that an enquiry be instituted in the Circuit court, if desired by either of the parties, as to the kind of currency in which the bonds are payable, or with reference to which they were entered into as a standard of value.

Decree affirmed.

484 *Beery & als. v. Irick & als.

Newton's Ex'or v. Bushong.

August Term, 1872, Staunton.

[13 Am. Rep. 539.]

1. Removal of Causes from State to Federal Court.—

A suit in a State court cannot be removed to a United States court, unless the suit might have been brought originally in the last court.

2. Same—Plaintiffs Residents of Different States.*—

There are several plaintiffs in a suit in a State court, some of whom live out of the State, and others live in it, and the interests of all are so connected that the rights and interest of one cannot be adjudicated separately; the defendants live in the State. The non-resident plaintiffs are not entitled to have the cause removed to a United States court, under the act of Congress of March 2, 1867, for the removal of causes.†

3. Same—No Removal after Appeal to Highest State Court.‡—

After a decree upon the merits has been made in a suit in a State court, and an appeal has been taken to the Court of Appeals, and the case is pending in that court, no party has the right to have the cause removed to a United States court.

In each of these cases there was a motion to remove the cause to the Circuit court of the United States, held at Harrisonburg. The first case was a suit in equity in the Circuit court of Rockingham, afterwards removed to the Circuit court of Augusta, by the widow and four of the children and heirs of Abraham Beery, deceased, against Andrew B. Irick, M. H. Effinger and others, to recover certain sums of money claimed to be due from Irick for the purchase

*Plaintiffs Residents of Different States.—Approved in *George v. Flicher*, 28 Gratt. 313. See also, *note* to *Continental Ins. Co. v. Kasey*, 27 Gratt. 216.

In *Burlew v. Quarrier*, 16 W. Va. 147, the court cited the principal case as authority for the following propositions: "1. A suit in a state court cannot be removed to a United States court unless the suit might have been brought originally in the last named court. 2. There are several plaintiffs in a suit in a state court, some of whom live out of the state, and others live in it, and the interests of all are so connected that the rights and interests of one cannot be adjudicated separately; the defendants live in the state. The non-resident plaintiffs are not entitled to have the cause removed to a United States court under the act of Congress of March 2, 1867, for the removal of causes." See 13 Am. Rep. 539, and *note*.

†See the statute in the opinion of JUDGE CHRISTIAN.

‡No Removal after Appeal to Highest State Court.—

The principal case was approved and sustained in *Continental Ins. Co. v. Kasey*, 27 Gratt. 221, and cited in *Henen v. B. & O. R. Co.*, 17 W. Va. 393.

of a tract of land of which Abraham Beery had died seized, and which, after his death, had been sold in 1857 under a decree of the court and purchased by Irick. Abraham W. Beery, one of the plaintiffs, had been for years before the suit was brought, an inhabitant of the State of Illinois; the 485 other plaintiffs *and the defendants were citizens of and residents in Virginia. There was a final decree in favor of Irick and Effinger as to the most important part of the plaintiffs' claim, and a decree for an account as to some other matters: and the plaintiffs applied to a judge of this court for an appeal from the decree, which was allowed. After the appeal had been allowed, and whilst the cause was pending in this court, Abraham W. Beery made the motion for the removal of the cause.

The second case was also a suit in equity in the Circuit court of Augusta county, by Samuel Bushong and three others, legatees of Mary C. Bushong, deceased, against John Newton, her executor, and on his death revived against his executor and others, seeking to recover the legacies bequeathed to them. There was a final decree in favor of the plaintiffs; and Newton's executor applied to a judge of this court for an appeal; which was allowed. Samuel Bushong and two of the other plaintiffs were living out of the State of Virginia; the other parties lived in the State.

After the appeal had been allowed, and the case was pending in this court, the non-resident parties made the motion for the removal of the case.

Fultz, for the motion.

Sheffey & Bumgardner, Baldwin & Cochran, against it.

CHRISTIAN, J. delivered the opinion of the court.

In these two causes a motion is submitted by certain non-resident parties (in the first named cause, by one of the appellants, and in the other by three of the appellees), to remove them from this court, where they are now pending upon appeals, to the Circuit court of the United States for this district.

The application for removal is made under the act of Congress of March 2d, 1867.

"The act of July 27th, 1866, for the removal of causes from State courts is 486 *hereby amended as follows: That where a suit is pending, or may hereafter be brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, such citizen of another State, whether he be plaintiff or defendant, if he will make and file in such State court an affidavit stating that he has reason to and does believe, that from prejudice or local influence he will not be able to obtain justice in such State court, may at any time before the final hearing

or trial of the suit, file a petition in such State court, for the removal of the suit into the next Circuit court of the United States to be held in the district where the suit is pending, and offer good and sufficient security for his entering in such court on the first day of its session copies of all process, pleadings, depositions, testimony and other proceedings in said court, and doing other such appropriate acts as, by the act to which this is amendatory, are required to be done upon the removal of a suit into the United States court; and it shall thereupon be the duty of the State court to accept the surety, and proceed no further in the suit; and the said copies being entered as aforesaid in such court of the United States, the suit shall there proceed in the same manner as if it had been brought there by original process."

If the petitioners in the cases before us have brought themselves within the provisions of this statute; if, in other words, they are such parties as the statute describes, and this tribunal is such a State court as is referred to, in its terms, then it is a matter of right to the petitioners to have their cause removed to the Circuit court of the United States; and this court has no discretion on the subject. To determine these questions, it becomes necessary to enquire into and ascertain the true construction of the act of Congress of March 2d, 1867, and those acts of which it is amendatory.

487 *The jurisdiction of the Federal courts is clearly defined by the constitution of the United States, and the laws of Congress; and it is a proposition too clear to admit of argument or doubt, that no cause can be removed into the Federal courts from a State court, except it be a cause of which, from the relation of the parties, or the subject matter of the controversy, the Federal court could have originally taken the jurisdiction.

It is perfectly obvious, that no suit can be removed to the national courts, which might not by the constitution of the United States have been originally commenced in one of these courts. It was never intended by the act of Congress known as the judiciary act, and the acts amendatory thereof, to extend the jurisdiction of these courts over causes brought before them on removal, beyond the limits prescribed to their original jurisdiction; and such is the judicial construction which has uniformly been given to these statutes.

It may, therefore, be safely assumed, that all the decisions affecting the original jurisdiction of the United States courts, in the classes of cases which may be removed, are equally applicable to them as the subjects of removal. Conkling's Treatise 177, and cases there cited.

It is too well settled to require a citation of authorities to support the proposition, that where the jurisdiction of the United States courts depends upon the citizenship of the parties, all the plaintiffs must be

competent to sue and all the defendants to be sued in said courts.

The expression used in the judiciary act, "or where the suit is between a citizen of the State where the suit is brought and a citizen of another State," means, obviously, that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued in the Federal courts. That is, when the interest is joint, each of the persons concerned in the interest must be competent to sue, or be sued in those courts. *Strawbridge v. Curtiss*, 488 3 Cranch, R. 267; *Corporation *of New Orleans v. Winter & als.*, 1 Wheat. R. 91; 17 How. U. S. R. 468; 2 Paine R. 103.

In both of the cases which are now sought to be removed to the Circuit court of the United States, a part of the plaintiffs are citizens of other States, and part are citizens of Virginia. In the case of *Beery v. Irick*, one of six plaintiffs is a citizen of the State of Indiana, and the remaining five are citizens of Virginia.

The interests of these plaintiffs in both cases are so blended and tied up together, and so connected with the interests of the defendants in the two chancery causes respectively, in which they are all made parties, that it is impossible that their rights can be adjudicated without having all the parties before the same tribunal. It is obvious, therefore, that in neither case could the Federal courts take original jurisdiction, because they are both cases where the jurisdiction depends altogether on the citizenship of the parties, and a part of the plaintiffs are citizens of Virginia and a part citizens of other States; and it is manifest their interests cannot be separated.

If, therefore, the motion now made here in the appellate court, had been made in the courts below (Circuit courts of Rockingham and Augusta), and before the final hearing, it ought not to have been entertained, because the cases were not such as could have been originally brought in the Circuit courts of the United States. *Hubbard &c. v. Northern R. R. Co.*, 3 Blatchf. R. 84; *S. C.* 25 Vermont R. 715; *Wilson v. Blodget*, 4 McLean's R. 363; *Fiak v. Chicago, &c., R. R. Co.*, 53 Barb. R. (N. Y.) 472.

In the last named case it was distinctly decided, that "unless all the plaintiffs are citizens of the State in whose court the suit is brought, and all the defendants citizens of a State other than that, the case cannot be removed to the United States Court."

But in the cases before us, there was a final decree by the court below, and no motion was submitted for a removal

489 *while pending in that court. But the motion is made here in the Appellate court, for the first time, after a final hearing of the causes in the court below. In the one case there was a decree in favor of the petitioner, in the other, a decree against the parties asking for removal.

If the cases before us were such cases as could be removed at any stage of the proceedings, to the Circuit court of the United

States, it is clear that the motion comes too late when made in the Supreme appellate tribunal of the State. The act provides that the non-resident party to a suit in a State court between a citizen of that State and a citizen of another State, shall be entitled to a removal of his cause to the next Circuit court of the United States to be held in the district where the suit is pending, on making the proper application "at any time before the final hearing or trial of the suit."

The question we have to consider, is (admitting for the time that it is a proper case for a removal), was the application made before the "final hearing or trial," within the meaning and intent of the statute.

The word "final" applies to and qualifies the word hearing, and not the word "trial." In the act of 1866 the language is "before trial or final hearing." The transposition of the words in the act of 1867 was probably accidental, and not affecting, nor designed to affect, any change in the meaning. The words "final hearing" are ordinarily applied to cases in equity, while the word "trial" is applied to actions at law. The obvious and unmistakable intention of the statute was to require a party desiring a removal to do so before trials in action at law, and before a final hearing in suits in equity. In the language of the court in *Akerly v. Vilas*, 1 Abbot's U. S. Dist. Ct. R. 293: "The reason and justice of this construction are apparent. Only the non-resident can apply for it. And it would constitute the very essence of injustice

to give him the right to experiment
490 *upon the decisions of the State tribunals, obtaining those which, if in his favor, would be binding and conclusive upon the other party, but which, if against himself, he could repudiate and take his chances again in a new tribunal. The statute did not intend to provide for any such wrong; but, on the contrary, clearly designed to exclude the possibility of it by requiring the application to be made before trial or final hearing." *Id.* 293, 294.

It follows, therefore, that if the application for removal had been made in the court below after the decrees were pronounced, adjudicating the rights of the parties and settling the merits of the controversy, such a motion could not have been entertained under the express terms of the statute. Is the case different because these decrees have been superseded and brought before this court for review on appeal? We think not. There has been a final hearing of the cases in the court below. They are here for review, and the question before this court is, Shall these final decrees be reversed or affirmed? If they can be now removed to the Circuit court of the United States, the same questions will be presented to that court, and the Circuit court of the United States must either review the cases upon the records as they stand upon the docket of this court, and determine whether the decrees shall be reversed or affirmed, or it

must set aside the decrees of the State court and try the cases *de novo* in the Federal court. If the theory of the learned counsel for the petitioners be true, the Federal court must take one or the other course. He does not tell us which. We think it can take neither. It never was the object of the statute to provide for a review of the decisions of a State court, but simply for the exercise of an election by a party to a suit in a State court to transfer it to another court of original jurisdiction for trial. The design manifestly was to authorize an election between the two tribunals, not to give him a chance at both.

491 *Any other construction would be to confer upon the Federal courts, whose jurisdiction is carefully limited by the constitution of the United States, an extraordinary and incongruous appellate jurisdiction, by which the judgment or decree of a State court, solemnly pronounced in a case where it had the undoubted jurisdiction, could be, reviewed, reversed and annulled by a Federal court.

Such a construction would permit a party who has deliberately chosen his tribunal, after years of litigation in a State court, where the decision, if in his favor, would bind the other party, if against him, to take another chance in another forum, to repudiate the authority of the tribunal he has chosen, after a final hearing of his cause, by invoking the aid of another State court, the Supreme appellate court, to enable him to get his cause before a Federal court.

In one of the cases before us the non-resident petitioner had failed in the court below upon the final hearing of his cause, and there was a decree against him. It will be conceded by his own counsel that he could not then, without obtaining an appeal, have removed the cause to the Federal court. It was too late by the express terms of the statute. He then invokes the aid of this court, upon the ground that the decree against him was erroneous. An appeal is allowed him by this court, or one of its judges; and thereupon he files his petition and affidavit that "he has reason to believe, and does believe, that from prejudice or local influence he will not be able to obtain justice" from this court, whose appellate power has been invoked, and granted, to relieve him against a decree which he complains is erroneous. If the appeal had not been allowed, the case, confessedly, would have been at an end, and could not have been removed to the Federal court. He prays an appeal, ostensibly that the decree may be reviewed and reversed by this court, and when he obtains it, he

492 *seeks to make this court, the supreme appellate tribunal of the State, the mere conduit through which he may travel to a Federal court. Such a course is unwarranted by any law, by any decision of any court, State or Federal, and is in conflict with the express terms of the act of Congress which, in effect, declares that no case shall be removed from the State courts

to the Federal courts after trial and final hearing.

Such a course of practice would be to substitute the Circuit court of the United States, as an Appellate court to the Circuit court of the State, in the place of that Supreme appellate court constituted by the constitution and laws of this State as the court of the last resort. Such unprecedented and dangerous jurisdiction in the Federal courts will never be recognized by this court, unless the very letter of the law imperatively requires it, and unless such law, if enacted by Congress, shall be declared by the Supreme court of the United States to be consonant with the constitution of the United States, which expressly limits the jurisdiction of the Federal courts.

We are of opinion that the motions for removal in both cases be overruled.

The order was as follows:

This day came again the parties by their attorneys, and the court having maturely considered the petition and arguments of counsel upon the motion for the removal of this cause to the next Circuit court of the United States, to be holden at Harrisonburg, in the western district of Virginia, is of opinion, for reasons stated in writing and filed with the record, that this is not a proper case for removal under the act of Congress of March 2, 1867. It is, therefore, considered that the motion aforesaid be overruled.

493 *Wilson & Wife, &c., v. Smith.

August Term, 1872, Staunton.

1. **Decrees Valid and Conclusive until Reversed—Fraud.**

—A decree of a court of competent jurisdiction, in a suit between proper parties, is valid and conclusive until reversed on some proper proceeding in the same suit and the same court, or on appeal to an Appellate court, unless there be some sufficient ground of fraud or surprise to entitle the injured party to relief in some other suit.

2. **Partition of Land—How Made.**—In a suit for partition of land by joint-tenants, tenants in common or parceners, whether partition can be conveniently made in kind or not, and whether the interests of those who are entitled to the subject or its proceeds will be promoted by a sale of the entire subject or not, are questions for the court in which the suit is pending to decide, and its decision cannot be questioned in any collateral suit, except on the ground of fraud or surprise.

3. **Same—Sale Confirmed by Court Cannot Be Impeached Collaterally.**—In such a case, a sale made pending the suit by agreement of the parties, in person or by counsel, which sale is afterwards approved and confirmed by the court, is as valid as if made under a previous decree of the court in the suit, and can no more be impeached collaterally than if so made.

4. **Same—Revival of Suit—By Motion.**—In a suit by W against L for partition of land, before any decree in the cause W dies, leaving a widow and infant child. The suit may be revived in their name; and neither a bill nor a *scire facias* is necessary, but it may be revived upon their motion without notice. Code, ch. 173, § 4, p. 718.

5. *Same-Same-Immaterial Errors.*—The order of revival suggests the death of W and that the suit be revived and proceeded in, in the name of "J and L, administrators with the will annexed, — Wilson, infant son and sole heir, and — Wilson, widow and devisee of said John W. Wilson, deceased." Though the administrators with the will annexed were not necessary, yet it does not harm; and though the christian names of the infant child and the widow are omitted, they are sufficiently described to identify them.

6. *Same-Same-In Name of Next Friend of Infant.*—It would have been out of place to have revived the suit in the name of a next friend for the infant; and an order authorizing some person to prosecute the suit for the infant might as well
494 "have been made in a subsequent order as in the order reviving the suit; and in an original suit to set aside the proceedings in the partition suit, *quere* if it may not be presumed to have been made.

7. *Same-Same-Same-Quere.*—Even if there was not a formal assignment of a next friend by an order of a court in the partition suit, it may well be questioned whether such a mere informality would of itself avoid the proceedings in the suit, and the sale made under them: the infant being joined with his mother and the administrators, *quere* if they may not be considered, in the absence of evidence to the contrary, and for the purpose of giving effect to the proceedings, as his next friend.

8. *Same-Same-Irregularities Cannot Be Objected to in Independent Suit.**—But if there were any irregularities in any of these respects, objection on that account could only be made, if at all, in that suit, or on appeal from the decree therein, and such objection cannot be made in an independent suit.

9. *Same-Same-Counsel.*†—In a suit for partition of real estate by W against L, W dies, and the suit is revived in the name of his widow and infant son. The counsel employed by W will be presumed, in the absence of evidence to the contrary, to be continued as counsel in the cause; and a decree for a sale of the property entered upon the consent of the counsel is a valid decree, and the sale under the decree will be sustained.

John W. Wilson and James M. Lilley being jointly entitled to a valuable property in the county of Augusta, known as the "Greenville Mills," a suit was brought for partition thereof, by the said Wilson against the said Lilly, in the Circuit court of said county. Pending the suit, and it seems, before any decree was made therein, John W. Wilson died, leaving a widow, Margaret E. Wilson, and an only child, John W. Wilson, who was his heir at law; and also leaving a will, whereby he gave to his wife one-third of his estate, and appointed Alexander Brownlee, the father of his wife, his executor. The will was admitted to probate on the 26th of May 1862; and on the same day the executor named in

the will having refused to qualify, John Newton and John J. Larew were appointed and qualified as administrators of the said testator with his said will annexed.

On the 15th day of June 1863, the partition
495 suit aforesaid was *revived in the names of the administrators, heir, and widow of the plaintiff, John W. Wilson, by an order made therein in these words: "John W. Wilson, the plaintiff in this cause, having departed this life, it is ordered that this suit be revived and proceeded in, in the name of John Newton and John J. Larew, executors of John W. Wilson, deceased, and administrators with the will annexed, — Wilson, infant son and sole heir of John Wilson, deceased, and — Wilson, widow and devisee of said John W. Wilson, deceased." On the 14th day of July 1863, an agreement was signed by the counsel of the parties in these words:

"It is agreed by the undersigned, the counsel of the parties in the suit of Wilson v. Lilley, respecting the partition of the Greenville Mills, pending in the Circuit court of Augusta county, that the mill and lot attached may be sold as promptly as practicable on the following terms: one-third of the purchase money to be paid in hand, and the balance in one and two years, with interest from the day of sale: provided, that the purchaser may pay the whole amount of purchase money so soon as the sale is ratified by the Circuit court of Augusta county. The sale to be subject to the ratification of said court at its next term; and possession, if given by the parties authorized to make the sale, to be surrendered at once if the court does not ratify the sale. John Newton is authorized, as commissioner, to make the sale, upon the usual notice of four weeks, and in the usual manner, at half commissions. Given under our hands this 14th day of July 1863.

Thomas J. Michie,
Harmon & Bell,

Counsel for Plaintiff.

Sheffey & Bumgardner,
Counsel for Defendant.

On the 14th day of August 1863, the
496 property was accordingly *sold by said Newton, and William F. Smith became the purchaser, at the price of \$18,525. A report of the sale having been made to the court, the cause came on to be further heard on the 19th day of November 1863, on the papers formerly read and the said report; and there being no exception to the said report, it was decreed that the same, and the sale made as stated therein, be ratified and confirmed; and it being suggested that the purchaser desired to pay up the whole amount of the purchase money, and that the parties to the suit desired to borrow the same, it was further decreed that the money should be paid into the Central Bank of Virginia as general receiver of the court, to the credit of the suit; and that the parties, plaintiffs and defendants, should be respectively allowed to borrow such part of said fund, not exceeding one-half thereof, as they may desire, upon executing bond

**Irregularities Cannot Be Objected to in Independent Suit.*—The principal case was cited and approved as to this point in *Fox v. Cottage B. F. Ass'n*, 81 Va. 602.

†*Counsel.*—The principal case was approved in *Marrow v. Brinkley*, 85 Va. 62, 6 S. E. Rep. 605.

with sufficient security therefor; which bonds were to be held by the general receiver as part of the fund to the credit of the suit. Upon payment in full of the balance of the purchase money due by Smith, it was further decreed that the commissioner, Newton, should convey to him the property.

It appears that accordingly the purchase money was paid in full to the said bank as general receiver aforesaid, and that a conveyance was made to the purchaser. It does not certainly appear what afterwards became of the money, though it was probably lost by the failure of the said bank.

Margaret E. Wilson, widow of the said testator, John W. Wilson, having intermarried with Joseph Wilson, the said Joseph Wilson and Margaret E., his wife, and John W. Wilson, only child and heir at law of the said testator, and an infant suing by the said Joseph Wilson his next friend, filed their original bill in the said Circuit court of Augusta county, on the 15th day of August 1867, against the said William

497 F. Smith; in which bill *the complainants, after setting out the facts aforesaid, or some of them and other facts, charge, among other things, that no part of the purchase money was borrowed or received by said Margaret E. as guardian of her said infant child; that the bank has failed, and the whole of the money has been lost, as complainants have been informed; that said Margaret E. has never been assigned dower in said property, nor has she ever received anything in lieu of her dower, nor has she been called upon or in any way notified to make an election whether she would take her dower in kind or in currency; that the said order made to revive the suit aforesaid did not bring the said Margaret E. and her child before the court; that it does not so name them as to make them parties to the suit, and they are nowhere named in the proceedings; that no amended or supplemental bill, or bill of revivor was filed, nor any next friend or guardian ad litem of the infant appointed, nor any of the requirements of the statute authorizing the sale of the lands of infants complied with; "that the said Margaret E. never employed counsel to attend to her interest in said property—neither of the counsel who consented to a sale of said property had been employed by her, nor were they or either of them authorized to speak for her," &c. Under these circumstances the complainants say, they are advised that the decree aforesaid, confirming the sale of said property to said Smith, is a nullity so far as it affects the rights of said Margaret E. and John W., and they, therefore, pray that the said decree be annulled, the conveyance to the purchaser, if executed, set aside, and the property restored to said Margaret E. and John W., and for general relief.

In June 1868, the said Smith filed his demurrer and answer to the bill. In his answer he said, that no impropriety was alleged against him, and that he stood upon the legal validity of the proceedings under which he bought and then held the

498 property; that he was advised *that on the death of John W. Wilson, the suit was properly revived against his heir, devisee and personal representatives, under chapter 173, § 4, of the Code, page 717. "The omission of the Christian names of the widow and the heir was, no doubt, accidental, and as they were otherwise clearly identified, it was not material. No process is necessary on such a revival." That respondent was informed and believed that the lawyers consenting to the sale were, in fact, the counsel of all the parties to the suit, and that, in addition to their authority as counsel, they acted upon the express consent and authority of the female plaintiff and of the guardian of the infant, in the agreement for the sale. That he was advised that the suit having been brought for partition, it was within the power of the court, under the proceedings in the cause or a proper state of proofs, to decree a sale of the whole property, as a means of making partition under chapter 124, § 3 of the Code, page 581. That it was competent for counsel to admit of record any fact provable under the pleadings, and to consent to any decree which it was within the power of the court to make; and that the agreement for a sale subject to the ratification of the court, and which was, in fact, afterwards ratified by the court, with the approval of all the counsel, was a matter clearly within the authority of counsel, and binding upon all the parties. That he was also advised, that as the female and infant plaintiffs here were certainly parties in said suit, if any error has been committed therein, it must be corrected by an appeal, and not by a new suit; and that a purchaser under a decree in that cause, respondent was protected as against all the parties therein. It is also stated in the answer, that the mills were burned by the Federal army in 1864.

Sundry depositions were taken and filed in the cause. On the side of the defendant, Smith, was the deposition of John Newton, the commissioner who made the sale, and on the side of the plaintiffs were the 499 depositions of *Alexander Brownlee and Thomas A. Brownlee, the father and brother of the plaintiff, Margaret E. Wilson, and the said plaintiff herself.

John Newton, among other things, testified as follows: "I was requested by the counsel on both sides of the case of 'Wilson v. Lilley, &c.,' to see Mrs. Wilson and ascertain from her whether she would consent to the sale of the property, the 'Greenville Mills,' before the decision of the suit. I saw her upon the subject, and told her of the arrangement which was proposed. She seemed to think that it would be better that the property should be sold before the decision of the suit; that the property was in a bad fix, and was doing nobody any good. She said she preferred that it should be so sold. I then notified the said counsel of Mrs. Wilson's wishes on the subject, and my recollection is, that the agreement of counsel filed in said cause for a sale of the

property was then drawn up and signed by said counsel. I also had several conversations with Alexander Brownlee, guardian of John W. Wilson, on the subject, and he seemed to be satisfied as to the sale being made, and he told me that he would see Mr. Thomas J. Michie, his counsel, on the subject, or had seen him. Mr. Brownlee, as guardian, was present at the sale and made no objection, but seemed to be satisfied. I never heard of any dissatisfaction of any of these parties until the filing of the bill in this cause, although I saw Mrs. Wilson very frequently after the sale." He also proved that the property (meaning the mill and buildings) was burned by the yankees after the purchase by Smith.

Alexander Brownlee, among other things, testified that he became guardian of John W. Wilson at the July court, 1863, (which is about the date of the agreement aforesaid); that after becoming guardian he never gave his consent to Newton, or anybody else, to sell the Greenville Mills for Confederate money. That Thomas J. Michie was counsel for him as guardian of John W.

500 *Wilson in the case of "Wilson v. Lilley, &c." That witness told them "that if they thought it was best to sell the property to do so." That his acquiescence to the sale given to his counsel was before witness became guardian as aforesaid; thinks it was on the day he qualified that he consulted with Mr. Michie as his counsel as guardian. That he went to Mr. Michie because he had been the attorney for John W. Wilson in the suit of "Wilson v. Lilley, &c." That he, witness, never employed him after witness qualified as guardian of the infant.

Thomas A. Brownlee testified that Mr. Newton came to consult his sister, Mrs. Wilson, concerning selling the mills. She told him she did not need the money; that she had Confederate money enough; and he told her that she had better sell it; that the yankees would probably destroy it, and she would get nothing for it. She stated that she was at a loss to know what to do; but for him to do what he thought best. The above conversation took place at the residence of his father, Alexander Brownlee, a short time before the sale.

Mrs. Margaret E. Wilson, one of the plaintiffs, among other things, testified: "Mr. John Newton talked to me several times upon the subject (the sale of the Greenville Mills), and wished me to consent to the sale of that property, but I always objected. I never wanted it sold. He told me I had better have it sold, for the yankees will come and burn it down, and it will do you and no one else any good. He told me that more than once, I am certain." She did not employ counsel in regard to the mill property. In answer to a question propounded to her on cross-examination by the defendant, Smith, viz: "Did you not say to Mr. Newton that he knew better than you did, and if he thought it best to have it sold to do so?" She said: "I told him he would have to do what he thought best." In an-

swer to a question then put to her by her husband, Joseph Wilson, she 501 *said she told Mr. Newton more than once that she had as much Confederate money as she wanted, and that she would sooner have the property.

On the 12th day of November 1870, the cause came on for final hearing, when the court, overruling the demurrer pro forma, and being of opinion that no cause appeared for impeaching or setting aside the sale made to the defendant on the 14th day of August 1863, and confirmed by the court on the 19th day of November 1863, decreed that the bill be dismissed with costs.

From the said decree the plaintiffs applied for an appeal to this court, which was accordingly allowed.

Fultz, for the appellants.

Baldwin & Cochran, for the appellee.

MONCURE, P. delivered the opinion of the court.

The object of this suit is to annul a decree in another suit, the sale made under or confirmed by it and any conveyance which may have been executed in pursuance of said decree.

A decree of a court of competent jurisdiction, in a suit between proper parties, is valid and conclusive until reversed on some proper proceeding in the same suit and the same court, or on appeal to an appellate court; unless there be some sufficient ground of fraud or surprise to entitle the injured party to relief in some other suit.

If the decree in controversy in this case be void, as contended by the appellants, where was the difficulty in their obtaining relief by an action at law? If they had an adequate remedy at law, as it seems they had if their pretensions be well founded, then they are entitled to no relief in equity.

But had not the court which rendered the decree competent jurisdiction to make it, and was it not rendered in a suit between proper parties?

First. Had not the court jurisdiction to make such a decree?

502 *The decree was rendered by the Circuit court of Augusta county in a suit instituted in said court for the partition of the "Greenville mills," situated in said county. The suit was founded on chapter 124 of the Code, page 581, concerning "partitions and coterminous owners." By the 1st section of that chapter, "tenants in common, joint-tenants and coparceners" are "compellable to make partition"; and "the court of equity of the county or corporation wherein the estate or any part thereof may be," are expressly invested with jurisdiction in such cases. The parties to the said suit came within the categories enumerated in the section. They were tenants in common or joint-tenants. And the subject for partition was situate in the county where the court was in which the suit was instituted.

By the 3d section of the chapter, it is provided that when partition cannot be conveniently made, if the interests of those who are entitled to the subject, or its proceeds, will be promoted by a sale of the entire subject, the court may order such sale; and may so order, "notwithstanding any of those entitled may be an infant, insane person or married woman"; and may "make distribution of the proceeds of sale according to the respective rights of those entitled." Whether partition can be conveniently made in kind or not, and whether the interests of those who are entitled to the subject or its proceeds will be promoted by a sale of the entire subject or not, are questions for the court in which the suit for partition may be brought to decide, and its decision cannot be questioned in any collateral suit, except on the ground of fraud or surprise. That a sale is made pending the suit, by agreement of the parties in person or by counsel, which sale is afterwards approved and confirmed by the court, makes no difference. Such a sale is as valid as if made under a previous decree of the court in the suit, and can no more be impeached collaterally than if so made. It is in fact a sale made

503 *under a decree. Then the court had jurisdiction to make such a decree.

And now,

Secondly. Was not the decree rendered in a suit between proper parties; that is, all the proper parties?

The suit was brought by one of the two sole proprietors of the property, and both of them were sui juris. There could have been no difficulty then on the score of parties. But pending the suit, and it seems before any decree or order had been made therein, the plaintiff, John W. Wilson, died, having been killed in battle, and it then became necessary to revive the suit against the real representatives of the plaintiff, who were his widow and devisee, Margaret E. Wilson, and his infant child and sole heir at law, John W. Wilson. Those representatives had an unquestionable right to revive the suit in their names, and prosecute it to the same conclusion to which it might have been prosecuted by the original plaintiff, to whose rights they succeeded; and the only question is whether it was so revived. The appellants insist that it ought to have been revived by a supplemental or amended bill, or bill of revivor; or at least by a scire facias. But the Code, chapter 173, § 4, page 718, provides that where the party dying is plaintiff, the person or persons for whom such scire facias might be sued out, may, without notice or scire facias, move that the suit proceed in his or their name, and an order shall be made accordingly. In this case, on the 15th day of June 1863, the death of the plaintiff, John W. Wilson, was suggested, and an order was made that the suit be revived and proceeded in in the name of "John Newton and John J. Larew, administrators with the will annexed," "— Wilson, infant son and sole heir," "and — Wilson, widow

and devisee of said John W. Wilson, deceased." Was not this a sufficient revival of the suit in the name of the real representatives of the plaintiff according to the aforesaid provision of the Code? We think

it was. The administrators with the

504 will annexed *of John W. Wilson were unnecessary parties; but the revival in their name can do no harm. The infant son and widow of the plaintiff were his sole real representatives, and the suit was revived in their names: utile per inutile nor vitiatur. That the Christian names of the infant son and widow are not inserted in the order, can make no difference. Enough is inserted in it to describe and identify the parties beyond all possibility of mistake. That no next friend of the infant is named in the order can make no difference. It would have been out of place to have revived the suit in the name of a next friend of the infant, and was more appropriate to allow some person as next friend to prosecute the suit for the infant. That might as well have been done in some subsequent order as in the order reviving the suit; and we may well presume that it was accordingly so done. There is nothing in the record of this case to show that it was not so done. A copy of the record of the partition suit is not made a part of the record in this suit. Even if there was not a formal assignment of a next friend by an order of the court in that suit, it may well be questioned whether such a mere informality would of itself avoid the proceedings in the suit, and the sale made under them. The infant came into court and into the cause with his mother and the personal representatives of his father; and they may well be considered, in the absence of evidence to the contrary, and for the purpose of giving effect to the proceedings, as his next friends. Alexander Brownlee, the grandfather of the infant, qualified as his guardian on or about the same day on which the agreement to make the sale, subject to the decree of the court, was signed by the counsel. He may have acted as next friend of the infant in whose name the suit had just one month before been revived. A formal order assigning a next friend to prosecute a suit for an infant is very unusual in our practice. Any person may

bring a suit in the name of an infant

505 as its *next friend, and ordinarily the court will recognize him as such next friend, and take cognizance of the case as properly brought and prosecuted. If it appear to the court that the suit is not for the benefit of the infant, or that the person named as next friend is not a suitable person for the purpose, the court may dismiss the suit without prejudice, or assign another person to prosecute it as next friend of the infant. And the court may, if it think fit, direct an enquiry by a commissioner to ascertain whether the suit be for the benefit of the infant, or whether the person prosecuting it as next friend be a fit person for that purpose. It does not expressly appear from the order reviving the suit on whose

motion it was made. The presumption, however, is that it was made on the motion of the parties in whose name the suit was revived, or at least of all of them except the infant, who was of too tender years, to make it in proper person. It was no doubt made by the adult parties for themselves and as next friend of the infant. They alone had the right to make it. The suit could be revived only in the names of the real representatives, who were the widow and devisee and the infant child and sole heir.

But if there were any irregularities in any of the respects aforesaid, (and whether there were or not, is a question upon which we mean to express no opinion in this case), objection on that account could only be made, if at all, in that suit, or on appeal from the decree therein, and not by an independent suit.

We are therefore of opinion that the decree (in the partition suit) was rendered in a suit between proper parties.

It now only remains to be considered, whether there was any sufficient ground of fraud or surprise to entitle the appellants to relief in this suit?

There was certainly no surprise in the case either proved or alleged, nor was 506 there any fraud. The only *ground on which any pretence of fraud can be based, is the allegation in the bill, that "the said Margaret E. never employed counsel to attend to her interest in said property: neither of the counsel who consented to a sale of said property, had been employed by her; nor were they or either of them authorized to speak for her. If they undertook to consent to a sale of said property, it was without the shadow of authority from said Margaret E. or any person authorized to act for her child."

It is not necessary that the counsel who consented to the sale of said property in behalf of the plaintiffs should have been employed by the said Margaret E. or her child, or his guardian, provided that the said counsel were employed by John W. Wilson, the original plaintiff in the partition suit, who was the husband of said Margaret E. and father of her child, and it is not pretended that they were not so employed. Being so employed, and he, John W. Wilson, having died pending the suit, which was afterwards revived in the name of his widow and child as his devisee and heir, the authority of the said counsel to act for the plaintiffs in the suit after it was revived must be presumed to exist, in the absence of evidence to show that it was determined. There is no such evidence in the case. On the contrary, the evidence shows that after the death of the original plaintiff in the partition suit, John W. Wilson, his widow and the guardian of his child recognized the authority of his counsel to continue to act for them in the suit, and consented to the sale of the property. John Newton, the commissioner who made the sale, expressly proves that he was requested by the counsel on both sides of the

partition suit to see Mrs. Wilson, the widow, and ascertain from her whether she would consent to the sale of the property; that he accordingly saw her, and she said she preferred that it should be sold; that he had several conversations on the subject

with Alexander Brownlee, her father 507 and *guardian of her child, and he seemed to be satisfied as to the sale

being made, and told witness he would see Mr. Thomas J. Michie, his counsel, on the subject, or had seen him; that Mr. Brownlee, as guardian, was present at the sale and made no objection, but seemed to be satisfied; that witness never heard of any dissatisfaction of any of these parties until the filing of the bill in this cause, although he saw Mrs. Wilson very frequently after the sale. This evidence, if it be true, leaves no room for doubt as to the authority of the counsel for the plaintiffs in the partition suit to act for them. It is not contradicted, in any material respect, by the evidence on the other side. That evidence consists of the depositions of the father and brother of the female plaintiff, and of that plaintiff herself, her father being the guardian of her child. The feelings of these witnesses were all, naturally, on the side of the plaintiffs; and yet, according to the testimony of them all, the widow and guardian of the infant child of John W. Wilson, the original plaintiff in the partition suit, in effect, assented to the sale. And this is the material, if not the only material, fact to which the testimony relates. To be sure, the witnesses for the plaintiffs testify that the widow was at first opposed to a sale—said she had Confederate money enough, and that she would sooner have the property; and that John Newton, the commissioner, wished her to consent to the sale, and told her she had better have it sold, for the yankees would come and burn it down, and it would do her and no one else any good. But they further testify that the widow and guardian both yielded to the opinion and advice of said Newton and assented to the sale, if thought best by him or the counsel for the plaintiffs in the partition suit. Now it is not pretended that Newton was influenced by improper motives in expressing the opinion or giving

the advice aforesaid. They were, no 508 doubt, *honestly expressed and given, and they were such as would doubtless have been expressed and given by almost every person of good judgment, under the circumstances. The property consisted of mills, which contributed to the sustenance of the Confederate army, and were in the line of the march of the enemy. It was, therefore, in imminent danger of being burned down by them. Newton properly assigned that danger as a reason for selling the property. It was accordingly sold for \$18,525 in Confederate money, which was certainly better, according to the judgment of most discreet men at that time, than to keep it under such circumstances, even though it might have been worth, under different circumstances, six or seven thou-

sand dollars in good money. The sale was made on the 14th of August 1863. The mills were, in fact, burned down by the Federal army in 1864, in confirmation and verification of the opinion expressed by Newton as aforesaid. There was then no ground of fraud on the part of Newton, or any of the parties to the partition suit, on which the decree in that suit can be impeached even as to them. Much less is there any such ground in regard to the purchaser at the sale, against whom, as he truly says in his answer, "no impropriety is alleged," and who "stands upon the legal validity of the proceedings under which he bought and now holds the property." He was a bona fide purchaser for value and without notice, under a decree of a court of competent jurisdiction, in a suit between proper parties; has paid up the full amount of the purchase money, and has been duly invested with the title by a deed regularly executed and recorded, and he is, therefore, entitled to hold the property against the claim of the plaintiff in this suit.

Of course what we have said must be considered as referring only to the question of the right of the plaintiffs to relief in this suit, and not to any right they may 509 *have to relief by any proceeding in the partition suit, or by an appeal from the decree therein. The latter question does not arise and cannot be decided in this case, and the record of the partition suit, upon which only it can arise, is not before us.

We think there is no error in the decree, and that it ought to be affirmed.

Decree affirmed.

510

*Eagles v. Hook.

August Term, 1872. Staunton.

Absent, BOULDIN, J.*

1. **Consolidation of Causes—What Amounts to.**—H brings two actions of debt against E, and the plea in both is payment. The parties agree that the suits shall be tried together, and there is one verdict and judgment for the amount of the debts in both actions. The court might have made an order to consolidate the actions; and the agreement was in effect a consolidation of the causes; and there was no error which can be set up for the first time in the appellate court.

2. **Form of Action—Objection to in Appellate Court.**—The note sued on in one of the actions was payable in good Virginia currency. There having been no objection to the form of the action in the court below, it cannot be made in the appellate court.

In June 1867, Robert S. Hook brought two actions of debt in the Circuit court of Highland county, against George and Samuel C. Eagle. The one was on a bond for \$420, bearing date the 4th of June 1862, and payable on the 1st of October of the same year. The other was on two bonds, one bearing date the 19th of March 1863, for

\$127.50, payable on demand in good Virginia currency, with interest from the 1st of October 1862; the other bearing date July 27th, 1863, for \$300 payable one day after date. There was a plea of payment in each case, and a joinder of issue thereon; and there was also a special plea that the bonds were given to be paid in Confederate States treasury notes, and in the first case a tender; but no issue seems to have been taken on these pleas.

The causes came on for trial on the 511 30th of April 1868, *when the parties agreed that they should be heard together; and the jury found a verdict for the plaintiff for the sum of \$716.32, with interest thereon from the 30th of April 1868, till paid; and the court rendered a judgment in favor of the plaintiff for this sum and interest; and his costs by him about his suits in this behalf expended. And the Eagles thereupon obtained a supersedeas from a judge of this court.

H. W. Sheffey & Bumgardner, for the appellants.

Woodson, for the appellee.

CHRISTIAN, J. delivered the opinion of the court.

Two actions of debt between the same parties were pending in the Circuit court of Highland county. The same plea was filed in each case, to wit: the plea of payment, and issues were made up on that plea only.

By agreement of the parties the cases were heard together before the same jury, which found a verdict in the following words: "We the jury find for the plaintiff the sum of seven hundred and sixteen dollars and thirty-two cents, with interest thereon from the 30th day of April 1868, till paid." A judgment was entered against the defendant for that amount.

There was no motion for a new trial, or in arrest of judgment, nor was there any objection taken in any form, either to the amount or to the form of the judgment. Neither the facts proved, nor the evidence heard, before the jury, are certified to this court.

It is now objected for the first time, in the appellate court, that the judgment is erroneous because there ought to have been a verdict and judgment in each action, instead of a general verdict and a judgment in solido.

The two actions being of the same nature, and between the same parties, it was a proper case for a consolidation of the actions, and the court might properly 512 ex mero *motu, have ordered the cases to be consolidated and heard together.

And while it would have been the most regular course to have entered a formal order of consolidation, the failure to make that entry is not such an error as can be taken advantage of in an Appellate court.

The agreement of the parties that the causes should be heard together, was in

*The cases were heard before his election.

effect a consolidation of the two actions. The parties and the court treated the two actions as one, and a general verdict and judgment in solido, not being objected to by the defendant, cannot be said here to be erroneous. It is clear the defendant, if there were error in the judgment, was not and cannot be injured by it. That judgment would be a complete bar to any suit which might be brought hereafter, upon either of the bonds, which had been the subject of one or the other of the two actions, and he was, in fact, benefited to the extent of saving the costs of trial of one action.

The other ground of error assigned, that in one of the cases the action ought to have been covenant instead of debt, is not well taken. The objection comes too late. It was not taken in the court below, and as the record does not present the question, it cannot be considered in this court. The judgment must be affirmed.

Judgment affirmed.

513

*Larue v. Cloud.

August Term, 1872. Staunton.

Absent. BOULDIN, J.*

1. **Payment by Check—Return of Check—Effect of.**—L owes C \$500, and in March 1862, C requests payment. L obtains a check on a bank in Winchester for the amount, endorses it, and sends it by his son to C, with directions to hand it to C, or if the son could not see her, to leave it with a friend for her. The son did not see C, and left the check with B, a relation of L, for C. In a few days B informs C he has the check for her, and the next day or the day after C sends her son for it, to whom B delivers it; and the son takes it immediately to Winchester, and there finds the banks shut up, and their assets sent to Farmville. The son thereupon returns it to B, who receives it, but does not inform L of it. The check having been returned by C to B and received by him, it is the same as if it had never been received by C, and she is entitled to recover the amount of her debt from L.

2. **Same—Same.**—After the return of the check to B and before L was informed of its return, a son of C, who is in the army, agrees that if he can get a furlough he will take the check to Farmville, and present it for payment; but he fails to get a furlough. The promise being on a condition which cannot be performed, is null, and L is still bound to pay C.

This was an action of debt in the Circuit court of Clarke county, brought in August 1867, by Mary E. Cloud against John B. Larue and John N. Buck. The suit was abated as to Buck upon the return upon the process, that he was no inhabitant of the county. Larue, who was principal in the bond, pleaded payment. The case was tried in July 1870, when the jury found a verdict for the plaintiff for \$425, the amount of the bond after deducting a credit of five dollars, with interest from the 9th of April

1861, upon which the court rendered

514 *judgment; and Larue applied to a

judge of this court for a supersedeas; which was awarded.

Larue took two exceptions to rulings of the court below. The first was to the opinion of the court giving several instructions to the jury on the motion of the plaintiff. This court did not pass upon these instructions; and it is, therefore, unnecessary to state them. The second was to the opinion of the court overruling his motion for a new trial, on the grounds that the instructions given were erroneous, and that the verdict was contrary to the evidence. The facts are sufficiently stated in the opinion of Judge Anderson.

A. Hunter and T. D. Ranson, for the appellant.

Conrad & Son, for the appellee.

ANDERSON, J. delivered the opinion of the court.

The case is briefly this, as presented by the record. John B. Larue executed his bond, jointly with another as his security, to Mrs. Cloud, on the 28th day of April 1861, for \$500 borrowed money, payable on demand. About the 1st of March 1862, he received a letter from Mrs. Cloud, requesting payment. He thereupon obtained a check from his son, William A. Larue, in these words: "Winchester, Va., March 4th, 1862. Current Funds. Bank of the Valley in Virginia pay to John B. Larue, or bearer, five hundred dollars"; which he endorsed and sent by his son to Mrs. Cloud, with instructions to hand it to her, "or failing to see her, to put it in the hand of some trusty friend to hand to her." His son failed to see her, and handed the check to William A. Buck, a brother-in-law of his father, at whose house Mrs. Cloud frequently stayed, with directions to hand it to her. Buck very soon after notified Mrs. Cloud that he had such check for her. And in the course of a few days Mountjoy Cloud, a son of Mrs. Cloud, called upon him for the check and got it. The next day,

515 *or the day after—witness thought the evening of the next day—the check was returned to Buck, with the statement that it was taken to Winchester, and there learning that the bank was shut up and its effects and money taken south, it was returned. Buck received it and put it away among his papers; but did not inform Larue of the fact that it had been returned. Was that such an acceptance of the check by Mrs. Cloud as imposed on her the duty and burden of following the bank up to Farmville, and there presenting it for payment?

Mrs. Cloud was not bound to receive the check at all. And she might have agreed to receive it as a payment of the bond, or she might have agreed to receive it conditionally and in a qualified sense. It was at her option. And the fact that it was promptly taken to Winchester, and that as soon as it was ascertained that the bank had been removed to Farmville, she returned it to the trusted friend of the drawer and

*The case was argued before his election.

endorser, who in this matter may be regarded as their agent; and the fact that he took it back, so far as the record shows, without objection, and filed it away amongst his papers, implies that she received it only for a qualified and limited purpose, to draw the money upon it at Winchester, to be applied as a credit upon the bond. But that if, for any cause, she could not draw the money upon it at Winchester, she was to have the privilege of returning it to Buck, from whom she received it, without affecting her right of action upon Larue's bond. This is a fair inference from the acts of both parties—the act of Mrs. Cloud in promptly returning the check, and the act of Wm. A. Buck in receiving it without objection. Whether Buck had authority or not from the drawer and endorser of the check to make such a qualified and conditional delivery of the check, cannot affect the liability of Mrs. Cloud, as there was no obligation on her part to accept it at all,

if, as is inferable, she consented to only such a *qualified and conditional acceptance. And Buck being the holder of the check as the agent of the drawer and indorser for its delivery, she was not bound to look beyond him to his principals. And having been put in possession of the check transiently for a brief period by Buck, and for a special purpose, and it being wholly unavailing for that purpose, she returned it to Buck, without having made any use of it, and he having received it, her relations to her debtor were in no wise changed by the transactions. She stood to him, and he to her, precisely as if there had been no sort of delivery of the check to her. The duty devolved upon Buck, and not upon her, to notify him that she was unwilling to accept of the check, and that no money had been paid upon it. It was no more her duty to inform the drawer or indorser of the check, after she returned it to their agent and he accepted its return to him, than it would have been if she had never touched it. What might have been her duties and liabilities if she had retained the check is another question, and does not arise in this case.

Nor is she liable because of the subsequent delivery of the check to her son William, for the purpose of presenting it to the bank at Farmville, on account of the non-presentment at that place. The acceptance through him was qualified and conditional. His proposal to take it for presentation at Farmville, was upon the condition that he could get a furlough from the army, to which he belonged, and only in the event that he could get the money, which was predicated of his getting a furlough, was he to deliver the "note" (bond) to the agent of Larue. He could not succeed in getting the furlough, and promptly returned the check to the agent, who received it. This qualified acceptance of the check could not affect Mrs. Cloud's right of action upon the bond, after the check was returned to the agent from whom it had been received and accepted by him.

Afterwards, in the latter part of the year 1863, Mrs. *Cloud agreed if William A. Buck, who still held the check, would present, or cause it to be presented, at Farmville, and get Virginia bank money for it, that she would receive the same in payment of the bond. Buck, through a friend, presented the check to the bank at Farmville, and requested payment in that kind of currency. But the bank refused to pay in anything but Confederate money. Mrs. Cloud not being willing then to receive Confederate currency, which had become greatly depreciated, for her gold debt, the money was not drawn. And then Mr. Buck, it seems for the first time, informed Larue that the money had not been received upon the check.

That he had not received notice earlier can create no liability upon Mrs. Cloud, as we have seen. It is much to be regretted that Col. Larue should be subjected to this loss. But it is not just that it should fall upon Mrs. Cloud. Nor is she liable in law. By no act of hers, or failure to do an act, which the drawer and endorser had a right to require of her, have they sustained any loss. It was competent for the agent, or his principal, the endorser, if he had been informed by his agent of the status, to have caused the check to be presented at Farmville, to have drawn the money, and tendered it to Mrs. Cloud in payment of the bond. And so desirous was she to have received payment, that it is probable she would have received it in Confederate money if it had been tendered before it became so much depreciated. For she seems not to have objected to the check as late as October 1862, because it was made payable in "current funds."

Exception was taken by the defendant's counsel in the lower court to the instructions given to the jury; and marked ability and much learning have been shown in argument by the counsel of plaintiff in error here, in support of those exceptions. But we do not deem it necessary to decide the many questions raised upon the *instructions, because we think, upon the facts certified, the verdict is right on other grounds, and ought not to have been otherwise, if the instructions objected to had been rejected. *Wilson v. Ches. & Ohio R. R. Co.*, 21 Gratt. p. 664; *Colvin v. Menifee*, 11 Gratt. 87. And, therefore, that it could not benefit the plaintiff in error to reverse the judgment on this ground and remand the cause. We are of opinion, therefore, upon the whole case, that the verdict of the jury is just and right, and that the court did not err in overruling the motion to set it aside and grant a new trial, and that the judgment should be affirmed.

Judgment affirmed.

519 *McClung's Adm'r v. Ervin.

August Term, 1872. Staunton.

1. *Confederate Money—Scaling.*—An agreement is entered into on the 1st of June 1863, for the purchase by M of E of one hundred head of cattle, for

which M was to pay E \$75 per head in current funds, to be paid to E when he demands the same: but the same is not to draw interest until after ratification of peace between the United States and Confederate States governments. The proof is that Confederate States treasury notes was intended by both parties to be the medium of payment, whether the payment was made before or after the peace. Nothing was said as to the mode of payment if there was no such currency. This was a contract to pay *in present*, and the debt should be scaled, and the amount fixed as of that date.

2. **Pleading—Bill of Exceptions—Verdict Contrary to the Evidence.***—A bill of exceptions to the refusal of the court to grant a new trial of a cause, on the ground that the verdict was contrary to the evidence, sets out the testimony of the witnesses, saying as to each, A proved, &c.; and at the conclusion says, and these being all the facts proved: there being no conflict in the testimony, the bill of exceptions is well taken.

This was an action of covenant in the Circuit court of Highland county, brought in May 1867, by William D. Ervin against William McClung's administrator, on an agreement in writing under the hands and seals of the plaintiff and William McClung, dated the 1st of June 1863, the material parts of which are as follows:

That said Ervin has this day sold to William McClung one hundred head of cattle of two and three years old, which are upon the Cow pasture farm of his father, in Bath county. Said McClung is allowed to leave as many of the said cattle on said farm as he thinks will do well; and keep them thereon, having the free use of said farm, as he may think proper, until the 1st of

October next, free of charge for pasturage. And said McClung, *on his part, in consideration of the premises aforesaid, and cattle and pasturage aforesaid, and the use of the farm as aforesaid, agrees and binds himself to pay to the said Ervin the sum of seventy-five dollars per head for said hundred cattle in current funds, to be paid to the said Ervin when he demands the same; but said price for said cattle is not to draw any interest until after a ratification of a treaty of peace between the United States and Confederate States governments.

The defendant appeared and pleaded "covenant not broken"; on which the plaintiff took issue; and the cause came on to be tried in October 1870, when there was a verdict and judgment in favor of the plaintiff for \$3,750, with interest thereon from the 10th of April 1865, till paid, and his costs.

When the verdict and judgment were rendered the defendant moved the court for a new trial, on the ground that it was contrary to law and the evidence. But the court overruled the motion; and the plaintiff excepted.

The bill of exceptions, after inserting the covenant, says the plaintiff introduced a witness, naming him, who proved, &c.,

stating his evidence at length, and so on with each witness; and in the same way it is stated, that the defendant introduced a witness who proved, &c. And after setting out the statements of the different witnesses, the bill of exceptions says, and these being all the facts proved, &c.

Among the witnesses introduced by the defendant, was James M. Seig, who drew the agreement. He said that at the time they entered into the agreement, McClung stated to the plaintiff, that he would buy his cattle for Confederate money; that he had on hand the money to pay for them, and that he would not buy unless he could pay in Confederate money. That plaintiff said he wanted to sell, and did not object to Confederate money, which he was willing at any time to receive; but that he did not wish to take it until he came back

521 from the war; *which he hoped and expected would be soon. That McClung remarked to the plaintiff, suppose you do not come back until after the war; and plaintiff replied he would take Confederate money at any rate, after the war; and thereupon McClung agreed to bargain for the cattle. That the contract was based on Confederate money, and nothing else was named. That witness explained to the parties, as he was writing the agreement, that current funds meant Confederate treasury notes, with which they expressed themselves satisfied; McClung remarking that he was willing for anything that would show that it was Confederate money. That McClung was reluctant to enter into the contract, fearing some difficulty about it; but that his objections were met by the assurance of the plaintiff, that he would take Confederate notes whenever he made the demand, whether the same was before or after the war. That nothing was said as to how the words "current funds" should be construed in case, when demand was made, there were no Confederate currency after the war; both parties seemed to run the hazard of Confederate currency after the war.

George A. Mays, who had been examined in chief by the plaintiff, was recalled after the defendant's evidence had been introduced, and stated that in the summer or fall of 1865, he met William McClung in the road, and in the course of their conversation McClung said that things had turned out differently from what anybody expected; that he was bound to pay the plaintiff in the currency of the country; that he had not made much or lost much, as he had used the money paying old debts with it. That McClung seemed to be suffering a good deal at the time from the disease of which he afterwards died.

Another witness for the plaintiff, William Ross, stated a conversation he had with McClung in July 1863, in which Mc-

Clung said he was to pay for the Ervin cattle *at the close of the war in currency. Witness remarked there was a risk in that, as the currency might change. McClung said he thought the cur-

*See Read's Case, 23 Gratt. 968.

rency would not be changed after the war.

The defendant introduced several witnesses who proved that \$75 a head in Confederate money was a high price in June 1863, for such cattle as McClung purchased of Ervin. That four or five years before the war, taking the first day of June in each year, such cattle would not have sold for more than from eighteen to twenty dollars a head; and for the same period since the war the price would have been about thirty dollars a head; and one of these witnesses stated that in the fall of 1864, he had, as agent of the Confederate government, bought a lot of cattle, which would average a hundred pounds more than Ervin's, at twenty dollars a head in gold. It was proved by another witness, that the cattle averaged in September 1863, seven hundred and forty-nine pounds. And another witness proved, that cattle that would graze to eight hundred pounds in the fall, would not exceed six hundred pounds, if that, on the first of the preceding June, the grazer calculating to add from two hundred to two hundred and fifty pounds to each bullock during the grazing season.

It was further proved, that McClung was confined to his bed from the 3d of September 1865, till he died, and that he had before the 3d of September been suffering for several months from a painful cancerous disorder in his side, of which he died in November 1865. Before the war he had been somewhat pressed for debt; but in 1862 and prior thereto, he had discharged his indebtedness to a great extent, and in 1863 was free from embarrassment and had abundant means at command. And one of the witnesses stated, that the money received by McClung for the cattle sold to one of the Confederate agents, including the cattle bought of the plaintiff, had not been used by McClung; a part of it
523 having been brought "home, where it remained until McClung's death, and the balance remaining in bank until the close of the war.

It was also proved, that on the 1st of June 1863, the ratio of Confederate States treasury notes to gold was that of seven or eight for one.

After setting out the facts proved, the bill of exceptions concludes: The court overruled the motion; being of opinion, that whilst the evidence proved to the satisfaction of the court, that it was in the contemplation of the parties that the contract was to be fulfilled and performed in Confederate States treasury notes after the war, that the Confederate States would then be established, and the said notes would be the currency of the established government, yet that in the judgment of the court the contract was impossible of execution by the course of events as originally intended, and the verdict of the jury was upon the facts proved substantially just and correct.

McClung's administrator applied to a judge of this court for a supersedeas to the judgment, which was awarded.

H. W. Sheffey, for the appellant.

William M. Robertson, Bumgardner & Terrill, for the appellee.

ANDERSON, J. There can be no doubt that the contract upon which this suit was brought, dated June 1st, 1863, was entered into with reference to Confederate money as the standard of value, and that according to the true understanding and agreement of the parties, it was to be fulfilled and performed in that currency. It was a contract in writing under seal for the sale of one hundred head of cattle, from three to two years old—mostly two years old—by the defendant in error, to the intestate of the plaintiff in error with the privilege to the purchaser of pasture on the farm of the former for as many of them as he
524 thought might do well, until the 1st *of October following, for the sum of \$75 per head "in current funds, to be paid to the said Ervin when he demands the same; however, said price for said cattle is not to draw interest until after a ratification of a treaty of peace between the United States and Confederate States governments." The contract does not specify any time for payment, but binds the purchaser to pay when Ervin "demands the same."

This is a contract, in effect, to pay in presenti. To pay when the seller "demands the same" is, in legal effect, the same as to pay on demand. *Stover Assignee v. Hamilton & al.*, 21 Gratt. p. 273. And it seems to have been so understood by the parties; otherwise they would not have deemed it necessary to make the stipulation which relieves the purchaser from the payment of interest from the date of the articles. And that stipulation, whilst it implies that the parties contemplated that it might not be paid until after the war then raging had terminated, does not imply that it was contemplated by the parties that it would be payable in any other currency than that of the Confederate States. For it shows that the parties looked to the termination of the war by treaty between the government of the Confederate States, as a sovereign power, and the government of the United States; from which it may be fairly inferred that the intention and expectation of the parties were that payment was to be made in Confederate currency, whether made before or after the termination of the war. This appears to have been the contract, as shown by the face of the instrument, and it is not contravened, but confirmed, by the parol evidence and the surrounding circumstances.

It is fully confirmed by the facts certified by the court of trial, as proved by Seig, the scrivener, who draughted the article of agreement, and was the only subscribing witness, who was present at the negotiations between the parties and heard all that passed. Nor is it invalidated
525 *by the facts proved by the witnesses, George A. Mays and Wm. Ross, as also certified by the court. By the last it

is proved that, in a conversation which he had with McClung in the latter part of June 1863, the latter said that he was to pay for the cattle at the rate of \$75 a head in the currency of the country after the war; and from what he said, witness understood that he expected to pay in Confederate currency. This evidence, though it is not so full nor so clear, is not at all in conflict with the evidence of Seig, nor with the import of the written agreement as construed. From the latter, it is evident that the parties contemplated that payment might be made after the war, and McClung may well have concluded that it would not be made until after the war. But as we have seen, the terms of the article imply that in that case it was to be paid in Confederate money. And this comports with the statement made by McClung to Mays. But it more clearly appears from the facts certified, as proved by Seig—as for instance, the statement, among others which might be mentioned, that McClung “was very reluctant to enter into the contract, fearing some difficulty about it, but that his objections were met by the assurance of said plaintiff that he would take the Confederate notes whenever he made his demand, whether the same was before or after the close of the war.” This view is also explanatory of the seeming conflict of the testimony of Wm. Ross.

Nor does the conversation detailed by the witness Mays, on his second examination, raise a question of credibility between him and the witness Seig. He says that in the course of the conversation between him and McClung, in the summer or fall of 1865, the latter said, “that things had turned out differently from what anybody expected; that he was bound to pay the plaintiff in the currency of the country; that he had not made much or lost much, as he had used the money paying old debts with it.” Admitting this conversation to have been correctly understood, remembered and detailed by the witness, it is not necessarily in conflict with the facts proved by Seig and implied by the written agreement. Both may be true, and the contract have been such as the article of agreement, more fully and clearly explained by Seig, shows it to have been. It only proves that soon after the war, when everything was in great confusion and uncertainty, before any act for the adjustment of Confederate contracts was passed by the Legislature, the intestate of the plaintiff in error met the witness in the road, his mind greatly disturbed with the condition of the country, “things having turned out differently from what anybody expected,” and suffering at the time from the disease of which he soon after died, he made the remarks attributed to him. He expresses the opinion, or fear, that he was now bound to pay this debt in the currency of the country, but consoles himself by saying that he had not made much or lost much, as he had used the money in paying old debts with it; when the fact was, as certified by the court of trial, that the money he

had received for the cattle he purchased from Ervin had all perished; and moreover, that in 1863 he was free from embarrassment and had abundant means at his command. The fact of this conversation, as proved by Mays, only shows that this troubled, suffering man was as mistaken in the grounds of his fears as to the obligation of his contract, as he was in the grounds of his consolation that he had used the money in paying old debts. And it appears that for the only purpose for which it was introduced, to show that McClung himself did not regard the contract as entered into with reference to Confederate treasury notes as the standard of value, or as solvable in that currency, it was rejected by the jury in their verdict, and by the court in its judgment, as entitled to no weight, for both are predicated of a Confederate contract. We do not, therefore,

527 *in reviewing this verdict, impinge the doctrine that it is the province of the jury to weigh the testimony, when we hold that such evidence ought not to weigh against the evidence of the subscribing witness and the written agreement, for in so holding we are evidently in harmony with the jury and the court of trial.

That it was a contract made with reference to Confederate currency as the standard of value, and according to the true understanding and agreement of the parties was solvable in that currency, may be implied from the following facts: that both the contracting parties were citizens of the Confederate States, and recognized the existence and authority of the Confederate government—one of them, Ervin, being then under marching orders to maintain its authority by the sword; that the place where the contract was made was within the territorial jurisdiction and power of that government, and recognized no other adverse to it; that Confederate currency then and there filled all the channels of circulation, and was received and paid out by both State and Confederate governments, and by the banks and individuals in all ordinary transactions—facts of public history; and that the price agreed to be paid for the cattle was not such as would have been paid in gold, being a high price, payable in Confederate money, at that time, according to the proof in the record; and these are strongly confirmatory of the facts proved by Seig and the construction given to the written agreement.

But it is contended that the bill of exceptions is not well taken, and cannot, therefore, be regarded by the appellate tribunal. It is certified that each fact and circumstance stated in the bill of exceptions was proved, and in conclusion, that these were “all the facts proved.” It appears, therefore, that it was the intention of the judge of the court of trial to certify what was, in his opinion, proved, and not merely what was testified, by the witnesses; and consequently, no issue as to the credibility

528 *of witnesses is submitted by the bill of exceptions to the appellate tribunal.

Therefore, upon the authority of repeated decisions of this court, which it is unnecessary to review, the bill of exceptions is well taken. I refer to *Ewing v. Ewing*, 2 Leigh, 337; *Carrington v. Bennett*, 1 Leigh, 340; and *Green v. Ashby*, 6 Leigh, 135. In this last case *Brockenbrough, J.* says: "It is well known that in trials before a jury circumstances are every day given in evidence which do not, of themselves, prove the fact which is in issue, but the fact itself may be inferred from those circumstances. The circumstances proved are facts, and the deduction to be drawn from them is also a fact. There is, then, a distinction between circumstantial facts and inferred facts. If there be no contradiction in the circumstances given in evidence, the appellate court may judge of the inference to be drawn as well as the trying court." Again he says, referring to the case of *Carrington and Bennett*: "If the trying court had contented itself with merely certifying the fact which it inferred, there would have been no mode of correcting the error of an improper inference deduced from admitted and proved facts, and there would have been no use whatever in signing a bill of exceptions in which the inferred fact was alone inserted." *Cabell, J.*, said: "In such case it is competent to this court, and it is its duty, to deduce from the testimony all such inferences of fact as the jury might have deduced from it." And *Tucker, P.*, said: "All that the rule (in *Bennett v. Hardaway*) requires is, that the appellate tribunal be absolved from the decision of the question, whether the testimony is true or untrue." And when the bill of exceptions states, as it did in *Carrington v. Bennett*, "that the witness proved so and so," and that "these were all the facts proved in the cause," this court must take it that the matter stated was proved to the satisfaction of the jury.

In *Patterson v. Ford*, 2 Gratt. 19, 529 there was a question *as to the credibility of the witness, and the certificate, after setting out the evidence concluded, "and this being all the evidence in the cause." And whilst *Baldwin, J.*, in delivering his opinion, intimates that *Carrington v. Bennett* was not authoritative, because the decision of a divided court of three judges, he expressly says it was not in point, there being no shadow of imputation there against the witness, and the certificate concluding "these being all the facts proved in the cause." But it is directly in point here. And although it was the decision of a divided court of three, *Cabell, J.*, who did not sit in that case, says in *Ewing v. Ewing*, which was decided shortly afterwards, that he approved of it, after having attentively considered it. And it is sanctioned and re-affirmed by a majority of the whole court, in *Green v. Ashby*, supra. And in the recent case of *Gimmi v. Cullen*, 20 Gratt. 450, it is recognized as authority. In that case it was held that the bill of exceptions was not well taken. And in assigning the reasons, *Joynes, J.*,

speaking for the court, says, "The language of the bill of exceptions, however, indicates that the intention of the court was to certify the evidence, and not the facts. It says the court certifies the following as the evidence in the cause." "Robert A. Lancaster deposed as follows." It says the other witnesses also introduced by the plaintiff, "testified, &c." In this case (he further says), there is no statement, as in *Carrington v. Bennett* for instance, that "these were all the facts proved;" nor any other expression to impair the force of the other words, and throw doubt upon the character of the certificate." Again, on p. 455 he says, He must have a certificate of the facts proved, or a certificate that the evidence was considered true by the court of trial; which would amount to a certificate that the facts stated in the evidence, were really facts proved. From the evidence certified in the former case, and from the facts certified in the latter, the appellate court will 530 *draw such inferences as a jury might reasonably draw." I conclude, therefore, that a bill of exceptions is well taken, though the evidence is stated in detail, if it is certified by the judge as facts proved, and is not materially conflicting, and there is no impeachment of the witnesses. As was said by *Brockenbrough, J.*, in *Green v. Ashby*, evidence admitted to be true, is in nowise different from facts proved.

I am of opinion, therefore, that upon the certificate of facts proved in this cause, it is competent to this court, and it is its duty, to review the judgment of the court of trial overruling the motion to set aside the verdict, and grant a new trial; and that upon a review of the facts certified, the contract upon which the suit is founded was, according to the true understanding and agreement of the parties, to be fulfilled and performed in Confederate treasury notes. This being so, is the verdict of the jury contrary to the evidence and the law?

It is true, as was said by *Baldwin, J.* in *Patterson v. Ford*, supra, that whilst the court may grant a new trial where the verdict is contrary to law and evidence, the duty of doing so is not always imperative; as where the verdict is adverse to a hard and unconscionable action or defence, or where it conforms to the substantial justice or equity of the case. In such cases the court may refuse to set aside the verdict and grant a new trial, although it is not warranted "by close deduction, or rigid analysis, or strict adherence to legal principles. The books are full of such cases, and the idea has been carried to great lengths, in oppressive or iniquitous actions or defences." But the power will be exercised, where it seems to be required, as in this case, in order to prevent gross injustice.

The court below was satisfied from the evidence, that the parties contemplated that the contract was to be fulfilled in Confederate States treasury notes after the war, that the Confederate States would then 531 be established, *and the said notes would be the currency of an established

government; yet in the judgment of the court, the contract was impossible of execution, by the course of events, as originally intended. If the contract as made by the parties, was impossible of execution according to the intention of the parties, could it be enforced at all, without making a new contract for them? is a question which naturally arises; but upon which I give no opinion, as it is unnecessary to the decision of the cause, and this court may not be fully in possession of the facts bearing upon that question, it not having been made in the court of trial. But however that may be, I think it is very clear, that in no aspect of the case, as presented by the record, is the defendant in error entitled to recover more than the value of the Confederate treasury notes, at the date of the sale, that being the date also of payment. Does the verdict exceed that value?

There are two modes prescribed by statute, by which the value of the Confederate money contracted to be paid, can be ascertained, when the cause of action grows out of a sale, or renting or hiring of real or personal property. One, by reducing the value to gold; the other, by the value of the property sold, rented or hired, in gold, at the date of the sale; as recently decided by this court in *Pharis v. Dice*, 21 Gratt. 307. In this case the jury seems to have adopted neither standard, but to have assessed the damages arbitrarily, without regard to any rule, but most probably as a compromise, if not capriciously. They allowed the plaintiff just half the amount of his claim.

The proof is that the value of Confederate money, at the date of the contract, in relation to gold, was from seven to eight for one. By that standard the value of \$7,500 of Confederate money as of the date of the contract, taking the highest value, was a fraction over \$1,071; and taking the lowest, was only \$937.50; and yet the verdict is for \$3,750. If there was no proof as
532 *to the value of the property at the date of the sale, or no satisfactory proof, the jury could only adopt the gold standard; I know of no alternative. The evidence in this cause furnishes no other criteria. There is no direct proof as to the value of the cattle, at the date of the sale. Indeed, there had been no sales for gold in that section, during that season. The proof is, that such cattle, for four or five years next preceding the war, were on the 1st day of June of each year, worth from \$18 to \$20 per head. And it was proved that in the fall of 1864, the Confederate government had purchased cattle in a neighboring county, at \$20 a head in gold, which would have weighed at least one hundred pounds a head more than the cattle bought by McClung from Ervin, which were proved to have weighed in the fall, after they had been taken from pasture, an average of seven hundred and forty-nine pounds and a fraction—say seven hundred and fifty pounds. Putting the cattle bought for gold in 1864, at eight hundred and fifty pounds

they were purchased at about two and one-third cents per pound in specie. At that price the Ervin cattle were worth in gold, according to their weight, after having had the benefit of the summer pasture, \$17.50 a head; which is a little less than the estimate of such cattle before the war. Put them at \$20, the highest price for such cattle before the war, in that neighborhood, and the verdict should not have exceeded \$2,000.

But the verdict greatly exceeds that. I am therefore of opinion, that the damages allowed by the jury are excessive, and that the verdict is plainly contrary to law and evidence; and that the judgment of the court below should be reversed, and verdict set aside, and a new trial directed.

CHRISTIAN, STAPLES, and BOULDIN, Js., concurred in the opinion of Anderson, J.

MONCURE, P., dissented.

The judgment was as follows:

533 *The court is of opinion, for reasons stated in writing and filed with the record, that the Circuit court erred in overruling the motion to set aside the verdict and award the defendant a new trial. Therefore, it is considered that the judgment be reversed and annulled and the verdict be set aside; and that the defendant in error pay to the plaintiff in error the costs by him expended in the prosecution of his writ of supersedeas in this court; and the cause is remanded to the said Circuit court for Highland county for a new trial to be had therein; which is ordered to be certified to the said Circuit court of Highland county.

534 *Wilson's Adm'r v. Barclay's Ex'or & als.

August Term. 1872. Staunton.

Dissolution of Partnership—Assignment of Chose in Action.—M. P. W and B were merchants and partners doing business in Lewisburg, Greenbrier county. W and B living in Rockbridge. In 1843, the partnership terminated, and the firm assigned to B, as a part of his input capital, the bonds of D for \$1,088, bearing date in 1842, and secured by deed of trust on real and personal property. In 1843, E and C, creditors of D, by judgment, rendered before the execution of the deed, filed their bill to subject the real estate of D to the payment of their judgment. B was made a defendant in this suit, but did not answer. He retained the bonds in his possession until 1848, and then sent them with other papers to an attorney for collection. In 1848, there was a decree in the suit of E and C for a sale of part of D's land; but it was never executed. At the May term 1849, N, another judgment creditor of D, made himself a party in the suit; and at the October term there was a decree for the sale of all the property, real and personal, of D. The sale was made in 1850: the personal property bringing but \$26.50; though it was in proof, that when the deed was made there was a tavern on the land, well furnished with furniture. In 1851, there was a final decree, applying the proceeds of the sale of the property—first, to pay the debt of E and C; second, the debt of N;

and third, the debt of B. The proceeds of sale satisfied the debts of E and C, and of N, but there was nothing left to be applied to the debt of B, except the proceeds of the personal property. At the time of the assignment the debt of D was considered good, but he seems to have had no property except what was embraced in the deed of trust. In 1860, the administrator of B filed his bill against the administrator and heirs of W, to recover W's proportion of the said bonds assigned to B. **Held:**

1. **Same—Same—Negligence by Assignee as to Prosecution.**—The negligence of B in having the suit prosecuted whereby interest on the prior debts was accumulated, and the property deteriorated, bars B's administrator from any recovery against the estate of W.
2. **Same—Same—Same.**—The negligence in enforcing the deed of trust by the sale of
535 *personal property, by which it was allowed to be lost to the trust, bars his recovery.
3. **Same—Same—Same.**—B not having done anything to recover the debt until 1848, and his administrator not having brought his suit until 1860, it is upon him to show clearly, that the money could not have been made out of D's property.
4. **Same—Same—Insolvency of Obligor.***—If D was insolvent at the time of the assignment of the bonds, or when he became so afterwards, if B relied upon D's insolvency as excusing B's prosecution of his suit against D, B should, as soon as he ascertained the fact, have given notice to his assignors, and should have offered to return the bonds; and not having done this, he cannot recover against them.

By an article of agreement under their hands and seals, bearing date the 5th of September 1836, Alexander T. Barclay and Dr. Hugh Wilson, of the county of Rockbridge, and Wm. Patton and Thomas Mathews, of the county of Greenbrier, entered into a partnership for conducting a mercantile business in the town of Lewisburg, under the name and style of Mathews, Paxton & Co., the business to be managed by Mathews and Paxton, and to continue for five years. Each of the parties was to put in a capital of \$3,000. At the end of the partnership, all debts or losses to be first paid; then the amount of capital furnished by each partner to be returned without interest; and then the net profits to be divided among them as follows: one-third to Mathews, one-third to Paxton, and one-third to be divided between Barclay and Wilson.

The business was continued until the end of the term, and the partners then proceeded to settle up the concern; and in part of his capital put in, Barclay received two bonds of John Deem, one for \$1,000, and the

other for \$38.56, both bearing date the 27th of July 1843, and payable on demand. These bonds were secured by a deed of trust on real and personal estate, and were assigned to Barclay by Mathews, Paxton & Co.

In March 1860, Barclay's executor 536 instituted a suit in *equity, in the Circuit court of Rockbridge county, against Wilson's administrator and heirs, in which, after setting out the foregoing facts, he says that Deem was much embarrassed, if not wholly insolvent, at the time of the assignment of his bonds to him, all of his property being covered by deed of trust or other liens. That Barclay had the deed of trust enforced, when a very small sum was realized. That the other partners thereupon became liable to pay him their proportion of this loss; and that Mathews had paid his proportion to Barclay, and Paxton had paid his part to the plaintiff; but that Wilson had not paid, and up to the time of bringing the suit, there was due from Wilson \$486.44, of which \$258.03 was principal. That Wilson removed to Texas, and died there in 1857 or 1858.

The prayer was for an account of the administration upon Wilson's estate, and payment of the amount claimed to be due.

Wilson's administrator answered, saying he had no knowledge of the facts stated in the bill, except what he had derived from the information of others, and the papers in the cause. He relied upon the statute of limitations, and also insisted that the negligence and delay of Barclay and his executor in prosecuting the claim had deprived him of all right to look to Wilson's estate for relief.

Thomas Mathews, examined for the plaintiff, after stating the assignment of Deem's bonds to Barclay to the amount of \$1,025.50, on account of his capital, states that they were at the time deemed available, as they were secured by deed of trust upon real and personal property. It, however, proved worthless, by reason of prior liens on the same property; and when sold, did not produce a price that reached Barclay's debt; and Deem had no other property. Witness, satisfied that nothing was made out of Deem, paid his proportion of the debt.

537 *A witness who had examined the records stated that on the 27th of July 1842, Deem executed a deed of trust on his real estate, to secure the bond of \$1,000 to Mathews, Paxton & Co., which was duly recorded. In August he executed another deed on his real and personal estate, to secure Erskine, and Erskine & Mathews certain debts. In 1843 Henry Erskine and others instituted a suit in chancery against Deem and others, the object of which was to enforce judgment liens upon his land, which were obtained prior to the execution of these deeds of trusts. The first decree in this cause was in October 1843, in favor of Erskine, Caperton and others, among them Mathews, Paxton & Co., for the debt secured by the deed aforesaid. At the May term 1849, John A. North filed a petition

*The principal case is cited among others in Merchants' Nat. Bank v. Spates, 41 W. Va. 87, 28 S. E. Rep. 685, as authority for the proposition that "if the assignee attempts to excuse himself for not suing, then he should immediately have demanded the money from the assignor with an offer to return the instrument assigned, that the assignor might take measures to recover from the maker."

in the cause, claiming to be a judgment creditor of Deem; and in the progress of the cause he obtained a decree. Various orders and decrees were made in the suit; by one of which, made in 1849, the land and personal property was sold in 1850, the personalty for \$26.50. On the 21st of May 1851, a final decree was entered, and the money was distributed, first, to the payment of the debts due to Henry Erskine; second, the debts due to North; and third, to the debt due Mathews, Paxton & Co. The two first debts were paid; but nothing was paid to Mathews, Paxton & Co., except the proceeds of the personal estate.

In 1848 John Echols was employed by Barclay as counsel to attend to the collection of the bonds transferred to him by Mathews, Paxton & Co. Among them was the debt of Deem. He says that when he came to collect this debt, he found it necessary to institute a chancery suit in Greenbrier county, there having been a deed of trust to secure the debt, and there being various other encumbrances on the property. The result of the suit and the sale was, that the property sold for barely enough to pay the encumbrances which were
538 *prior to Barclay's for this debt. He received in January 1851, twenty-five dollars from the trustee in the deed, from the proceeds of the sale of the personal property of Deem; and that was all he ever received on the debt, except what was paid by Mathews.

It appears certain that Deem was regarded as insolvent as early as 1847, and that from 1842 he had no property but that conveyed in the deeds of trust; several of the judgments against him were rendered as early as March and May 1830.

In September 1860, there was a decree for an account, and the cause came on to be finally heard on the 24th of April 1868, when the commissioner having reported the fourth of Deem's debt to be \$611.12½, of which \$258.13½ was principal, the court made a decree in favor of the plaintiff against Wilson's administrator for that amount, with interest on the principal from the 12th of April 1868, till paid, and the costs. And Wilson's administrator thereupon obtained an appeal to the District court of Appeals at Charlottesville, and the cause was afterwards transferred to this court.

Upon the suggestion of the judges, the record of the case of Erskine & others v. Deem & als., was brought up by consent; but the counsel for the appellee, after examining the record, withdrew his consent to its being considered a part of this record, and it is not in the possession of the reporter, though it is referred to in the opinion of the judge.

Brockenbrough, for the appellants.

H. W. Sheffey, for the appellee.

STAPLES, J. This is an appeal from a decree of the Circuit court of Rockbridge county, in a suit instituted by the executor of Alexander Barclay, deceased, against the

administrator and heirs of Hugh Wilson, deceased. It appears that upon the dissolution of the firm of Mathews, 539 *Paxton & Co., in the year 1843, of which plaintiff's testator and defendants' intestate were members, two bonds amounting in the aggregate to \$1,038.56, with interest thereon from their respective dates, were assigned to plaintiff's testator, as a part of the capital stock invested by him in said partnership. These bonds were never collected, as is claimed, in consequence of the insolvency of the obligor; and this suit was brought to recover the share or proportion for which the estate of Hugh Wilson is responsible.

I do not deem it necessary to consider the question so elaborately discussed at the bar, of the effect of the statute of limitation upon the plaintiff's right of recovery. In my view of the case, the want of due diligence, on the part of Barclay, in enforcing the trust deeds given to secure the debts assigned to him, and the long delay of his representative before instituting this suit, are sufficient of themselves, to defeat this claim.

The bonds in question were assigned to Barclay in March 1843. He retained them in his possession until the year 1848, and then, for the first time, placed them in the hands of an attorney for collection, along with other papers relating to the concern of Mathews, Paxton & Co. The attorney states, he found it necessary to institute a suit in chancery in consequence of the various encumbrances upon the property of Deem, the obligor in the bonds. This is no doubt a mistake; as at that time the suit of Erskine & Caperton was pending. That suit was brought in 1843; the object was to enforce the liens of various judgments against the real estate of Deem. Although Barclay was made a party to this suit in the beginning, it does not appear that he ever answered the bill, or manifested the slightest interest in the conduct of the cause. At the October term 1843, a decree was rendered for the sale of part of Deem's real estate. This decree was, however, never executed;

nor was any other step taken in the
540 case, until the year 1849. *At the October term in that year, another decree was rendered for the sale of all the real estate belonging to Deem; and directing proceeds of sale to be applied—first, to the judgments in favor of Erskine & Caperton; second, to the North judgments; and third, to the debt due to Barclay. The sale was made in 1850; and confirmed in the year 1851. It will thus be seen that the suit was permitted to remain seven years on the docket, without the slightest attempt on the part of Barclay to enforce the sale, either under the trust deeds, or the decrees of the court.

In the meantime, it is highly probable, the lands were deteriorating in value, while the interest was accumulating upon the debts having priority over those secured by the trust deeds. These deeds embraced several tracts of lands, upon one of which was

a hotel with its appurtenances, and also a large quantity of personal property of considerable value. There were also two other tracts not included in the deeds, but subject to the lien of the judgments. It does not appear what became of the personal property. It was probably consumed by the family, or sold and applied in discharge of other debts.

Although the Chancery court had taken jurisdiction over the real estate of Deem, there was nothing to prevent a sale of the personal effects under the trust deeds. These deeds were executed in July 1842, and the debts assigned in March following. By the exercise of the least diligence in enforcing a sale of the personal property, there cannot be a question but that Barclay would have realized the greater part, if not the whole amount, of his claim.

This is the aspect of the case as presented by the record brought here at the suggestion of the court, and filed in the cause with the consent of counsel. In as much, however, as that consent was given before the record was seen, and as the counsel for the appellee seems to apprehend that some injustice may thereby be done his *client, it is proper to consider the case very briefly without reference to the facts disclosed by that record.

After this long delay, it must be conceded that the laboring oar is upon the plaintiff. It is incumbent upon him to establish clearly all the facts necessary to fix the liability of the defendants. It was his duty—not that of the defendants—to show the quantity and value of all the property embraced in the deeds, and that no portion of the debts could have been made from a sale of that property.

None of the witnesses examined by him, tell us anything in respect to the personal property, or what became of it. It is true that Mathews, one of the partners, seems to have been satisfied of the insolvency of Deem, and to have paid Barclay his share or proportion of the bonds; but it is equally true that the other partners were not so easily satisfied, and have as steadily refused or declined to assume any such liability.

The testimony of the other witnesses examined by plaintiff, was given nearly twenty-five years after the date of the assignment, and the execution of the trust deeds, and relates to events and transactions with which neither was personally acquainted. It would be easy to show that all this evidence is wholly insufficient to establish plaintiff's case. It is clear, as a general rule, the assignee must sue the maker or obligor before he can resort to the assignor. This rule is varied where it is perfectly manifest a suit would be wholly unavailing. It is equally clear, that where the debt which has been assigned, is secured by a specific lien, it is the duty of the assignee diligently to enforce such lien before he can have any recourse against the assignor. If he fails to pursue this course, it is incumbent upon him clearly to show that the security was worthless, and that no loss or damage has resulted from his lack of dil-

igence. In the present case there is a manifest omission to establish these important facts.

542 *It will be borne in mind, that the assignment was made in the year 1843. If at that time the obligor was insolvent, as is claimed, the assignors were immediately liable upon the contract of assignment. It was the duty of Barclay then to institute his suit against his co-partners, or reasonably to notify them of his inability to collect the debt. Let it be conceded, however, that Deem's insolvency did not appear until the sale of his real estate in 1850. This suit was not brought until the year 1860—nearly ten years after the sale, and seventeen years after the assignment. After this long delay it is very doubtful, to say the least, whether there can now be a safe determination of the matters in controversy. The danger of injustice, from loss of information and evidence, is great. And what is more material, the remedy of the defendants over against others is greatly impaired, if not wholly destroyed, by death and insolvencies. Under such circumstances, a court of equity should refuse to afford a remedy, though no statute of limitations may directly affect the right of recovery. In *Wagner v. Baird*, 7 How. U. S. R. 234, 259, Mr. Justice Grier, quoting the observation of Lord Camden, that nothing but conscience, good faith and reasonable diligence, can call this court into activity, used this language: "Length of time necessarily obscures all human evidence and deprives parties of the means of ascertaining the nature of original transactions; it operates by way of presumption in favor of the party in possession." *Doggett v. Helms*, 17 Gratt. 96, and cases there cited; *Tazewell's ex'or v. Whittle's adm'r*, 13 Gratt. 329.

In *Deane v. Scholfield*, 6 Leigh, 386, Judge Cabell, in discussing the duties and obligations of assignees, said: "If the assignee attempts to rest it on the ground that he was under no obligation to pursue the maker, he must equally fail; for even admitting that he was under no obligation to pursue him, then he should immediately have demanded the money from the assignor, *with an offer to return the note, that the assignor might take measures to recover from the maker. It would be against all justice that the assignee of a note should seek to subject the assignor to its payment, after thus having held it up for years without any notification of his intention to hold him liable, and without offering him the means of saving himself by suing the maker."

These observations strongly apply to this case, and present controlling reasons for the rejection of the claim asserted by this bill. I think the chancellor erred in sustaining it; that the decree for this cause should be reversed and the bill dismissed.

The other judges concurred in the opinion of Staples, J.

The decree was as follows:

The court is of opinion, for reasons stated

in writing and filed with the record, that the said decree is erroneous. Therefore, it is decreed and ordered, that the same be reversed and annulled; and that the appellee, James H. Paxton, executor of Alexander T. Barclay, deceased, out of the assets of his testator in his hands to be administered, do pay unto the appellant his costs by him expended in the prosecution of his appeal aforesaid here. And this court proceeding to pronounce such decree as the said Circuit court ought to have rendered: it is further decreed and ordered, that the plaintiff's bill be dismissed, and out of the assets of the testator in his hands to be administered, that he do pay unto the defendants their costs by them about their defence in the said Circuit court expended; which is ordered to be certified to the said Circuit court of Rockbridge county.

544

***Markham v. Boyd.**

August Term, 1872, Staunton.

Record in Chancery Suit—Presumed Correct.—Upon a bill for a new trial of an action at law, on the ground of after-discovered evidence, the record of the case at law not showing what evidence was before the jury, or what facts were proved on the trial, and the chancery record not giving that information; and the same judge who tried the cause at law, having dissolved the injunction and dismissed the bill, the appellate court has not the materials to enable them to review the decree; but must presume it is correct.

In February 1855, William W. Boyd brought an action of ejectment in the Circuit court of Botetourt, against Jesse E. Markham, to recover a tract of four hundred and twenty-five acres of land, on Jennings creek, in said county. The case was tried in June 1857, when there was a verdict for the plaintiff. Markham thereupon moved the court for a new trial; but the court overruled the motion and rendered a judgment according to the verdict. No exception was taken to the refusal of the court to grant a new trial; and therefore, the record did not show what evidence had been introduced in the trial of the cause.

In January 1858, Jesse E. Markham filed his bill in the same court, against Wm. W. Boyd, in which he prayed for an injunction to the judgment in the ejectment case, and for a new trial of the cause, on the ground of after-discovered evidence. He afterwards filed an amended, and then a supplemental, bill. The case made by the bills was, that the land mentioned in the verdict was part of a thousand acres granted to Henry Banks on the 3d of August 1786; and Markham

claimed the same under John Milner, 545 who purchased of *Wm. B. Banks; and Wm. B. Banks claimed to have purchased of Henry Banks. At the trial Markham offered in evidence the copy of the deed from Henry Banks to Wm. B. Banks, which was upon the records of the County court of Botetourt; but it was objected to by Boyd, upon the ground that it had not been properly certified and recorded; and the court sustained the objection, and excluded the evidence. Markham was, therefore, unable to show any title to the land. Since the judgment in the ejectment cause—and indeed, since the filing of the original and supplemental bills (which had stated other after-discovered evidence), the original deed from Henry Banks to Wm. B. Banks had been accidentally discovered, and Markham, as he insists, is now able to show a perfect title to the land. This deed bears date the 11th of October 1827.

The bill also alleges that since the trial, an agreement between John Milner and John Scott, who was in possession of the land under one Tebbs, under whom Boyd claimed, had been discovered, which would have had an important bearing upon the time and fact of Milner's taking possession of the land.

Boyd demurred to the original, the amended and the supplemental bills, and also answered. He claimed title under two grants from the commonwealth, one to Abraham Dooly for four hundred and twenty-five acres of land, dated the 1st of March 1781, which covered a part of the land recovered in the ejectment suit; and the other to John Beale, dated the 22d of September 1797, for seventeen thousand five hundred acres, including the whole of the recovered land. This title of Beale afterwards came by regular conveyances to Wm. P. Tebbs; and there was evidence introduced of actual possession of the land by Tebbs by himself and his tenants, the last of whom was John Scott, from about 1805 down to about 1834 or '35, and possession by Milner, and those claiming under him, from that time; his possession having

546 *been acquired by his agreement with Scott, who agreed to rent from him, upon condition that he would hold him harmless from any claim against him by Tebbs' heirs; and who left the land in 1836. Though the agreement was not before the jury, there was a receipt in the handwriting of Scott to the same effect as the agreement.

Beside many deeds and other documents taken from the records of the courts of Botetourt and Rockbridge counties, there were a number of witnesses examined in this case by both the parties, as to the possession of the land by those under whom they respectively claimed, which was not introduced on the trial of the ejectment.

The cause came on to be finally heard on the 12th of October 1858, when the court was of opinion that the discovery by the plaintiff of the original deeds, and the written contract in the bills and proceedings mentioned, did not entitle him to relief in

*Record in Chancery Suit.—In Adams v. Hubbard, 25 Gratt. 186, the court said that the doctrine laid down in the principal case equally applies to awards as to verdicts, and was decisive of the case at bar.

Records Presumed Correct.—See Neale v. Farinbolt, 79 Va. 59, where the principal case is cited among others, as authority on this point. See Wynne v. Newman, 75 Va. 818.

equity. It was, therefore, decreed that the injunction be dissolved, and that the original and amended bills be dismissed with costs. From this decree Markham obtained an appeal to the Supreme court of Appeals at Lewisburg; and it was afterwards transferred to this court.

Barksdale, Smith and Elder, for the appellant.

Pendleton, for the appellee.

CHRISTIAN, J. delivered the opinion of the court.

The power of a court to set aside a verdict of a jury, and grant a new trial, upon the ground of newly discovered testimony, is one that is exercised rarely and with great caution. It will not be exercised but under very special circumstances. The party asking its exercise must show that he was ignorant of the existence of the evidence relied upon; that he was guiltless of negligence; and that the new evidence, if 547 it had been before *the jury, ought to have produced a different verdict. The newly discovered evidence must not only be material in its objects, and not merely cumulative, corroborative and collateral, but it must be such as ought to be decisive, and productive on another trial of an opposite result on the merits of the case.

These principles are well settled by the decisions of this court. In the case before us it appears that the appellee, Boyd, had instituted his action of ejectment against the appellant, Markham, in the Circuit court of Botetourt; and that at the June term of that court, in the year 1857, a verdict was found for the plaintiff (the appellee here) for the land in the declaration mentioned. A motion was submitted for a new trial, which was overruled, and a judgment entered in accordance with the verdict. No exception was taken to the judgment of the court refusing a new trial, and consequently neither the evidence nor the facts proved were certified.

In August 1859, Markham filed his bill, praying an injunction to said judgment, and praying that a new trial might be awarded, upon the ground that he had discovered, since the trial, material evidence which could not have been produced by the utmost diligence at the trial, and which was accidentally discovered afterwards. He found it necessary to file an amended bill, and a supplemental bill, which set out more distinctly the character and weight of the evidence, and the manner in which it was discovered. Neither of these bills profess to set out the evidence which was heard before the jury on the trial of the ejectment. An injunction was awarded; and upon a motion to dissolve the injunction, before the same judge who tried the ejectment case, there was much evidence submitted on both sides; but it is not pretended that all the evidence which was heard before the jury is in the record of the injunction suit.

This court, therefore, not having before it the evidence which was before the jury 548 in the ejectment case, cannot *possibly arrive at any satisfactory conclusion as to the relevancy or strength of the newly discovered testimony.

The judge who presided at the trial of the ejectment suit, and who entered the final decree dissolving the injunction and dismissing the bills in this case, is under the circumstances alone competent to decide whether the newly discovered evidence, if it had been before the jury, ought to have produced a different verdict. He has very clearly and decidedly expressed his opinion, in his decree dissolving the injunction. He says, "Assuming that the plaintiff has shown due diligence in preparing for his defence at law, it does not appear that the case before the jury would have been materially changed if the said original deed had been in the possession of the plaintiff at the time of the trial."

As to that portion of the land in controversy included in the Dooly patent, under which the defendant Boyd claims (this patent being older than the grant to Henry Banks with which the plaintiff seeks to connect himself), the said deed had no tendency to prove a better title in Markham. It appears that the defendant at the trial of the action of ejectment was permitted to show color of title; that he relied upon his adverse possession for a sufficient length of time, as he contended, to protect him under the statute of limitation; and upon these points parties were fully heard at law. It does not appear that upon another trial the discovery of said deed would enable the plaintiff to make out a stronger case upon another trial. As to the written agreement also alleged to have been discovered since the trial, the court says, "The written contract between Milner and Scott, in the bill mentioned, proves nothing that was not substantially proved at the trial. The receipt which was read in evidence, proves the same contract, in substance, which was proved by the written agreement." Such is the opinion of the court below declared in its decree.

549 *The deed and the written agreement referred to in the decree, constitute the newly discovered evidence upon which the appellant based his application to a court of equity for a new trial. Can this court say that the decree of the court below was erroneous in refusing to award a new trial, when the evidence which was before the jury in the ejectment case is not before this court? We certainly cannot do this in face of the fact, that the judge who heard all the evidence in the ejectment case, asserts in his decree, that the newly discovered testimony (of the relevancy and strength of which we can form no opinion), could not have had the effect to change the verdict of the jury. The decree of the Circuit court must, therefore, be affirmed.

Decree affirmed.

550 *Hilb for, &c., v. Peyton & als.

August Term, 1872, Staunton.

1. **Adjustment Act—To What It Applies.***—The § 1, of the act of March 3, 1865, known as the adjustment act. Sess. acts 1865-'66, p. 184, applies to all contracts made between the 1st of January 1862, and the 10th of April 1865; though the written contract on its face, specifies the medium in which it is to be paid.
2. **Confederate Money—Scaling.**—In June 1863 P borrows of H \$5,000 of Confederate treasury notes, for which P gives his bond payable two years after date without interest. In such funds as the banks receive and pay out. In action by H against P on this bond, the jury scale the debt as of the date of the bond, and render a verdict for that amount with interest from that day; and this verdict is approved by the court. The appellate court will not disturb it.
3. **New Trials.**—For the principles upon which a new trial will or will not be awarded, see opinions of ANDERSON and STAPLES, JS.

This case was decided at Staunton in 1871, and is reported in 21 Gratt. 386. It was in the list of cases decided, made out by the president, which was forwarded to the reporter to be reported. After that list was made out, a motion for a rehearing of the case was submitted to the court; but it was not acted on for some time, and the case was in print, before the fact that a rehearing was granted was brought to his attention.

This is an action of covenant in the Circuit court of Augusta county, brought in January 1867, by Simon H. Hilb, for Abraham Singer, against J. B. Peyton, and three others, on a bond in the form following: \$5,000. Two years after date, for value received, we promise and bind ourselves, jointly and severally, to pay to Simon H. Hilb, his heirs and assigns, 551 the sum of five thousand *dollars, without interest, and in such funds

as the banks receive and pay out. Witness our hands and seals. June 9th, 1863.

The defendants appeared and pleaded "covenant performed"; on which issue was joined; and the cause came on to be tried in June 1870, when the jury found a verdict for the plaintiff for \$625 in gold, with interest from the 9th of June 1863. Whereupon the plaintiff moved the court for a new trial, on the ground that the verdict was contrary to the law and the evidence; but the court overruled the motion; and the plaintiff excepted.

The bill of exception states, that the court overruled the motion, and expressed the opinion that the verdict was in accordance with the true understanding and agreement of the parties, and did substantial justice between them; and that while the evidence showed that it was to some extent, regarded by the parties as a contract of hazard, the hazard understood and intended was confined to the fluctuations of Confederate currency. Thereupon the plaintiff by his counsel excepting to the opinion and action of the court, prayed that the facts proven on the trial should be certified of record, which was done accordingly as follows:

The plaintiff introduced the bond (which has been already given), and proved that at the maturity of said bond, the funds received and paid out by the banks of Virginia, were greenbacks and national bank notes, which at that time were worth, as compared with gold, from \$135 to \$145 of currency to \$100 of gold. The plaintiff there rested his case; and the defendants on their part proved that the bond in controversy was given upon a loan of \$5,000 in Confederate States treasury notes; and there rested his case. Whereupon the plaintiff, Hilb, was introduced and examined to prove the true understanding and agreement of the parties, in respect to the kind of currency in which the contract was *to

552 be performed. He proved that he was engaged in business in Staunton; and was not a money lender; that when applied to by one of the defendants, for a loan of money, he declined; but upon a second application he agreed to make the loan upon the terms stated in the bond; and that in accepting these terms, he expected to receive, at the maturity of the bond, a currency better than that which he loaned. The defendants introduced J. B. Peyton, one of the defendants, who proved that he was the principal in the bond, and was the party with whom the negotiations were had. He confirmed the evidence of the plaintiff, as to his refusal at first to make the loan, and his subsequent agreement to loan on the terms stated in the bond. The witness proved that he regarded the contract, to some extent, as a contract of hazard; that he had faith in the Confederate cause; that when he made the contract he expected to discharge it in Confederate treasury notes; and that the hazard of the contract was the appreciation or depreciation of that currency. He wrote the bond. William H. Peyton, another of the defend-

***Parol Evidence as to Contracts under the Adjustment Act.**—Several cases cite the principal case as authority for the proposition that under the adjustment act "parol or other relevant evidence was admissible. in relation to all contracts made between those periods [1st of January, 1862 and 10th of April, 1865] whether in writing under seal or not under seal, as the means of understanding what was the true understanding and agreement of the parties as to the kind of currency in which they were solvable, or with reference to which as a standard of value they were made." See *Calbreath v. Va., etc., Co.*, 22 Gratt. 712; *Sexton v. Windell*, 23 Gratt. 536. Also, see *Wrightman v. Bowyer*, 24 Gratt. 434.

Verdict Contrary to Weight of Evidence.—The principal case is cited in *Steptoe v. Flood*, 31 Gratt. 342, as authority for the proposition that "when the judge who presides at the trial, and also sees and hears the witnesses testify, refuses to set aside the verdict, an appellate court, which has not that advantage, will not reverse the judgment upon the ground that the verdict is contrary to the weight of the evidence." The court in this case evidently had reference to the credibility of the witnesses alone. See note on "Bills of Exception" VII. A. appended to *Stoneman v. Commonwealth*, 26 Gratt. 887.

ants, proved the unwillingness of the plaintiff to loan Confederate treasury notes at first, but his subsequent agreement to do so upon the terms set forth in the bond; and that the verbal understanding between the parties prior to the loan, was correctly expressed in the bond. The defendants also introduced the scale of depreciation of Confederate treasury notes, showing that at the date of the bond, they were worth from seven and a half to eight for one in gold. And this being all the evidence, &c.

Upon the application of the plaintiff a supersedeas was awarded.

Fultz and G. M. Cochran, for the appellant.

Baldwin, for the appellee.

ANDERSON, J. The inducement to 553 the passage of the "act of March 3d, 1866, known as the adjustment act, is shown by the preamble. It was designed to establish some uniform and equitable rule for the adjustment of liabilities under contracts which were made, or obligations which were incurred, during the late war, on the basis of Confederate States treasury notes. To this end section one provides "that in any action, suit or other proceeding, for the enforcement of any contract, express or implied, made and entered into between the 1st of January 1862, and the 10th of April 1865, it shall be lawful for either party to show, by parol or other relevant evidence, what was the true understanding and agreement of the parties, either express or to be implied, in respect to the kind of currency in which the same was to be fulfilled or performed, or with reference to which as a standard of value it was made and entered into."

This section prescribes a new rule of evidence in actions, suits or other proceedings, for the enforcement of certain contracts. What contracts? Such as were made and entered into between the 1st day of January 1862, and the 10th day of April 1865. But is it applicable only to a particular class or description of contracts entered into between those periods? or to all except a particular class or description? The language embraces all, without exception. It is "any contract, express or implied," &c. It plainly embraces, therefore, all contracts made and entered into between those periods, whether written or not written, under seal or not under seal, express or implied—any contract. The only limitation is that it must have been made or entered into between the periods designated.

And what rule of evidence is authorized and prescribed in actions, suits or other proceeding, for the enforcement of such contracts? It is, that either party may show, by parol or other relevant evidence, what was the true understanding and agreement of the parties, either expressed 554 *or implied, as to the kind of currency in which the contract was to be fulfilled, &c. If the contract was not in writing, such evidence would have been

admissible, independent of this enactment. But it was the design of the Legislature to enlarge the rule, and to apply it to all contracts made between those periods, in order to ascertain what was the true understanding and agreement of the parties as to the kind of currency in which they were solvable, no matter what was the form of the contract or how expressed. The design was to get at the intention and true understanding of the parties, whether expressed or implied; and to this end it is enacted that it shall be lawful for either party to show it by parol or other relevant evidence. The language is very comprehensive—parol or other evidence that is relevant. The only limitation is that it shall be relevant. And such evidence is admissible, whether the suit be brought to enforce a contract in writing and under seal, or a verbal contract, an express or an implied contract—"any contract," if it were made and entered into between the periods designated. There is no exception of contracts under seal or in writing, and no qualification "to explain an ambiguity." With such restrictions and qualifications, there was no necessity for any legislative interference; for, subject to these limitations and restrictions, parol, or other relevant evidence, was admissible, independent of this legislative enactment. It is true that, in effect, it abrogates the common-law presumption that a contract to pay so many dollars was a contract to pay so much money in specie; and so far as the act of Assembly of October 20th, 1863, raises a conclusive presumption that contracts made after a certain period shall be deemed to be paid in a particular currency, it is in conflict with this act, and is in effect repealed thereby. Walker, per rep. v. Pierce, 21 Gratt. 722. But it is not restricted to this office. Every contract made between those periods is 555 *thrown open to the introduction of parol, or other relevant evidence, to disclose what was the true understanding and agreement of the parties, either express or to be implied, as to the kind of currency in which it was solvable, or in reference to which, as a standard of value, it was entered into. And such evidence is admissible to explain, vary or contradict the written evidence of the contract, with a view to ascertain what was the true understanding and agreement of the parties as to the kind of currency in which it was to be fulfilled, &c., to be weighed by the court, or jury, as the case may be. Such, in my opinion, is the obvious meaning of the act; and as its operation is limited to contracts for the payment of money in currency, made and entered into between the 1st of January 1862, and the 10th of April 1865, and extends to none other, there is no cause for alarm that the old and established rules of evidence, which do not allow written contracts to be varied or contradicted by parol evidence, may, in general, or permanently, be overturned. Whether the extraordinary condition of the country justified this extraordinary legisla-

tion in relation to contracts entered into during that period, and this departure from the well established rules of evidence in relation to them, was a question for the legislature. But I do not hesitate to say that, in my opinion, justice required it; and its operation has shown that its enactment was wise and beneficent.

With this construction and understanding of the law, it is clear that it was competent for either party in this cause to introduce parol or other relevant evidence, besides the evidence of the bond, to show what was the true understanding and agreement of the parties as to the kind of currency in which the bond upon which the suit is brought is solvable. It is expressed in the bond that it is to be paid "in such funds as the banks receive and pay out." In a former opinion in this cause, I imperfectly attempted to show that this language 556 unexplained "by other evidence," imports, although the debt was payable two years after date, that it was to be paid in such funds as the banks received and paid out at its date. I am still of that opinion. But it must be admitted that the parol evidence which was introduced rather militates against that construction, as the parties themselves seem to have considered that it might be payable in a better currency than the banks were then receiving and paying out. I shall therefore so treat it in what I have further to say.

In what sort of currency was it solvable, according to the true understanding and agreement of the parties? Did they contemplate or intend, in their contract, that it should be paid in United States or Confederate States currency? Whatever was the intention of the parties should be carried out. That is their contract.

The surrounding circumstances tend to show that they did not intend to contract for the payment in United States currency. They were both citizens of Virginia, which was one of the Confederate States, against whom the United States was waging a fierce and devastating war. By the laws of their country it was a penal offence to receive and pay out United States currency. "And even if they intended (I quote from the opinion referred to) that payment should be made in such funds as the banks were receiving and paying out at the maturity of the contract, they intended the banks which then operated in the State, or which might be afterwards created by the government of Virginia, or of the Confederate States, and be subordinate to those governments, and which dealt in funds which were created or authorized by the Confederate government, or by Virginia, as a member of the Confederacy. It was no part of their contract, and never entered their heads (so far as this record shows), that payment was to be made in such funds as were received and paid out by United States banks, or by banks which were subject to the 557 government of the United States, or in the currency of the United States government." Neither of them says, in

testifying, that it was contemplated that the war might terminate unfavorably to the Confederate States before the maturity of the bond, and that they contracted with reference to such a contingency. On the contrary, the proof is that whilst it was regarded, in some sense, a contract of hazard, the hazard was with regard to the appreciation or depreciation of Confederate currency. That is the testimony of the principal obligor, as to his understanding of the contract. And it is not contradicted by the obligee, or by any evidence in the cause. He says he expected to get a better currency. But he does not pretend to say that he expected to be paid in United States currency. If such was his expectation or understanding, the presumption is he would have said so. And not having said so, he must be understood to mean that he anticipated an improvement in the Confederate currency, and expected to be paid in a better Confederate currency. And so considered, his testimony is in harmony with the defendants'. If it were otherwise, his testimony is in conflict with the other testimony in the cause, and upon a well established rule, the bill of exceptions could not be regarded. I conclude, therefore, that the parties meant such funds as the banks of Virginia, as a member of the Confederacy, received and paid out. "They were receiving and paying out the same kind of currency which the plaintiff loaned to the defendants. And they were the only banks known to the parties." They had nothing to do with any other banks. I think, therefore, that the jury might well have concluded that the evidence did not satisfactorily show that it was the intention of the parties to make a contract of hazard contingent upon the result of the war.

This is an application to the appellate tribunal to reverse the judgment of the 558 court of trial overruling a motion to set aside the verdict of the jury, upon the ground that it is contrary to the evidence, upon a certificate of the facts proved upon the trial. In *Patterson v. Ford*, 2 Gratt. 19, 23, Baldwin, J. thus clearly states the law with regard to new trials. He says "the only power of the court is to set aside the verdict and to direct a new trial to be had before another jury; a power which is exercised when the case seems to require it, in order to prevent gross injustice, or to preserve obedience to the law; or to maintain the authority of the court in its exposition of the law to the jury; or where, from fraud or surprise, a fair trial has not been had on the merits. The court may grant a new trial where the verdict is contrary to law or evidence; but the duty of doing so is not in all cases imperative. There are various considerations which may be brought to bear upon its discretion, such as the doubtful character of the question, the hard or unconscionable nature of the action or defence, the belief that the verdict conforms to the substantial equity and justice of the case, the trifling value of the matter in controversy, and others that

might be mentioned." And he holds that courts may sustain verdicts "that attain substantial justice, though unwarranted by close deduction, or rigid analysis, or strict adherence to legal principles." He says "the books are full of such cases, and the idea has been carried to great lengths in oppressive or iniquitous actions or defenses."

Is this verdict a plain deviation from the evidence? Or is it necessary to set it aside, in order to prevent gross injustice? On the contrary, does it not attain substantial justice between the parties? And to set it aside, would it not be in furtherance of a hard and unconscionable action? Did the judge of the Circuit court err, therefore, in the exercise of a sound discretion, in overruling the motion to set it aside? He

certifies that the verdict was, in his 559 opinion, "in accordance with the true understanding and agreement of the parties, and did substantial justice between them; and that while the evidence showed that it was, to some extent, regarded by the parties as a contract of hazard, the hazard understood and intended was confined to fluctuations of Confederate currency." And now, although we might not be satisfied that the opinion of the judge is correct, that the verdict is in accordance with the true understanding and agreement of the parties, yet much respect is due to the opinion of the jury, whose province it is to weigh the evidence, "to estimate the force of circumstances, probabilities and presumptions, and to canvass intentions and motives"; and the judge who presided at the trial and heard all the evidence, being brought to the same conclusions with the jury, and all agreeing that the verdict attained substantial justice between the parties, and that to set it aside would be in furtherance of an inequitable, hard and unconscionable action, it is peculiarly a case proper for the appellate tribunal to refuse to disturb the verdict. The verdict allows the plaintiff interest from the date of the bond, and in other respects, may not be in strict conformity to legal principles, or to the contract between the parties; but these, if they be errors, are not to the prejudice of the plaintiff; and of them the defendants do not complain. I am, therefore, of opinion to affirm the judgment of the Circuit court.

STAPLES, J. This case was argued and decided at the last term of the court here. A motion was then made for a rehearing, which, by consent of counsel, was held under advisement until the November term in Richmond. The motion was, however, not acted on in Richmond in consequence of the great press of business upon the court during its winter session. While, however, the motion was under consideration, the opinion of the court accidentally found its way into the hands of the reporter, and is reported in the 21 vol. of Grattan.

560 When the mistake was discovered, it was too late to correct the error

without seriously retarding the publication of other cases then already printed. Under these circumstances, the report of the case has been much regretted by the judges; but it would not affect their solemn obligation to reconsider the decision previously made, if in the interest of justice and law such reconsideration was necessary and proper. To use the language of Judge Roane in *Dillard v. Tomlinson*, 1 Munf. 183, 199: "In coming to this decision in favor of a reconsideration, the court was justified by innumerable precedents in this court, in which the court has admitted its own fallibility and corrected its former errors. I will mention in particular the case of *Bedinger v. Commonwealth*, 3 Call, 461, in which this court disclaimed a jurisdiction which it had exercised in many former instances; two of which had also gotten into print (a circumstance which with upright judges certainly can make no difference), and in which the judges had also delivered *seriatim* opinions."

It is due to myself to state, that I was not satisfied with some of the views announced in the prevailing opinion, at the time it was delivered. Subsequent reflection satisfies me that my doubts were well founded, and that the doctrines enunciated in that opinion, in reference to the admission of parol evidence in this class of cases, should be considerably modified, if not entirely overruled. I propose now to give the reasons which have led me to this conclusion.

It will be observed that the bond which is the subject of controversy, bears date 9th June 1863, and stipulates for the payment, two years after date, of five thousand dollars, without interest, and in such funds as the banks receive and pay out. It is insisted, that the defendant cannot be permitted to show by parol evidence, that this contract, according to the true understanding and agreement of the parties, was to be performed in Confederate

561 States treasury notes. The argument upon this point is that the act of March 3rd, 1866, was rendered necessary by the use of the word "dollars" in a large majority of the contracts made during the war; and that its provisions do not apply where the parties have themselves stipulated the kind of currency in which the obligation is to be paid.

There are several objections to this construction. In the first place the statute makes no such distinction. It embraces every contract for the payment of the money or currency entered into within the periods designated by the act. The first section declares, that in any action or suit for the enforcement of any contract, express or implied, entered into between the 1st day of January 1862 and the 10th day of April 1865, it shall be lawful for either party to show by parol or other relevant evidence, what was the true understanding and agreement of the parties, either expressed or to be implied, in respect to the kind of currency in which the same was to be fulfilled

or performed, or with reference to which as a standard of value it was made and entered into. It is impossible that language could be more comprehensive. It applies to every contract within the periods mentioned, whether express or implied, whether by parol or by deed, whether payable in dollars simply or in currency. There is no restriction, no exception. And I do not think we are authorized, upon any considerations of apprehended hardship or mischief, or mere conjectures of legislative intention, to restrict the operation of the statute to a certain class of contracts, in violation of this plain and positive language.

In the second place a promise to pay a specific sum in "dollars," or to pay so many dollars, is a contract to pay a particular kind of currency. It is a contract to pay a specie currency. This is the legal effect of such a promise, according to universal understanding in Virginia. This rule has 562 of course been modified by the "legal tender acts; but the principle is not affected. Now it is well settled, that at common law parol evidence is not admissible to vary the legal effect of a written obligation. The reason is, that when the legal import is clear and definite, the intention of the parties is, for all substantial purposes, as distinctly and as fully expressed as if they had written out in words what the law implies. This principle received the unanimous approval of this court in *Woodward, Baldwin & Co. v. Foster*, 18 Gratt. 200. When, therefore, the obligor is permitted to show by parol, that in using the word "dollars" he did not mean either coin or legal tender notes, but a worthless depreciated paper money, he is permitted to apply the statute to an instrument of writing in which the kind of currency is specified, and to contradict the positive language, the express terms of his obligation.

It seems to me, therefore, the distinction sought to be made, in respect to the admission of parol evidence, between contracts which do, and those which do not, specify the kind of currency in which the debt is to be paid, is not sound. In the one case, the effect of the evidence is to vary the express terms, and in the other, the legal import of the instrument.

The same principle applies, when the obligation is for the payment of a specific sum in current funds at a future day. This as clearly imports a promise to pay in funds current at the periods of payment, as if it were expressed in so many words. And yet it is the constant practice under the statute, to permit either party to show by oral testimony, the real understanding to have been a payment in the money current at the date of the contract. *Meredith v. Salmon*, 21 Gratt. 762, and cases there cited; *Taylor v. Turley*, 33 Maryl. R. 500. If there is any substantial distinction between an obligation to pay in current funds and an obligation (like the present) to pay in such funds as the banks receive and pay out, I am unable to perceive it. As a general 563 rule, whatever *the banks receive and

pay out is current in the country; and whatever is current in the country the banks readily receive and pay out. The parties as plainly stipulate in the one case as in the other, the kind of currency in which the contract is to be fulfilled. And if parol evidence is admissible in one instance, it is equally so in the other. There is no substantial ground for the application of different rules of evidence in the cases.

It seems to be supposed, however, that a bond or note for the payment of current funds at a future day, is ambiguous on its face. In other words, it is not absolutely certain whether the parties had reference to funds current at the date or at the maturity of the instrument; and it is, therefore, competent to show what they really intended. This may be so. If, however, this reasoning be correct, and the statute is to be construed as only applying to instruments of doubtful meaning, there would seem to be but little necessity for its enactment; and but little good resulting from its provisions. It would not be difficult, however, to show that the bond now under consideration, is by no means free from ambiguity. The promise is to pay "in such funds as the banks receive and pay out." It is not a contract to pay in such funds as the banks shall receive and pay out; or may receive and pay out; or shall then receive and pay out, but such "funds as the banks receive and pay out." It is in the present tense, and may have reference to the currency in circulation when the instrument was executed. At any rate, it is a case peculiarly proper for the admission of parol or any relevant evidence, in order to ascertain the real understanding and agreement of the parties. Such evidence does not, in fact, necessarily vary or contradict the writing. It does not deny that the obligation was to be performed in bankable funds. Its object is simply to ascertain what banks were in the contemplation of the parties. Did they have reference to the

Virginia banks, the banks then in 564 existence, or *to the banks of some foreign government, thereafter to be established? Did they mean the currency then in circulation, recognized by the laws, the government and the people, or some other and better currency issued under the authority of a different government? Did they intend to speculate upon the loss of the cause, or having perfect confidence in its success, was it simply intended to provide against the contingency of paying a specie currency? These are enquiries important to be made in this case, and in all cases relating to the contracts of that period. They must have been in the mind of the Legislature when it authorized the true understanding and agreement to be shown without regard to the form of the instrument executed by the parties.

The rule that parol evidence is inadmissible to contradict or vary the terms of a valid written instrument, is a rule of the common law established by the courts, and founded upon considerations of public policy

and convenience. It is not confined to deeds and instruments of a more solemn nature, but extends to every class of contracts reduced to writing. A mere note of hand can no more be contradicted than a deed. The reason, as stated by a great author, is, it would be inconvenient that matters in writing made by advice and on consideration, and which finally import the certain truth and agreement of the parties, should be controlled by an averment to be proved by the uncertain testimony of slippery memory. It is, however, a mere rule of evidence. It is subject to many important exceptions and modifications, allowed by the good sense of the courts, to meet the exigencies of advancing civilization, trade and commerce. While recognizing the rule as unquestionable, and its authority as absolutely binding, the courts, in many instances, have frittered it away by nice and subtle distinctions, difficult to be understood or reconciled with the rule itself. But, however firmly the rule is established, it may be changed or modified, and 565 *even abolished, by legislative authority. In such case, the law does not impair the obligation of the contract, but resorts to other modes to ascertain what it is. This principle is laid down in *Cooley on Constitutional Limitations*. It appears also that a right to be governed by existing rules of evidence is not a vested right. These rules pertain to the remedy which a State gives to its citizens, and are not regarded as entering into or constituting a part of the contract, or as being the essence of a right. They are, therefore, at all times subject to the modification and control of the Legislature, like other rules affecting the remedy, and the changes which are enacted may be made applicable to existing causes of action, even in those States where retrospective laws are forbidden. It has, therefore, been held that a statute which modifies the common law rule excluding parol evidence to vary the terms of a written contract, was not objectionable as applied to existing causes of action. These principles received the unanimous approval of this court in the case of *Crawford v. Halsted & Putnam*, 20 Gratt. 211.

In enacting the statute now under consideration, it seems to have been the intention of the Legislature utterly to abrogate the common law rule which prohibits proof of any contemporaneous parol agreement where there is a written instrument. Instead of perplexing the courts with difficult questions, by confining, or attempting to confine, the operation of the statute to a certain class of contracts, the Legislature probably deemed it best to permit a full investigation in every case, leaving it to the good sense of judges and juries to give due weight to the plain unambiguous writings of the parties.

When we consider the extraordinary condition of affairs created by the war—the perplexity, the anxiety and confusion pervading all classes of society; the want of care, deliberation, and oftentimes of legal

counsel, in the preparation of written 566 instruments; the fact that *nineteenths of the people were participating, in some form, in the gigantic contest then being conducted; it is impossible to say that this innovation upon the common law is not founded upon wisdom and sound policy.

"It would be inconvenient," says Lord Coke, "that matters in writing, made by advice and on consideration, should be controlled by an averment of parties." How is it possible, with any degree of consistency, to apply that principle to a people, three-fourths of whose territory was overrun by invading armies, and whose minds were agitated with perpetual apprehensions of danger? Can it be said that matters put in writing at such a period were made by advice and on consideration? The Legislature has acted upon no such narrow and rigid rule of public policy. It has provided a remedy for evils growing out of an unprecedented condition of affairs, which should be liberally and beneficially applied by the courts.

It has been said that this construction of the statute unsettles the law, and is in conflict with previous decisions. I am not aware that this precise question has been before this court directly for adjudication. I am confident that no case can be found—not even the dictum of any judge of this court—inconsistent with the views here advanced. The cases of *Boulware v. Newton* and *Kraker v. Shields* have been cited, but those cases did not involve the point now under discussion.

In *Boulware v. Newton*, there was proof that the note in controversy was given upon a loan of Confederate treasury notes of their value at the time of the loan; but no effort was made, no evidence offered, to establish a parol agreement dehors the writing. Judge Rives, in delivering the opinion of the court, said the legal construction of the instrument received no aid from extrinsic evidence. There is not the slightest intimation that such evidence, if offered, would not have been received and considered.

567 The decision in *Kraker v. *Shields*, 20 Gratt. 377, was placed mainly on the ground that the vendor, in expectation of a better currency in a short time, expressly refused to sell his land except upon the terms of receiving the deferred instalments in money current when the bonds matured, and these terms were communicated to the purchaser and agreed to by him. In *Morgan's adm'x v. Otey*, 21 Gratt. 619; *Walker v. Page*, Id. 722; *Meredith v. Salmon*, Id. 762, parol testimony was admitted without objection, and relied on to show the real contract and understanding of the parties. These cases, if they have any bearing at all upon the question here, tend strongly to sustain the views now expressed. They are certainly not in conflict with anything I have said. The practice of the courts throughout the State, so far as my observation extends, has been in conformity with this construction. In the

meantime, no complaint has been made of the operation of the law, no effort made to secure its repeal or amendment, and no appeal taken to this court upon the ground of the improper introduction of *parol evidence* to affect the written contracts of the parties.

The learned counsel for the plaintiff seems to have construed the statute in the same way. In this very case he himself not only set the example of introducing *parol evidence*, but he allowed the defendant to do the same thing without objection. Neither in his petition, nor his oral argument before this court, did he raise any question of the kind. The objection was first made in the opinion of a majority of the judges.

I am now satisfied it is better for us—the part of wisdom and sound policy—to retrace our steps, and give our sanction to the general construction of this statute as adopted in the State. Any attempt on our part to distinguish between the cases—to apply the statute to particular contracts—will only confuse and mislead the courts and profession, and fill the docket here with appeals which otherwise would never be taken.

568 *On the other hand, the mischief, if any, resulting from a liberal construction of the statute, is very limited in its character. It is confined to written obligations for the payment of money entered into during the existence of the war, and predicated on Confederate States treasury notes. These are the contracts creating rights and imposing liabilities, perplexing alike to debtor and creditor, within the true intent and meaning of the statute. If this be an unwise and dangerous innovation, the remedy is not in the courts, but in the power that enacted the law.

My opinion then is, that the *parol evidence* adduced in this case was clearly admissible. Being admissible does it sustain or justify the verdict? Judge Anderson has so fully discussed this branch of the subject, I do not deem it necessary to do more than to devote a few moments to the consideration of the evidence. In the first place, it may be a question whether the Circuit judge has stated the facts, or merely the evidence adduced at the trial. It is true, that in the commencement of the bill of exceptions, he professes to certify the facts; but throughout he merely gives the statement of the witnesses; and in conclusion he says this being all the evidence. The judge, however, certifies, that in his opinion the verdict was in accordance with the true understanding and agreement of the parties, and did substantial justice between them, and that while the evidence showed that it was to some extent regarded by the parties as a contract of hazard, the hazard understood and intended, was confined to the fluctuations of Confederate currency. This is the conclusion drawn by the judge as well as the jury, from the evidence, and is, I think, entitled to as much weight as his certificate of the statements of the witnesses; and this upon the principle announced in *Slaughter v. Tutt*, 12 Leigh,

163. It was said in that case, that although "the facts may be certified by the judge, still respect should be paid to the

569 *verdict and judgment of the trying court, because in many cases a fair presumption might arise that a fact necessary to warrant or repel the inference drawn, had been omitted in the certificate of facts; and because that should be held as rightly determined which the facts do not show to be wrong. It is very clear that in this case the facts certified do not establish that the case was not rightly determined. See *Brugh v. Shanks*, 5 Leigh, 598; *Harnsburger's adm'r v. Kinney*, 6 Gratt. 287.

Conceding, however, that the verdict is not strictly warranted by the evidence, is it the duty of this court, under all the circumstances, to grant a new trial? The opinion of Judge Baldwin, speaking for the court, in *Patterson v. Ford*, 2 Gratt. 23, is an answer to the question. "The court (he said) may grant a new trial where the verdict is contrary to law or evidence, but the duty of doing so is not in all cases imperative. There are various considerations which may be brought to bear upon its discretion; such as the doubtful character of the question, the hard or unconscionable nature of the action or defence, the belief that the verdict conforms to the substantial justice and equity of the case, and others that might be mentioned." He further says, it is the constant practice of the court to sustain verdicts that attain substantial justice, though not strictly warranted by the evidence or strict adherence to legal principles. In illustration of this principle he cites the case of *Wilkinson v. Payne*, 4 T. R. 468. In that case the action could only be sustained by the presumption of a legal marriage, of which there was no evidence; though the fact might have been proved if it had occurred, and all the probabilities were against it. The jury, however, presumed the marriage and found a verdict for the plaintiff. A new trial was refused by the Court of King's Bench. Lord Kenyon, C. J., said: "In the case of new trials, it is a general rule, that in a hard action where there is some-

570 thing on which the jury have raised *a presumption agreeably to the justice of the case, the court will not interfere by granting a new trial where the objection does not lie in point of law. The same principle runs through all the decisions. Applications for new trials are founded upon the supposition that some injustice has been done; and without proof to that effect, it is believed that the applications are invariably denied."

"To induce the granting of a new trial there should be strong probable grounds to believe that the merits of the case have not been fully and fairly tried, and that injustice has been done." See on this subject, 2 *Graham & Waterman on New Trials*, page 48, where a large number of cases are collected, illustrating this principle: Also, 2 *Black. Com.*; 2 *Tucker Com.* 302.

These rules are laid down with reference

to applications made to judges in the inferior courts, who preside at the trial. They apply with much greater force when the appellate jurisdiction is invoked to set aside a verdict approved by the *nisi prius* judge.

In the present case, the claim is to a recovery of \$5,000 of principal money, and more than \$2,000 of interest, in a sound currency, upon a loan of \$5,000 in depreciated paper of the value of \$625, at the date of the loan. What is there in such a claim that should induce this court to interfere in its behalf? It is the contract we are told. The jury of the vicinage with the paper and both parties before them in explanation of its provisions, their motives and intentions, have said there was no such contract. The judge who heard the evidence, agrees with them. Conceding that an appellate court has the right to disturb such finding, is it under an imperative duty to do so? I think not. So thinking I will let the verdict stand.

Much has been said of the inviolability of contracts, and of the duty of enforcing them. All this meets my hearty concurrence. Not a word has fallen from me at any time, in opposition to this doctrine. But I repeat now what I have always said, that I am not inclined, if I can help it, to award to parties in the present currency, the nominal amount of debts contracted with reference to a highly depreciated Confederate currency. If this be the contract, plain, unmistakable, I suppose we must enforce it, if valid in other respects. But if there be any reasonable doubt as to the true meaning of the parties, that doubt should be resolved in the interests of humanity and justice.

These are my reasons for refusing a new trial in this case. It will be seen they are in conflict with the opinion delivered at the last term; in which I then expressed my concurrence. Upon mature reflection, I am satisfied the views then entertained are erroneous. If there are any disposed to criticise this change of opinion, I can only answer, that no false pride shall constrain me to adhere to opinions when convinced they are erroneous. Whatever may be my defects as a judge, to persist in conscious error is not one of them. I can afford to be right at the expense of consistency; but I cannot afford to be consistent at the expense of my conscience. In this I am fortified by the example and the teaching of great judges, who have not hesitated to retrace their steps taken in a wrong direction. There is one especially, a man of the purest character and the greatest learning who did not hesitate, on a memorable occasion, publicly to retract the opinions of a lifetime. I allude to Judge Cabell, one of the foremost chancellors of his generation. He was the great representative and advocate of the doctrine of fraud *per se*, as it was termed. His opinions on this question in various cases, were characterized by the greatest ability and learning. But when the memorable case of *Davis v. Turner*, 4 Gratt. 422, 471, was before this court, in

an argument of great length and power, he announced an entire change of opinion. He thus concludes: "Some of the opinions now expressed, are widely different from those which I have heretofore entertained. The revolution has not been effected without a struggle; not that I have for a moment permitted the pride of self-consistency to stand in the path of duty; but because from the very constitution of our nature, we feel a prejudice in favor of opinions long formed and often acted on, which for a time at least, closes our eyes against the light that would show that we have erred. But I am convinced, and I cheerfully retrace my steps, by heartily concurring in the judgment about to be pronounced, and which will restore the law to the solid foundations of good sense and sound reason, on which it originally stood. And Lord Hardwicke says, in *Galton v. Hancock*, 2 Atk. R. 438, in announcing an entire change of opinion upon a question before him, 'These are the reasons which induced me to alter my opinion, and I am not ashamed of doing it, for I always thought it a much greater reproach to a judge to continue in his error than to retract it.' Fortified by such examples, I have no difficulty in retracting my error.

BOULDIN, J. concurred in the opinion of Staples, J.; and he concurred in the opinion of Anderson, J., except that he did not think that the contract looked to the currency received and paid out by the banks at the date of the contract.

CHRISTIAN, J. dissented, and referred to his opinion delivered on the former hearing of the case.

MONCURE, P. concurred in opinion with Christian, J.

Judgment affirmed.

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*Phelps v. Seely & als.

August Term, 1872. Staunton.

1. *Rescission of Contract by Parol Agreement.**—By article of agreement under seal, S sells to H a lot of land, of which at the time H is in possession as tenant of S. Sometime afterwards, H informs S, that he cannot pay for the lot, and proposes to rescind the contract; which S consents to: and H informs S that P will buy the lot at the same price.

**Rescission of Contract by Parol Agreement.*—The rule laid down in the principal case, that a written contract creating an equitable lien, may be rescinded by a subsequent parol agreement partially acted on or fully performed is followed as authoritative in several subsequent cases. See *Jordan v. Katz*, 39 Va. 680, 16 S. E. Rep. 866; *Ballard v. Ballard*, 25 W. Va. 478.

In *Straley v. Perdue*, 33 W. Va. 375, 10 S. E. Rep. 784, the courts saying: "In the case of *Minor v. Edwards*, 12 Mo. 187, it was held that an acceptance of a deed of inferior value to such a one as the grantee is by his contract entitled to, as a compliance with such a contract, is equivalent to a waiver of such better title," cites the principal case, and *Jarrell v. Jarrell*, 27 W. Va. 748.

Stherenpon agrees to sell to P. and with the assent and at the request of H, S sells and conveys the lot to P. **Held:**

1. **Same—Valid.**—The written contract, whether delivered up or not, may be rescinded by a subsequent parol agreement, which has been fully carried out; and in this case the contract was rescinded.

2. **Same—Estoppel.**—The sale to P having been at the instance of H, and with his concurrence, even if the contract could not be rescinded by a subsequent parol agreement, H would be estopped in equity, by his own acts, from setting up the written contract.

2. **Resulting Trust by Parol Testimony—Absolute Deed a Mortgage.***—A resulting trust may be set up by parol testimony, against the letter of a deed; and a deed absolute on its face may, by like testimony, be proved to be only a mortgage. But the testimony to produce these results must, in each case, be clear and unquestionable. Vague and indefinite declarations and admissions, long after the fact, have always been regarded, with good reason, as unsatisfactory and insufficient. For comment on such evidence see the opinion.

***Resulting Trust Established by Parol Testimony—Absolute Deed a Mortgage.**—The principal case is cited and followed by many subsequent ones as authority for the proposition that a resulting trust may be established by parol testimony. But the evidence, to produce such results, must be clear and unquestionable. Loose, indefinite and vague declarations, especially when made long after the fact, are unsatisfactory and insufficient. See *Borst v. Nalle*, 28 Gratt. 436, and *foot-note* on Resulting Trusts; *Jennings v. Shacklett*, 80 Gratt. 771; *Kane v. O'Connors*, 78 Va. 76; *Sinclair v. Sinclair*, 79 Va. 42; *Moorman v. Arthur*, 90 Va. 477, 18 S. E. Rep. 869; *Riggan v. Riggan*, 93 Va. 90, 24 S. E. Rep. 920; *Throckmorton v. Throckmorton*, 91 Va. 48, 22 S. E. Rep. 162; *Donaghe v. Tams*, 81 Va. 143, 146; *Bright v. Knight*, 85 W. Va. 46, 13 S. E. Rep. 66; *Tennant v. Tennant*, 48 W. Va. 547, 27 S. E. Rep. 333, dissenting opinion of BRANNON, J.; *Troll v. Carter*, 15 W. Va. 563, 563. The principal case is also cited as authority for the proposition that parties to a deed absolute on its face, may, by parol evidence, prove the deed was intended as a mortgage or as a mere security for a debt. See *Snively v. Pickle*, 29 Gratt. 31, and *foot-note*; *Miller v. Bloese*, 80 Gratt. 744; *Edwards v. Wall*, 79 Va. 323; *Nease v. Capehart*, 8 W. Va. 125.

As to the weight of such parol evidence, see *Edwards v. Wall*, 79 Va. 323; *Donaghe v. Tams*, 81 Va. 151; *Kent v. Kent*, 83 Va. 312; *McDevitt v. Frantz*, 85 Va. 922, 9 S. E. Rep. 282, all citing the principal case as authority.

In *Troll v. Carter*, 15 W. Va. 563, the court citing the principal case, and many others, said: "So, too, all the authorities agree that an equitable claim of any sort, and especially one which depends on parol testimony only, will not be recognized after great lapse of time, during which time it has been ignored, where no satisfactory reason can be assigned for not setting up the claim sooner. And that this is more especially true when the equitable claim is of a character which required clear and explicit evidence to sustain it; such lapse of time itself rendering the evidence, which might otherwise have been regarded as sufficiently clear and explicit, unsatisfactory."

In October 1866, Mary A. Seely brought her suit in equity in the Circuit court of Augusta county, against Rachel Phelps and others purchasers from her, to enjoin the defendants from taking possession of a lot of ground in Staunton, and to redeem what she alleged was intended to be a mortgage upon the lot. The bill stated that about the year 1846, Horace Seely, the father of the plaintiff, purchased of A. H. H. Stuart lot No. 16 in the town of Staunton, 574 containing one acre; that he *took possession of it, and improved it by erecting a dwelling thereon, and occupied it until his death in 1859; that thereafter the plaintiff's mother occupied it until her death in 1864; and since that time, the plaintiff, the only child of Horace Seely, has held exclusive and adverse possession of said house and lot, by herself and through her tenants.

The price which Seely agreed to pay for the lot was \$400, which, owing to his limited means, the expense of improving the lot and his bad health, he found it inconvenient to pay. In this situation, Mrs. Phelps, an elderly widow lady, possessed of ample means, and member of the same church with Seely, offered to pay the purchase money for the lot, with the understanding that it should stand as security for what she paid, and Seely should have a right to redeem it at any time by refunding the money she might pay. In 1850 Mrs. Phelps procured a deed from Stuart, conveying the lot to her, without any trust, condition or reservation. The deed purports to be made in consideration of \$440, bears date 28th December 1850, was acknowledged on January 1st, 1851, but not recorded until March 1, 1855. Plaintiff cannot say what, if any, agency her father had in making said deed, but she knows from his repeated assurances, that he never intended to surrender or abandon his contract with said Stuart; and that his right to redeem the house and lot was just the same after the deed as before. Plaintiff charges that the deed to Mrs. Phelps was made with the express understanding and agreement between her and her father that said deed should be held by said Phelps as a mortgage, with the conditional right reserved by him to redeem, at any time, by repaying her the money with the interest. And plaintiff states that at the time of making the deed the lot with its improvements was worth perhaps \$1,000 or \$1,500. As soon as plaintiff had reason to believe that it was the intention of said Phelps to claim 575 said property, *plaintiff caused a tender to be made to her of the money she had paid, with interest on it, through a friend in Washington city, which said Phelps declined to receive.

The plaintiff stated that Mrs. Phelps had conveyed the lot to Aaron Shoveler, and eight others named, trustees for the Methodist Episcopal Church of the United States, by deed bearing date the 15th of September 1866, the consideration named therein being \$2,200; and she charges that said Shoveler

and others, at the time of taking said deed, had full notice in fact of her full right to redeem said property; and that they cannot claim the protection of purchasers without notice, as they have not paid the purchase money.

The bill charges that the said Shoveler and other trustees had, within a few days past, entered upon said lot, and are engaged in digging out the foundation for a church. And she prays for an injunction to restrain them, 'until she has an opportunity of bringing forward proof to sustain the allegations of her bill; and that she may be permitted to redeem said property by returning to Mrs. Phelps her money with interest, and for general relief. The injunction was granted.

Mrs. Phelps answered the bill. She says it is true that Horace Seely did contract with A. H. H. Stuart for the purchase of lot No. 16, in the town of Staunton; but this contract was dated the 11th of July 1843, not in 1846, as stated in the bill. It is also true that Seely took possession of said lot, and did erect on it a small dwelling-house, in which he resided until his death in 1859. After his death the widow of Seely continued to occupy said property, until her death in 1864; and since her death, which occurred during the war, the plaintiff was left in possession of the property. But it is not true that the possession of Horace Seely, or his widow, or the plaintiff, was adversary to the rights of the respondent;

but, on the contrary, said possession
576 was held *under this respondent as a matter of grace and favor extended to them by her.

The defendant further says: On the 11th of July, 1843, Horace Seely entered into the contract with A. H. H. Stuart or the purchase of the lot for the price of \$400, with interest from the 1st of November 1841. That Seely entered on the lot as lessee on the 1st of November 1841; and hence it was stipulated that the interest should commence from the date of possession. After making the contract Seely employed Wm. Grove to erect on the lot, a small frame dwelling-house, and executed to Grove two notes for \$77.88 each, dated 25th December 1843, which was about the time the carpenters' work was finished.

Seely having failed to pay the notes, Grove recovered a judgment against him, and he was taken in execution, under writs of ca. sa. and committed to jail. These executions were issued May 7th, 1845. About this time respondent came to reside in Staunton. Shortly after her arrival she learned the distressed condition of Seely and his family, and became interested in his behalf. Upon a conference with him it was agreed that Seely should abandon his contract with Mr. Stuart, and that respondent should become the purchaser from Mr. Stuart; she agreeing to give her bond to Mr. Stuart for the purchase money and unpaid interest, then ascertained to be \$440, and also to pay off the debts due to Grove, including costs and jail fees. Respondent's

only object in making this arrangement, was of kindness to Seely and his family. In accordance with this understanding respondent paid off the execution against Seely. He then called on Mr. Stuart and surrendered the contract of purchase, and delivered up to him the article of agreement; and a new agreement was then entered into between respondent and Stuart, by which she became the purchaser of lot No. 16. Since the institution of this suit, at the request of an agent of this respondent,
577 Mr. Stuart has *searched his papers and found the original contract between himself and Seely, which Seely had surrendered to him, and which he had happened to preserve as evidence of his being free to sell to respondent. And she exhibits it.

At the time of the purchase by respondent from Mr. Stuart, she paid to him a part of the purchase money, and gave her bond for the residue, which she afterwards discharged in full a short time before he executed the deed to her. She emphatically denies that she was mortgagee of the property, or that she bought it subject to any trust, condition or understanding with Mr. Seely, or any one else, that he was to have the right to redeem it by refunding the purchase money. Any such understanding or agreement would have been perfectly idle, because Mr. Seely was notoriously and hopelessly insolvent, and the whole transaction was founded on the knowledge of that fact. She thinks it altogether probable, that if, within a reasonable time after the purchase, Mr. Seely, by any good fortune, had been able to purchase the property, she would have let him have it at what it cost her; but she would have done so, not in consequence of any obligation, legal or moral, to do so, but purely as a matter of personal favor to him. She paid a full and fair price for the lot and house, according to the market value of property in Staunton at that date. Her purpose in making the purchase was to befriend Mr. Seely and his family; and in fulfilment of this purpose she allowed him to occupy the house and lot rent free, as long as he lived; and after his death she accorded the same privilege to his widow. And in the twenty-one years she has been the absolute owner of the property, she has never demanded or received one dollar of rent from the Seely family.

Respondent removed from Staunton many years since, and has but recently returned to live here. And she says it is not true that the plaintiff, at any time or place,
578 *made a tender to respondent of the purchase money and interest. But if she had done so, respondent would not have received it after the lapse of twenty-one years.

Shoveler and the other trustees answered, denying notice of the plaintiff's claim. They purchased the lot, believing Mrs. Phelps had a clear, unincumbered legal title to it, at the price of \$2,200, of which they had paid \$1,200.

A. H. H. Stuart, who was examined as a witness by the defendant, states that he sold the lot to Seely on the 11th of July 1843; though Seely had been in possession of it, as tenant, for about two years before that time. Seely held the lot a year or two, and did some painting for witness on account of the price. He then came to witness and stated he would be unable to pay for it, and proposed to surrender his purchase. To this witness agreed, and Seely surrendered to him the contract filed with defendant's answer. At the same time, or shortly thereafter, Seely informed witness that Mrs. Phelps would give witness \$440 for the lot, and witness agreed to let her have it. Mrs. Phelps accordingly became the purchaser, and made payments to witness from time to time, until the whole price was paid, and witness executed a deed to her for the property. Being asked, Was anything said to you by Seely or Mrs. Phelps, either when the contract was surrendered by Seely, or when the deed was executed to Mrs. Phelps, or at any other time, about Seely's having the right of redemption? the witness says: I have no recollection of having any interview with Mrs. Phelps on the subject; if I did, it has escaped my memory; nor have I any recollection of hearing anything from Mr. Seely in regard to the matter. He says the contract with Seely was in duplicate, and he thinks the paper filed with the answer is the copy which was in Mr. Seely's possession. It is in his handwriting, and my impression is it is the copy which he had and surrendered to me.

579 *N. J. B. Morgan, the son-in-law of Mrs. Phelps, in whose family she lived whilst in Staunton, and who was at that time minister of the Methodist church at that place, says he found Mr. Seely in the county jail, for a debt due to some one, whose name he did not remember, nor does he remember the amount of the debt; but it was for carpenters' work. He mentioned his case at home, and Mrs. Phelps and his wife felt much sympathy for him, and made arrangement to pay the debt. He was not formally Mrs. Phelps' agent, but he attended to some business for her with Mr. Stuart, in regard to a lot which had been purchased by Mr. Seely from Mr. Stuart. Mr. Seely was anxious for Mrs. Phelps to take the lot, on the ground that he could not pay for it. He thought the bargain a good one, and proposed to her to take his place in the purchase. Witness had frequent conversations with Seely on the subject. Mrs. Phelps agreed to his proposition, and purchased the property from Mr. Stuart, Seely giving up his contract with Mr. Stuart. Witness was privy to the whole transaction. Mrs. Phelps left Staunton with witness' family in January, or early in February, 1846; witness remained sometime after their departure, and closed up the business for Mrs. Phelps with Mr. Stuart, so far as arranging payments was concerned; and to his knowledge there was not any contract, stipulation or trust by which Mrs. Phelps

agreed to buy said lot for Seely; and there was no contract or understanding (so far as witness knew) by which a right of redemption of said lot, or anything of the kind, was secured by Phelps to Mr. Seely.

James F. Patterson was examined as a witness by the plaintiff. He says he was very intimate with Horace Seely, who told him of his arrangements with Mrs. Phelps; but at the distance of time he could not undertake to detail circumstances or statements then made. Seely showed him three letters

580 he had received from *Mrs. Phelps. In one of these letters Mrs. Phelps was repeating assurances which she had given him that she held the title to the lot in her own name, for the time being, that she might secure it to his wife and children. She reminded him that he was in debt, and assured him that she would secure it to his wife and children, and in that way he would be sure of a home; and that nothing could happen to her that would deprive the wife and children of the lot. I gave my interpretation to that part of the letter, by saying to Mr. Seely, that Mrs. Phelps had certainly made her will, and bequeathed the lot to his wife and children, so that, in case of her death, his family would be sure of the lot. My construction of that part of Mrs. Phelps' letter was received by Mr. Seely with marked satisfaction. All the letters were written in language a mother might address to a son. The sum Mrs. Phelps had paid for the lot was mentioned, he thinks, in two of the letters, which she expected he would be able to pay; but nothing was said about interest.

This witness further says: From the numerous conversations I had with Mr. Seely on the subject of the lot, and of Mrs. Phelps having a deed for it, but more particularly from the letters of Mrs. Phelps to Mr. Seely, of which I have spoken, my decided opinion has been, and is, that Mrs. Phelps, actuated by a strong feeling of sympathy and interest in the family of Mr. Seely, and having money at her command, paid the balance that Mr. Seely was owing on the lot, and took a deed to herself, with no other intention than to secure the lot to the family of Mr. Seely; and that upon being paid back the amount she had advanced, by Mr. Seely or his family, she would, in good faith, make a conveyance in fee simple to such member of Mr. Seely's family as he might direct, or might be entitled to it, and in that way carry out the understanding between herself and Mr. Seely.

581 *This witness further stated, that he saw the contract between Mr. Stuart and Mr. Seely, in the possession of Mr. Seely, in the handwriting of Mr. Stuart. He saw the contract on several occasions in the possession of Mr. Seely, prior to the arrangement with Mrs. Phelps, and he thinks he saw it in Seely's possession after that arrangement.

M. G. Harman, another witness for the plaintiff: He says he acted as agent for Mrs. Phelps at her solicitation, and his recollection is that he had several interviews

with Seely, and Mrs. Phelps was willing, at all times, that he should take the property by his refunding to her the money and interest she had paid for the property. Mr. Seely was extremely desirous to secure the property or a part of it, and proposed to cut off a small lot with the house, and sell the remainder to pay the amount which Mrs. Phelps had paid Mr. Stuart, with its interest. Mrs. Phelps' witness understood as doing this owing to the very kind feeling she entertained for Mr. Seely and his family. At witness' instance the lot was divided, cutting off about three-fourths, with the intention of having it sold off to pay the debt and interest paid to Mr. Stuart; but for some cause it was postponed. The balance of the lot, with the house, was to be Seely's, if the three-fourths cut off sold for enough to pay the principal and interest of the debt paid to Stuart. He thinks this was in 1858 or 1859; of the time he is not certain. In all witness' correspondence with Mrs. Phelps, she expressed a willingness that Seely should have the property on the terms mentioned; but he never was able to raise the money. It was, witness considered, a matter of favor on Mrs. Phelps' part to redeem the property, and give Mr. Seely an opportunity to repay her the amount she paid for it, with its interest.

A. D. Trotter, another witness for the plaintiff, refers to a correspondence he had with Mrs. Phelps in 1849 or 1850, with reference to the purchase of the lot, for 582 the *purpose of building upon it the Wesleyan Female Institution. He says terms were made with her provided we could arrange the matter with Mr. Seely, as to his interest or right in the property. He states how it was proposed to divide the lot, and what part Seely was to have; and that the trustees for whom witness acted, were to pay Mrs. Phelps the amount of her claim for the part they were to get; but the negotiation fell through. He says he was in Baltimore in the spring of 1856 or 1857, and met with Mrs. Phelps, who referred to a claim on the property occupied by Mr. Seely, and requested him to attend to the matter for her. He declined it; and recommended M. G. Harman. Sometime after this Harman called on witness and said he was Mrs. Phelps' agent, and told him that he arranged the whole difficulty for Mrs. Phelps with the Seelys, and had done better for her than she expected. Harman requested him to lay off for the Seelys one-fourth of an acre with the improvements; which he did; and the Seelys put their fence on the lines laid off by witness, leaving the balance of the lot uninclosed. The arrangement Harman thought he had made was not for some cause consummated, and the Seelys have continued to occupy the property. From all he could learn, he concluded that as Mr. Seely was much involved in debt, Mrs. Phelps, as his friend, undertook to advance the means to secure him a home, with the understanding that she must, upon being reimbursed, convey to or secure for Mr. Seely and his family the

property; and he was surprised when he learned that Mrs. Phelps asserted now that the Seelys had no right to nor interest in the property. Witness did not pretend to speak with distinctness, as lapse of time and exciting intervening events have done much to take facts from his memory, and he only gives his best impression and recollection.

The plaintiff introduced a letter from Horace Seely to M. G. Harman, dated 583 March 10th, 1856, in which he *says I am sorry it is not in my power to pay any part of the rent demanded by Mrs. Phelps. I cannot at this time raise a dollar. I would pay it without hesitation if it were possible. I can say, however, that by the assistance of my daughters, who are teaching school, that I expect to be able to pay a part by the end of this quarter, if possible the whole of it. As to rent, Harman says he has no recollection of ever having demanded rent, but from this letter he supposes he must have been requested to collect rent. His impression is he called to collect rent at the request of the Rev'd Mr. Phelps. He did not attempt to coerce the payment.

On the 29th November 1866, the administrator of Horace Seely was, by consent of parties, made a plaintiff in the cause. And then the cause came on to be heard, when the court held that Seely had surrendered absolutely his contract with Stuart, and that Stuart's conveyance to Mrs. Phelps was equally absolute and unconditional, and no mortgage was sufficiently established. But that under the circumstances of the case, Mrs. Phelps must be construed as having, in equity, taken the conveyance to herself with a resulting trust in favor of Seely, at the time he abandoned the Stuart contract in her favor. The court, therefore, whilst it dissolved the injunction as to Shoveler and the other trustees, referred the case to a commissioner, with directions to ascertain and report to how much of the proceeds of the sale of the house and lot the parties are equitably entitled, taking said Phelps as entitled to the proceeds of sale in proportion to her investment in the property, and Seely's administrator to the proceeds of sale in the proportion of the investment of said Seely, &c.

The commissioner made two reports, to both of which the defendant excepted. By the last he fixed the proportion of the purchase money of the lot to which Mrs. Phelps was entitled at \$1,555.55; and Seely's share at \$684.44.

584 *The cause came on to be finally heard on 21st of November 1867, when the court overruled the exception of the defendant to the last report, and made a decree that Mrs. Phelps should pay to Seely's administrator the sum of \$684.44, with interest thereon from the 15th of September 1866 till paid, and costs.

From this decree both parties obtained appeals to the District court of Appeals at Charlottesville. The case came on to be heard in that court on the 4th day of July

1868, when the court held that the deed from A. H. H. Stuart to Mrs. Phelps, though absolute on its face, was intended as a mortgage to secure to her the money advanced by her for the use of Seely; and reversed the decree of the Circuit court, and remanded the cause. Mrs. Phelps thereupon applied to a judge of this court for an appeal, which was allowed.

Stuart, for the appellant.

Fultz, Echols, Bell & Catlett, for the appellee.

BOULDIN, J. It is perhaps unnecessary to decide in this case, whether the written contract of the 11th of July 1843, between Stuart and Seely, could be waived or rescinded by a subsequent parol agreement, as it is apparent, as well from the theory of the bill, as from the proofs in the cause, that all that was done by Stuart in that respect, was done not only with the full knowledge and consent of Seely, but in fact at his instance and request. Under such circumstances Seely would be estopped in a court of equity from setting up any claim or interest in himself in derogation of the act of Stuart, thus assented to and authorized by himself. But the question, whether the contract of the 11th of July 1843, could be thus waived or rescinded, has been very earnestly and elaborately argued by learned counsel on both sides of this case; and it may be expected, and is perhaps proper, that the views of the court on that question should be expressed.

585 *No rule of law is better established as a general rule than this,—that a written contract, whether under seal or not, and whether relating to land or not, cannot be explained, varied, or controlled by parol evidence. But that is not the question before us. The question is, whether an executory contract in writing, creating an equitable interest in land, may not in equity be rescinded, waived or abandoned by a subsequent distinct and independent parol agreement between the parties, partially acted on or fully performed by them.

If part performance of an original parol contract be sufficient in a court of equity to withdraw the case from the operation and influence of the statute of frauds, as it unquestionably is, no good reason is perceived, why part or full performance of a subsequent distinct and independent parol contract, rescinding the former contract for full consideration, and substituting another in its place, should not in like manner withdraw the latter contract from the influence of the statute. The principle of the two cases would seem to be precisely the same.

But we are not left to mere analogy. The precise question seems to have been decided in more than one case both in England and America. In a note to the case of *Pym v. Blackburn*, 3 Ves. R. 34, 40, the annotator, after citing among other cases, the cases of *Goman v. Salisbury*, 1 Vern. R. 240, and

Legal v. Miller, 2 Ves. Sr. R. 299, says, "In each of the last two cases, an agreement executed according to the statute, was discharged by a subsequent parol agreement, of which evidence was given, on the ground of part performance. For this purpose the evidence must prove a distinct subsequent, independent agreement."

In the case of *Rich v. Jackson*, reported in a note to the subsequent case of the *Marquis of Townshend v. Stangroom*, 6 Ves. R. p. 334-5-6, Lord Hardwicke's opinion that parol evidence is admissible to rebut an equity, was approved; and it was held that the rule which denies 586 *the right to vary by parol the effect of a written agreement within the statute of frauds does "not affect the case of a subsequent, distinct, collateral agreement." And in *Price v. Dyer*, 17 Ves. R. 535, 363-4, Sir William Grant, after saying that the case then before him did not render it necessary for him to express an opinion directly on the question, whether a written contract in relation to land could be waived or discharged by parol, says, "But as at present advised, I incline to think, that upon the doctrine of this court such would be the effect of a parol waiver, clearly and satisfactorily proved;" but he goes on to say, "but here there was no such waiver. The waiver spoken of in the cases, is an entire abandonment and dissolution of the contract restoring the parties to their former condition."

Such, however, was precisely the character and purpose of the abandonment and dissolution of the contract in this case, between Stuart and Seely as proved by Stuart. The American cases are to the same effect as the English.

Mr. Hilliard in his work on Vendors, ch. 10, § 19, p. 173, says, "And the general rule is, that a written agreement within the statute of frauds may be varied by a subsequent parol, distinct and collateral agreement;" citing among others the following American cases, viz: *Dearborn v. Cross & al.*, 7 Cow. R. 48, and *Baldwin v. Salter*, 8 Paige R. 473.

In the first case, *Dearborn v. Cross*, the plaintiff sold a dwelling-house and distillery to the defendant, gave him a bond to make the title, took from him his several notes for the consideration, and delivered to him the possession of the premises.

One of the notes given in consideration of the sale, was afterwards put in suit; and the defence at the trial was, that the contract of sale had been rescinded by a verbal agreement between the parties; and that the plaintiff pursuant to that agreement, and with defendant's

587 *consent, had re-entered upon and rented the house, and finally sold the whole premises to another. The title bond, however, had never been delivered up or cancelled. The defence was overruled by the Circuit court, upon the ground that the contract could not be rescinded by a parol agreement of this description; that it could be discharged only by a release, or a sur-

render and cancelling of the contract. The case was taken to the Supreme court of New York, which held that no action would lie on the note, the whole contract of sale being discharged by the new, parol, executed agreement. The court say, p. 49, "The evidence given and that which was offered to be given, show not merely an executory agreement to rescind the contract, but an agreement executed and carried into effect, by a surrender of the possession and a subsequent sale of the premises." And after citing several pertinent authorities, the court goes on to say, "the defendant Cross, therefore, could not enforce this contract against the plaintiff; and there seems to be no necessity for sending him to a court of equity in order to restrain the plaintiff from collecting the notes, which were the consideration of the contract."

There is a very striking analogy between the case of *Dearborn v. Cross* and the case before us. There is in this case clear and conclusive proof of a subsequent, distinct and independent parol agreement, between Stuart and Seely, by which the contract of sale was abandoned and rescinded; and this agreement was acted on and fully executed by the subsequent sale of the property by Stuart to Mrs. Phelps, with the consent and at the instance of Seely, and by Seely's surrender in effect, of the premises to Mrs. Phelps by his acceptance of the position of her tenant. Under such circumstances, my opinion is, that the contract of sale, whether surrendered for cancellation or not, was wholly rescinded, and that the parties were restored to their former position.

The next and only other question 588 necessary to be considered *is, whether at the time of the deed from Stuart to Mrs. Phelps, or prior thereto, there was any understanding or agreement between Mrs. Phelps and Seely, that the money paid or to be paid by Mrs. Phelps for the land, should be advanced by her as a loan to Seely, and that she was to take a deed for the land from Stuart directly to herself, as a security for the loan. No such agreement appeared on the face of the deed; and if it existed it must be established by testimony. The question is, therefore, one of fact only.

Was any such agreement made? Mrs. Phelps, in her answer to the bill, denies emphatically "that she was mortgagee of the property, or that she bought it subject to any trust, condition or understanding with Mr. Seely, or any one else, that he was to have the right to redeem it by refunding to her the purchase money." She says that any such arrangement would have been perfectly idle, as Mr. Seely was hopelessly and notoriously insolvent, and the whole transaction was founded on the knowledge of that fact. She admits that she made the purchase with a view "to befriend Mr. Seely and his family," and thinks it probable that if, in a reasonable time, Mr. Seely had been able to repurchase the property at the price paid by her, she would have let him have it, not under any legal or moral obligation, "but purely

as a matter of personal favor to him." This is the substance of her answer, and it amounts to an emphatic and unequivocal denial of the loan and mortgage. Mr. Stuart, who sold her the property and made the deed, looked on it as an absolute conveyance to Mrs. Phelps, without reservation or condition, having heard nothing to the contrary from any of the parties. So far from it, when his contract with Seely was rescinded, the latter informed him that he was utterly unable to complete his purchase from him, but that Mrs. Phelps would buy the lot at the same price—\$440. If it was to be an advance for him, it is reasonable to suppose that *he would have said so, instead of speaking of it as a purchase by her. And Mr. Morgan, the son-in-law of Mrs. Phelps, and the active agent between the parties—privy, as he says, to the whole transaction—took the same view of the matter, never having heard, as he proves, of any loan or mortgage. On the contrary, he proves that Mr. Seely acknowledged himself unable to complete his purchase, and that he requested Mrs. Phelps to take his place and buy the property from Mr. Stuart; which she did.

This is all we have from the persons immediately cognizant of and party and privy to the transactions occurring at and prior to the date of the deed, except the subsequent admission of Seely himself, that he was debtor to Mrs. Phelps for the rent of the property, and would pay it when able—an admission utterly inconsistent with the idea that he owned the property, subject only to an encumbrance. Against all this there is nothing in the record but the loose and unsatisfactory testimony of several witnesses, testifying to vague and indefinite declarations and admissions of Mrs. Phelps, made long after the date of the transaction—declarations and admissions not only having no direct reference either to a loan or mortgage, but all of them applying as forcibly to the position of Mrs. Phelps as to the pretensions of the appellee.

There is no doubt that a resulting trust may be set up by parol testimony against the letter of a deed; and it is also true that a deed absolute on its face may, by like testimony, be proved to be only a mortgage; but the testimony to produce these results must, in each case, be clear and unquestionable. Vague and indefinite declarations and admissions long after the fact, such as have been relied on in this case, have always been regarded—and I think with good reason—as unsatisfactory and insufficient.

In *Lench v. Lench*, 10 Ves. R. 511, 590 517-18, Sir Wm. *Grant, speaking of parol evidence of subsequent admissions or declarations to establish a trust, says: "The witness swears to no fact or circumstance capable of being investigated or contradicted, but merely to a naked declaration of the purchaser admitting that the purchase was made with trust money. That is in all cases most unsatisfactory evidence, on account of the facility with which it may be fabricated and the impossibility of con-

tradicting it. Besides, the slightest mistake or failure of recollection may totally alter the effect of the declaration."

And so in *Bostford v. Burr*, 2 Johns. Ch. R. 405, 411, Chancellor Kent, commenting on the parol testimony by which a trust was sought to be engrafted on a written instrument, says: "This is a remarkable instance of the inaccuracy and fallacy of parol testimony, and shows the great danger there is of giving much latitude to these implied trusts founded on naked declarations in opposition to the solemnity and certainty of written documents."

The case of *Bostford v. Burr* will be found, in all of its essential features, to be very much like the case before us, but with this difference, that the testimony in that case tending to establish parol admissions of the trust was much more direct and pertinent than any offered in this; yet Chancellor Kent held that it was wholly insufficient to change the terms of the deed. He said, page 412, "all the proof seems to consist of the confessions of the defendant; yet those confessions will, most of them, apply as well to the pretence of the one side as the other"; and in noticing and commenting on the testimony, he quotes, with approbation, the language of Sir William Grant in *Lench v. Lench*, already referred to.

Now, it will be seen that Mrs. Phelps had always expressed a willingness and a purpose "to befriend Mr. Seely and his family"—to provide for them a home 591 in "their destitute condition—not, however, as a matter of obligation and contract, but purely of kindness and favor; and she admits in her answer that she purchased the property with that view, and would, within any reasonable time, have re-sold it to Seely at the same price, had he been able to make the purchase. All her acts and declarations, as proved in the cause, are entirely consistent with this position. By none of them did she ever admit that there was either a loan or a mortgage: on the contrary, Col. Harman, one of the witnesses relied on to establish the mortgage, proves distinctly that he regarded the provision intended by Mrs. Phelps for Mr. Seely and his family to be purely a matter of favor.

My opinion is, that such testimony, long after the execution of the deed, is not sufficient to alter and overthrow its plain terms, supported as it is by the statements on oath of Mrs. Phelps, in her answer; by the direct and positive testimony of Morgan, the active agent between the parties, privy to the whole transaction; by the positive and negative testimony of Stuart, the grantor; and by the subsequent solemn admission of Seely himself, in writing, that he was debtor to Mrs. Phelps for the rent of the property, and would pay the same when able.

Upon the pleadings and proofs in the cause my opinion is, that from and after the date of her purchase from Stuart, Mrs. Phelps was entitled to the property in con-

troversy absolutely, and without reservation or condition, whensoever she might think proper to demand the possession thereof; that as matter of favor, and not of contract, she allowed Mr. Seely and his family to enjoy the property without rent for more than twenty years—until, in fact, both Seely and wife, the chief objects of her bounty, were dead; and that in so doing she fully discharged all obligations of duty and charity.

The decrees of the District and Circuit courts must be *reversed, with costs to the appellant, and the bill dismissed.

MONCURE, P., and CHRISTIAN and ANDERSON, Js. concurred in the opinion of Bouldin, J.

STAPLES, J. dissented.

The decree is as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the said decrees of the said District court and the said Circuit court are both erroneous. Therefore, it is decreed and ordered that the said decrees of the said District court and of the said Circuit court be reversed and annulled; and that the appellees, Mary A. Seely and Samuel Paul, sheriff of Augusta county, and as such administrator of Horace Seely, deceased, out of the assets of his intestate in his hands to be administered, do pay unto the appellant his costs by him about his suit in this behalf expended, and also his costs in said District court expended; and this court proceeding to pronounce such decree as the said Circuit court ought to have rendered: it is further decreed and ordered that the plaintiff's bill be dismissed, and that she do pay unto the defendants their costs by them about their defence in the said Circuit court expended; which is ordered to be certified to the said Circuit court of Augusta county.

Decree of District court of Appeals and Circuit court reversed.

593 *Hansbrough & Wife v. Stinnett.

August Term, 1872. Staunton.

1. Jurisdictional Amount—Supreme Court—Fraud.*—On the trial of an action for slander, in the progress of the trial, the defendant takes several exceptions to the rulings of the court. The jury find a verdict for the plaintiff for \$500; and the plaintiff by his counsel, releases upon the record five dollars

*Jurisdictional Amount.—The principal case is cited in *Fink v. Denny*, 75 Va. 667, and *Cox v. Carr*, 79 Va. 35, as authority for the statement that parties can neither confer on, nor rob a court of, jurisdiction, by improper devices.

In *Todd v. Gates*, 20 W. Va. 470, the court, citing the principal case as authority, said: "If, therefore, in this case, it had appeared before the justice, or on the trial in the county court, that the plaintiff's claim, or amount sued on, was an entire sum, exceeding the jurisdiction of the justice, and that the plaintiff by feigned credits or otherwise had reduced it to an amount within the jurisdiction of the justice,

of the damages assessed by the jury, and the court renders judgment for \$495; to all which the defendant objected at the time. The release was in fraud of the jurisdiction of the Supreme court of Appeals, and is void; and this court has jurisdiction to hear and decide the cause, upon appeal.

In an action for slander in the Circuit court of Botetourt county, in which Richard Stinnett was plaintiff and Hiram Hansbrough and Ann his wife, were defendants, the cause came on for trial at the April term 1872 of the court, when the jury found a verdict for the plaintiff, and assessed his damages at five hundred dollars. The defendants thereupon moved the court to grant them a new trial; but the court overruled the motion. And the plaintiff by his attorney then in open court released five dollars, parcel of the damages found by the verdict of the jury; and the court rendered a judgment in favor of the plaintiff against the defendants for four hundred and ninety-five dollars, the residue of the damages found by the jury, with interest from that day, and costs.

The defendants objected to the release of the five dollars, part of the damages; but the court overruled the objection, and permitted it to be done: and the defendants excepted.

The defendants had taken several other exceptions in the progress of the trial; and applied to a judge of this court 594 *for a supersedeas to the judgment; which was awarded. The cause being thus pending in this court, the appellee moved the court to dismiss the supersedeas for the want of jurisdiction, the judgment of the court being as was alleged for less than \$500.

Pendleton, for the motion.

Hansbrough, against it.

MONCURE, P. read the judgment of the court.

Upon a motion to dismiss the supersedeas awarded in this cause, for the want of jurisdiction, the judgment of the court below, as is alleged, being for a less sum than \$500.

This day came again the parties by their attorney, and the court is of opinion that the release given by the attorney of the plaintiff, in the court below, of five dollars of the damages, amounting to five hundred dollars found by the verdict of the jury, was given for the purpose of depriving this court of appellate jurisdiction in this case; that the said release for the said purpose is unlawful and void; and that in regard to the question of such jurisdiction, the judgment of the court below must be considered as having been rendered for the said sum of five hundred dollars, the damages aforesaid,

or sued upon only a part of it, and it was not shown during the trial that such claim was subject to *bona fide* credits, set-offs or counterclaims, sufficient in amount to reduce it to a sum of which the justice has jurisdiction, the court should have dismissed the action as *coram non judge*."

instead of for the sum of four hundred and ninety-five dollars, the residue of the said damages, after deducting the said sum of five dollars. Therefore, it is adjudged and ordered that the motion to dismiss the case for the want of jurisdiction, on the ground that the judgment of the court below is for less than five hundred dollars, be overruled, and that the defendants recover against the plaintiff in the said motion, their costs by them about their defence in the same expended.

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*Wartman & als. v. Yost.

August Term, 1872, Staunton.

1. **Set-Off—Statute.**—Y brings an action of debt upon a bond against W and two others, W being the principal in the bond. The defendants seek to set off a judgment recovered by P against Y, which had been assigned to W. **Held:**

1. **Same—Same.**—Under the statute, Code ch. 172, § 4, the judgment is a good set-off to the bond, though the debt sued for is against W and two others, and the judgment is assigned to W; and though the plaintiffs' claim is legal and the claim of W is equitable.

2. **English and Virginia Statutes.**—See the opinion of *Moncure, P.* for the difference between the English statute of set-off and that of Virginia.

An action of debt was brought in the County court of Rockingham county, by S. M. Yost against John H. Wartman, Giles Devier and H. T. Wartman, on a joint and several single bill obligatory, executed by the defendants on the 15th day of July 1868, for the sum of fifteen hundred dollars, with interest from date, payable on the first day of January 1869. The defendants pleaded payment, on which issue was joined, and also filed an account of set-off, which they desired to prove upon the trial. A verdict was found for the debt and interest aforesaid, on which judgment was accordingly rendered. Two bills of exceptions were tendered by the defendants, and allowed and signed by the court, to opinions given by the court upon the trial, but it will be necessary to notice only one of them; from which it appears that on the trial of the cause, the plaintiff gave in evidence the bond, upon which the action was founded, which was read in evidence to the 596 jury; and thereupon *the defendants offered in evidence a copy of the record of a judgment rendered in the County court of said county at its July term in the year 1867, in the name of William S. Perry against Samuel M. Yost, which copy is set out in the bill in words and figures, showing that the judgment was for twenty-two hundred and fifty dollars, with legal interest thereon from the 15th day of July 1867, till paid, and costs; and also offered in evidence a copy of the record of the proceedings in said cause, resulting in said judgment.

***Set-Off—Statute.**—See *Edmunds v. Harper*, 31 Gratt. 641, and *B. & O. R. Co. v. Jameson*, 18 W. Va. 840, where the principal case is cited and approved.

The defendants also offered to prove an assignment of said judgment to the said John H. Wartman, one of their number, in accordance with the following paper writing, purporting to have been made by the said William S. Perry, viz:

"In the County court of Rockingham county, July term 1867, William S. Perry v. Samuel M. Yost, judgment on award for \$2,250, with interest from 15th of July 1867, till paid, and costs \$4.48.

"For value received, I assign the above described judgment to John H. Wartman, August 10, 1868.

"William S. Perry."

The defendants also offered evidence tending to show that they stand in the relation of principal and sureties, as to the subject matter of the action, and that the one of their number, John H. Wartman, claiming to be entitled to the set-off or payment mentioned, is principal. But the plaintiff objected to the introduction of the testimony offered by the defendants, upon the ground that it did not tend to prove either a payment or set-off, which the defendants were entitled to have allowed to them; and the court sustained the objection of the plaintiff, and refused to permit the defendants to introduce all or any of the evidence for either purpose: to which action of the court the defendants excepted.

To the said judgment of the County court a *supersedeas* was awarded by the judge of the Circuit court of said county; by which latter court the said judgment 597 *was affirmed. To the said judgment of affirmance of the Circuit court, a *supersedeas* was awarded by a judge of the late District court for the Sixth district, holden at Winchester; and as the case was pending in the said District court when the present constitution took effect, it was transferred by law to the Supreme court of Appeals; and being such a case as the said court of Appeals has jurisdiction to try, it was deemed proper by the said court to be tried at Staunton; and it was ordered accordingly. Thus came the case before this court.

Effinger and Michie, for the appellants.

The evidence itself showed a proper and allowable set-off, and it is difficult to discover from the record upon what ground the court rejected it. The Code uses the most comprehensive language on this subject,—no words could be more so: "Any payment or set-off" may be proven. Code 1860, page 716, § 4.

The set-off, under our own statute and practice, may be acquired at any time anterior to trial. That a judgment in favor of the defendant against the plaintiff may be set off by the defendant in the plaintiff's action against him, will not be denied. See 5th Rob. Practice (new), p. 963, note†. Can it be pretended that a judgment assigned to the defendants before trial, and properly brought forward in the pleadings, cannot as well be used by them for this purpose as

a note or single bill assigned under similar circumstances, and presented for the same purpose? Where judgments are in the same court and between the same parties, it is every day's practice for the court to order them to be set off upon a rule. When an assignment has intervened, the mode of doing it may have to be varied. Imaginary difficulties may be suggested, but they are easily surmounted. They were suggested in the case of *Ford v. Stuart*, 19 John. R. 342; but the court said: "We think the case of *Tuttle v. Bebee*, 8 John. R. 118, is 598 decisive of the right to set off *this judgment in favor of the assignee.

The only difference is that in that case a bond was assigned, and in this a judgment. Is a judgment a chose in action which in Virginia is not assignable? A domestic judgment upon which execution may issue can scarcely be called a chose in action at all. A foreign judgment, upon which suit must needs be brought for the purpose of enforcing collection, might perhaps be thought to resemble a chose in action. Kent's description of a chose in action is, 2 Com. 351 side, 413 top, 7th edition, that "it is a personal right not reduced to possession, but recoverable by suit at law. Money due on bond, note or other contract, damages due for breach of contract, for detention of chattels, or for costs, are included under this general head or title of things in action."

Nor does the assignment of domestic judgments come within the reason of the common law rule forbidding the assignment of choses in action. It was supposed that such assignment "would be the occasion of multiplying of contentions and suits, and great oppression of the people." But this bugbear of maintenance no longer subsists in Virginia. The multiplicity of suits, it is true, is an evil, and one against which this very law of set-offs, carried so much further in this country than in England, is directed. So effectually have we gotten rid of the common law rule touching assignment of choses in action, that the revisers of the Code of 1849 did not think it necessary to continue the statutory provision rendering them assignable. We have indeed the provision which assumes their assignability, that "the assignee of any bond, note or writing not negotiable may maintain thereupon any action in his own name which the original obligee or payee might have brought." These words doubtless were designed to include, and do include, judgments, domestic as well as foreign. But it may be said that the assignee of a judgment has not the legal title, but only an equitable right. If this 599 be true, still it would not prevent the set-off of the judgment by the assignee. The assignee of a bond since the Code of 1849, as well as before its adoption, though he may sue in his own name, has not the legal title. The "legal title," says Judge Moncure, in *Davis v. Miller*, 14 Gratt. 1, 13, "still remains in the assignor, in whose name the suit may be brought."

Garland v. Richeson, 4 Rand. 266, is the leading case on the subject. But since the adoption of the Code of Virginia, as well as before, the assignees of bonds have met with no difficulty in the courts of Virginia in setting off bonds assigned to them. The assignee in either case is the beneficial owner; a payment to him would discharge the obligation, and consequently he may set it off. The courts of law and equity are both open to him; he can enforce by such payment to himself; and is a set-off anything more or less than a cross-action?

It is not necessary to cite authorities in Virginia to show that the assignee of a bond, though he has not the legal title to it, may set it off against another demand against him. It is sufficient to refer to *Clopton's adm'r v. Morris*, 6 Leigh, 278. The only question in that case, as in all others, was whether or not the beneficial interest was in the assignee, who sought to set off the bond. It is the beneficial interest that is looked to. See 8 Bac. Abr. set-off C, § 2.

The case of *Arnold v. Hickman*, 6 Munf. 15, is one in which the validity of an assignment of a judgment was fully recognized.

In *Glazebrook's adm'r v. Ragland's adm'r*, 8 Gratt. 332, under peculiar circumstances an assigned judgment was held to be not a good set-off; but it is a noticeable fact that in the two opinions delivered arriving at the result above given, there is no intimation of the existence of any such rule as renders the assignment of a judgment not good in law, and therefore not good as a set-off.

The difficulty in the mind of the court in the case at bar could not have been that the demand of Yost was against all the petitioners, and the judgment sought to be set off by them had been assigned to but one of their number; for the petitioners offered to prove that they occupied the relation of principal and surety, and that John H. Wartman, the assignee of the judgment, was the principal, and the others but his sureties; thus bringing the set-off within the statutory provision touching such matters, on page 716, Code of Virginia 1860, § 4. Indeed, the relation of the petitioners rendered the set-off a matter of right, and the petitioners, Giles Devier and Henry T. Wartman, could have by bill in equity compelled the plaintiff, Yost, to permit, and the petitioner, John H. Wartman, to make, this set-off, upon the principle of marshalling securities; but petitioner, John H. Wartman, assenting and offering the set-off, there was no necessity to resort to a court of equity to compel him to do so. The separate debt is paid in such a case. *Story's Eq. Jur.* 1437; *Stephenson v. Taverners*, 9 Gratt. 394.

Liggett and Woodson, for the appellee.

It will be perceived that the contest here must be as to the legal assignability of this judgment, so that it could constitute a set-

off. If it was not susceptible of assignment at law, it was not a set-off at law.

Now choses in action at common law were unassignable, and it is only by virtue of statutory enactment that they became so.

Is a judgment under the statute specified among the list of choses, that may be assigned, or on which suit may be brought in name of the assignee?

The Code of Virginia, 1860, reads: The assignee of any note or writing not negotiable may maintain thereupon any action in his own name which the original obligee or payee might have brought, but shall allow all just discount, not only against himself, but against the assignor before the defendant had notice of the assignment. Page 630, sec. 14.

But the counsel for appellants have intimated that a judgment was not a chose in action. The authorities assume otherwise.

Blackstone, in discussing property in things personal, says: Property in chattels personal may be either in possession, which is where a man hath not only the right to enjoy, but hath the actual enjoyment of the thing, or else it is in action where a man hath only a bare right without any occupation or enjoyment. *Chitty's Blackstone*, 1, p. 313, chap. 25.

Again, same author, p. 318: "Money due on a bond is a chose in action, for a property in the debt vests at the time of forfeiture mentioned in the obligation, but there is no possession till recovered by due course of law." A judgment for money is no more the possession of money than is the bond on which the judgment is obtained—it is one stride, perhaps, nearer possession, dependent on the condition of the debtor's pecuniary affairs—but is merely the record of the court that the debtor must pay the money he owes, and how much—an order that the chose in action shall become a chose in possession through the instrumentality of the court's officers. If a judgment is a chose in possession, whence the necessity of executions, making sales thereunder, and returns? Not until the judgment order is paid cash in hand is it a chose in possession. See 1 Tucker, p. 346-7, on assignments, where emphatically is asserted the position we assume.

Appellants' counsel suggest that a judgment may be a set-off at law, though not an equitable set-off. Such is not our understanding of the relative powers of the two forums. Equity, when it has hold of a subject legitimately can recognize not only facts of off-sets that the legal tribunal can, but may recognize those which a legal tribunal could not. Equity, as a general rule, follows the law in its recognition of set-offs—and can go further—but never since the chancery tribunal has seized on the subject of set-offs, has the legal had the power to allow anything to be off-setted which the equitable could not allow. Where there is adequate remedy at law for the assignee, equity will not and cannot have jurisdiction (Code 630, 1860), but where there is not—and chancery

assumes jurisdiction by reason of inadequacy—then, all the pleas of set-off allowable at law prevail in chancery.

In order that a set-off may be used as a defence in a court of law, it must be a claim for which the defendant might sue in his own name—it is in effect a cross-action. The forms of the plea of set-off, 1 Chitty on Pleading, page 570; 2d Tucker, p. 105 to 111, and note at page 111. And this is the idea conveyed by the 9th section of chapter 172 of the Code of 1860. Under that section, a defendant who files a plea of set-off, is deemed to have brought an action against the plaintiff, and is entitled to a judgment against the plaintiff for any excess. How could that be done in a case of this sort, and in whose name would the execution issue?

Upon the subject of set-off we refer the court to 2 Tucker, page 106; Trimyer v. Pollard, 5 Gratt. 460; Turner v. Satterlee, 7 Cow. R. 480; Mason v. Knowlson, 1 Hill, N. Y. R. 218.

Appellants contend that the word writing in section 14, Code 1860, p. 630, comprehends judgments. The word writing here evidently refers to a writing originally constituting the basis of an action and recognizing indebtedness. It will be observed that the law reads "note or writing not negotiable." Negotiable paper was already safe in this regard, and there are other writings which are neither bonds or notes and not negotiable, that may be made by a debtor, and signed by him—an order not payable at bank for instance. This objection hardly requires notice.

603 *If the foregoing views are correct, and the law is well defined appertaining thereto, and the authorities clear, concise and concurrent, the decision of the courts below must be sustained.

Numerous authorities are cited by appellants, all of which either fail to be applicable to this cause, by reason of a failure of analogy in existent facts, or in having no relation whatever to the subject matters considered.

MONCURE, P. delivered the opinion of the court. After stating the case, he proceeded:

That this case should have been decided as it was, both by the County and Circuit courts, must, at the first view of it, strike the mind with some surprise. That the defendants should have a right to set-off in the action, a judgment assigned to one of them, and he the principal debtor, against the plaintiff, would seem to be just and reasonable. To be sure, there would formerly have been a technical objection to such right of set-off, arising from a want of mutuality, which was always necessary to the existence of the right; the set-off being a claim of one of several defendants against the plaintiff, whereas the claim for which the action was brought, is a claim of the plaintiff against all the defendants. But such an objection, so far as it could apply to this case, has been completely removed by statute; it being provided by the

Code of 1849, chapter 172, section 4, that "although the claim of the plaintiff be jointly against several persons, and the set-off is of a debt, not to all but only to a part of them, this section (being the one which gives the right of set-off), shall extend to such set-off, if it appear that the persons against whom such claim is, stand in the relation of principal and surety, and the person entitled to the set-off is the principal." Now that is precisely the case here, in regard to the want of mutuality, and therefore no objection on that ground can be sustained.

604 *The ground on which the objection taken to the set-off in this case was sustained, no doubt was, that the defendant, who claimed to be entitled to the benefit of the judgment sought to be set-off against the plaintiff's claim, was only the equitable, and not the legal, owner of the judgment, and could not bring an action at law thereon in his own name.

Even under the statutes of set-off in England, it was held in the celebrated cases of Bottomley v. Brooke and Rudge v. Birch, cited in 1 T. R. 621-2, that a debt due from the equitable owner of the claim for which an action was brought in the name of the legal owner, might be set off in such action. See Winch v. Keiley, Id. 619. These cases, it is true, were afterwards questioned, and at length overruled, by the courts of that country. See the cases cited and commented on in 5 Rob. Pr. p. 980. But this course of decision in England, in regard to the cases of Bottomley v. Brooke and Rudge v. Birch, is due entirely to the peculiar phraseology of the statutes of set-off existing there; as plainly appears from the recent case of Isbery v. Bowden, 8 Welsb., Hurl. & Gor. 852, decided by the court of Exchequer in 1853; in which the cases on the subject were reviewed and the judgment of the court delivered by Martin, B. after the case had been fully argued, and held under advisement during a vacation. "The statute (2 Geo. 2, c. 24, § 13), enacts," said the court, "that where there are mutual debts between the plaintiff and the defendant, one debt may be set against the other. This is the whole enactment, as applicable to the present case, and upon its true construction the question depends. If the words of the statute had been, that where there were 'mutual debts,' the one might be set against the other, the argument of Mr. Mellish (counsel for the defendants), would have had more weight; but those are not the only words, for the debts are to be, mutual debts between the plaintiff and the defendant, and

605 there is no *debt here due from the plaintiff at all; and except the words, 'between the plaintiff and the defendant,' can be excluded, the plea cannot be maintained." After reviewing the cases cited by counsel, the court further said: "In this case the party whom the defendant agreed to pay was the plaintiff, but the plaintiff was not the party who agreed to pay the defendant the debt sought to be set off; and we think that, looking at the plain words

of the statute, we best give effect to the true rule now adopted by all the courts at Westminster, for its construction, by holding that, inasmuch as the debts are not mutual debts between the plaintiff and the defendant, the one cannot be a set-off against the other. This is acting upon the rule as to giving effect to all the words of the statute, a rule universally applicable to all writings, and which, we think, ought not to be departed from, except upon very clear and strong grounds, which do not, in our opinion, exist in this case."

Now, the language of our statute of set-off is very different from that of the English. We have seen what that of the latter is: "Where there are mutual debts between the plaintiff and defendant, &c., one debt may be set against the other," &c. The language of our statute is: "In a suit for any debt, the defendant may at the trial, prove, and have allowed against such debt, any payment or set-off which is so described in his plea, or in an account filed therewith, as to give the plaintiff notice of its nature, but not otherwise." Code, ch. 172, § 4. Nothing is there said about "mutual debts between the plaintiff and defendant," as in the English statute. In *Allen, &c. v. Hart*, 18 Gratt. 722, this court had occasion to notice the material difference between the statutes of the two countries, and the different constructions which had been put upon ours; and the court, in conclusion upon this subject, said: "This course of decision in this State shows, that the statute of set-off has been liberally construed,

with a view to the furtherance
606 *of its obvious policy, which is to prevent multiplicity of suits, and as far as conveniently can be done, to effectuate in one action complete justice between the parties." *Id.* 729. Our courts, in this respect as well as others, look to the real, and not the nominal parties to the suit. In *Pates v. St. Clair*, 11 Gratt. 22, this subject is fully noticed by the court. And by the Code, ch. 185, § 9, p. 768, it is provided that "when the suit is in the name of one person for the benefit of any other, if there be judgment for the defendant's costs, it shall be against such other." It thus appears to be the tendency, as well of our Legislature as of our courts, to regard the real, rather than the nominal parties to the suit. That it is the policy of our Legislature to give courts of law cognizance of equitable defences, and thus to prevent multiplicity of suits, is further illustrated by sections 5 and 6 of the chapter 172, concerning "payment and set-off," in the Code, page 716.

In the courts of the other States of our Union the course of decision in England, in regard to the statute of set-off, may generally be followed; but in none of them, perhaps, in all respects. In some of them *Bottomley v. Brooke* and *Rudge v. Birch* have been regarded, as in England, to be incorrect decisions. In others, those decisions have been recognized as sound, and the principle of them has been followed: as

in Kentucky in *Long v. Carlyle*, 1 A. K. Marsh. R. 401; *Ward v. Martin*, 3 T. B. Monr. R. 18. So also the Supreme court of the United States in *Winchester v. Hachley*, 2 Cranch's R. 342, Chief Justice Marshall, delivering the opinion of the court, held that a creditor upon open account, who has assigned his claim to a third person with the assent of the debtor, is still competent to maintain an action at law in his own name against the debtor for the use of the assignee; but the debtor is allowed to offset

his claim against the assignee. The
607 diversity in the *decisions of the courts of the different States on this subject, no doubt, arises from the diversity in the language of their respective statutes of set-off, most of which probably conform substantially, if not literally, to the English statute; and therefore, the construction put upon the latter by the English courts has been generally put upon similar statutes in this country by the American courts. But this remark does not apply to our statute, which, as we have seen, is materially variant from the English. Our statute on the subject has, we believe, been substantially the same, so far as this case is concerned, ever since the first statute on the subject was enacted in the colony of Virginia—at all events, since the act of 1705, which was before there was any statute of set-off in England. In regard to this whole subject, we refer to 5 Rob. Pr. pp. 955, 1012, where all or most of the cases are collected.

We are, therefore, of opinion that the testimony offered by the defendants in the court below, as mentioned in their first bill of exceptions, did tend to prove a set-off, which they were entitled to have allowed them; that the said court erred in sustaining the objection of the plaintiff to the said testimony, and in refusing to permit the said defendants to introduce the same; and that the judgment be reversed, the verdict of the jury set aside, and the cause remanded to the said court for a new trial to be had therein; on which new trial the said testimony, if again offered, is to be received.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the said judgment is erroneous. Therefore, it is considered that the same be reversed and annulled, and that the plaintiffs recover against the defendant in error their costs

by them expended in the prosecution
608 of their writ of supersedeas *aforesaid here. And it is ordered that the verdict of the jury be set aside, and the cause remanded to the said Circuit court for a new trial to be had therein; on which new trial the testimony offered by the defendants in the said court on the former trial, as mentioned in their first bill of exceptions, if again offered, is to be received. Which is ordered to be certified to the said Circuit court of Rockingham county.

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***Bowman v. McChesney.**

August Term, 1872, Staunton.

1. **Confederate Money.**—In October 1863 M executes his bond by which he promises to pay B \$4,000. at any time called for, after three months' notice, said money to bear no interest. It was given for a loan of Confederate treasury notes, and the provision for three months' notice was inserted at the instance of M. Nothing was said as to the kind of money in which it was to be made. It was not called for until after the war closed. **HOLD:**

1. **Same.**—The bond, according to the true understanding and agreement of the parties, was to be paid in Confederate currency, and therefore should be scaled, as of the date of the bond.

2. **Note Payable "On Demand"—"On Call."**—There is no legal difference between a bond payable when "demanded," or "on demand," and one payable "on call" or "at any time called for." In each case the debt is payable immediately.

3. **Waiver of Notice.**—The provisions for three months' notice having been inserted at the instance and for the benefit of M, he may waive it.

This was an action of debt in the Circuit court of Augusta county, brought in August 1866, by Jacob Bowman, Sr., against William S. McChesney, to recover the amount of a bond for four thousand dollars. The cause came on to be tried in November 1868, when the jury found a verdict for the plaintiff for \$285.71, with interest from the 23d of October 1863, till paid. The plaintiff thereupon moved the court for a new trial, on the ground that the verdict was contrary to the evidence. But the court overruled the motion; and rendered a judgment upon the verdict; and the plaintiff excepted.

The facts certified are substantially as follows: The bond on which the action was brought is as follows: \$4,000.—For value received, I promise and bind myself, my heirs, &c., to pay to Jacob Bowman, 610 Sr., at any time called for, after three months' notice, the just and full sum of four thousand dollars, said money is to bear no interest. Witness my hand and seal, October 23d, 1863. William S. McChesney, seal. It was proved that the defendant, who was a surgeon in the Confederate service, a short time before the date of the bond applied to William Bosserman for the loan of some Confederate notes. That Bosserman not having the money let the plaintiff know that the defendant wished to borrow. That the plaintiff put into Bosserman's hands, \$4,600 of Confederate notes; and the bond for \$4,000 was then prepared by Jacob Bowman, Jr., a son of the plaintiff; the stipulation for three months' notice having been inserted at the instance of Bosserman, who had been requested by the defendant to have it arranged that he should

have some notice to pay. That Bosserman took the said sum of \$4,600, and brought back the bond and handed it to Jacob Bowman, Jr., to be given to the plaintiff; which was done. The plaintiff did not see the defendant or have any understanding with him, in respect to the kind of currency in which the bond was to be discharged. When Bosserman met the defendant after getting the money from the plaintiff, Bosserman informed him he had some money to lend him belonging to the plaintiff. Defendant objected to giving his bond to the plaintiff, as he had not seen him; but after some hesitation he agreed to give it, and sat down to write the bond; but Bosserman thereupon produced the bond already prepared, which the defendant signed, and handed it back to Bosserman, who sent it to the plaintiff as before stated. The consideration of said bond was Confederate States treasury notes, which at the time bore to gold the ratio in the market of fourteen to one. Bosserman made no special agreement with the defendant as to the currency to be paid back. The defendant proved by his own evidence, that as for himself he thought of nothing but Confederate notes in the transaction; 611 *that he did not contemplate paying in good money, and that he had faith in the success of the Confederate cause.

Jacob Bowman, Jr., a witness for plaintiff, says after the suit was brought, in a conversation between himself and the defendant about it, he heard the defendant say, that he had borrowed the money in good faith and expected to pay it back in good faith; but the law entitled him to scale it, and he intended to take the benefit of it. Plaintiff proved that nothing was said by him to the defendant, until after the war was ended. That some time after Lee's surrender, he met the defendant, and asked him if it would be convenient for him to pay plaintiff some money; that defendant said he had none; that plaintiff then asked him if he would pay him in the following spring (1866); that he had to raise as much as \$500; and defendant said he thought he could help plaintiff, and promised to do what he could. Plaintiff said he did not have much faith in the Confederate success, and was anxious to get rid of his Confederate money.

Upon the application of the plaintiff a supersedeas was awarded him by a judge of the District court of Appeals at Charlottesville; and the case was afterwards sent to this court.

Fultz, for the appellant.

Baldwin & Cochran and Hanger, for the appellee.

BOULDIN, J. delivered the opinion of the court.

This case cannot be distinguished, in principle, from the case of Stover, assignee, v. Hamilton & others, 21 Gratt. 273. The contracts in both cases are, in substance, the same. In this case, as in that, the ob-

*Note Payable "On Demand"—"On Call."—The court, in Bacon v. Bacon, 94 Va. 686, 27 S. E. Rep. 576, citing the principal case among others, said: "A note or bond payable 'on demand' or 'on call' (which is the same thing) is payable at once, and interest and the statute of limitations commence to run from its date." See also, Moon v. Richardson, 24 Gratt. 222.

ligation was entered into within the period embraced by the statute for the adjustment of Confederate liabilities, and was given for a loan of Confederate States treasury notes. In neither case was the debt 612 to bear interest *until payment should be demanded, and in both alike—but for the stipulation in the one case for a “reasonable time,” and in the other for “three months notice”—the debts would be payable on demand; for this court is unable to appreciate the distinction attempted to be drawn at the bar between an obligation payable “on demand” or “when demanded,” and one payable “on call” or “at any time called for.” In each case, under the laws of Virginia, the debt is payable immediately, and the obligors, without formal demand, are bound—unless otherwise provided on the face of the bond—to pay interest from the date of the obligation, and are entitled to make payment at any time after the execution of the bond.

But it has been very earnestly contended that, by reason of the words “after three months’ notice,” inserted in the contract in this case immediately after the words “at any time called for,” this obligation has been wholly withdrawn from the influence of the general rule, and is only payable at the pleasure of the obligee. There might be some force in the argument, had that provision, as was the case in *Boulware v. Newton*, 18 Gratt. 708, been inserted at the instance and for the benefit of the obligee. But such was not the case here. On the contrary, the stipulation for a short notice was, as was a similar provision in the case of *Stover*, assignee, v. *Hamilton & others*, inserted at the instance and for the benefit of the obligor, so as to make it operate not as a restriction upon him, but as a privilege secured to him; and it is a familiar rule of law, that a party may always waive a condition or stipulation in a contract inserted solely for his benefit. Accordingly in *Stover v. Hamilton & others*, which in this respect is not distinguishable from the case before us, it was the unanimous judgment of the court that, notwithstanding the stipulation for “a reasonable time,” the debt as to the obligor was payable instantan (that stipulation being 613 inserted for *his benefit), and was properly scaled as of the date of the contract. That judgment is fully approved by this court.

The court is of opinion that the contract in this case was, according to the true understanding and agreement of the parties, to be fulfilled and performed in Confederate States treasury notes; that as to the obligor, it was payable at any time from its date, and therefore, that the jury was right in scaling the debt as of the date of the obligation.

The judgment must be affirmed, with costs and damages to the appellee.

Judgment affirmed.

614 *Beery & als. v. Irick & als.

August Term, 1872, Staunton.

Case at Bar.—In April 1857, land was sold by a commissioner, under a decree in a suit for partition, for one-third cash, and the balance in five annual payments; a lien on the land for the deferred payments being reserved; the parties entitled being the widow and several children of B. At the sale I became the purchaser, and by the decree of the court or by agreement of all the parties, I was allowed to retain one-third of the purchase money, for the life-time of the widow; he paying her the interest thereon annually. Separate bonds were given to the commissioner for this one-third; and I paid up the principal of his bonds for the two-thirds, and the interest on the other third, until May 1862; and he paid the interest then due, and a part of the principal of the two-thirds. At the October term of the court, I, without giving notice to the parties, and without their knowledge, obtained from the court, an order directing him to pay the balance of the purchase money in his hands, to E, the general receiver of the court, to be invested in State bonds. He accordingly paid the amount to E in Confederate treasury notes, and E invested the funds in State bonds; but before making his report, sold them, and invested in Confederate States bonds. The papers in the suit having been destroyed, the widow and children brought their suit in equity, against I and E to recover the fund. **HOLD:**

1. **Order—Notice.**—The order having been obtained by I without notice to the parties, and without their knowledge, was null and of no effect as to them, and he is still liable for the purchase money, and the lien on the land still exists.
2. **Decree—Immediate.**—The plaintiffs are entitled to an immediate decree against I; and are not to be delayed until the equities between I and E can be decided.
3. **Further Proceedings—What May Be Litigated.**—The cause going back for further proceedings, I and E, or either of them, if they, or he, desire it, may litigate the question of the liability of E to I and the extent of such liability, if there be any, in this case.

615 *This was a suit in equity instituted in June 1866, in the Circuit court of Rockingham county, and afterwards transferred to the Circuit court of Augusta, by Elizabeth Beery, the widow, and the children and heirs of Abram Beery, deceased, against Andrew B. Irick, M. Harvey Effinger, and others, to recover from Irick and Effinger a part of the purchase money of a tract of land sold in 1857, under the decree of the Circuit court of Rockingham county, in a suit by the widow and heirs of Abram Beery for partition. All the papers in that suit were destroyed during the war.

The bill sets out the facts as to the sale and its terms. The sale was made by John C. Woodson, as commissioner under the decree of the court, in February 1857, and the land was purchased by Andrew B. Irick and Wm. G. Stephens; but Stephens relin-

***Notice.**—See *Purdie v. Jones*, 32 Gratt. 820, and *foot-note*. See also *Taylor v. Lancaster*, 33 Gratt. 21, where the principal case is distinguished.

quished the purchase to Irick. The land was sold for \$12,437.08, of which one-third was to be paid at the next court succeeding the sale, which was on the 8th of May, and the residue was to be paid in five equal annual payments, dating from the 2d of May 1857. Irick paid two-thirds of the cash payment, and gave his bond, bearing interest, to the commissioner for the other third; and as to each of the deferred payments, he gave one bond for two-thirds of it, and another bond for the one-third, a lien being reserved on the land. And the bill states that it was one of the terms of the decree, that the widow should receive, during her life, interest on one-third of the purchase money of the land. The commissioner reported the sale, and his report was confirmed.

Irick paid the principal of his bonds for the two-thirds of the purchase money, and the interest on the other third, up to May 1862; and he paid the amount due on that day to some of the heirs, and the interest due to the widow on the one-third of the purchase money. At that time the whole of one-third was due, amounting to \$4,145.69, and there was due to several of the 616 heirs *each the sum of \$138.69. The bill charges that none of the money

so due on the 2d of May 1862, was paid to the parties by Irick; but at the October term of the court for 1862, he, without the knowledge or consent of the widow or heirs, and without any summons to them to appear and defend their interests, obtained an order authorizing him to pay to the receiver of the court, to be invested in State bonds, the said sum of \$4,145.69, and that the same was paid to the receiver in Confederate treasury notes.

The complainants insist that the court had no authority, upon the motion of one who was no party in the cause, and without notice to them, to make the order for the payment of the money by Irick to the receiver of the court. And they pray for a decree against Irick, and any others liable therefor, for the amount due them; that the land may be sold for the unpaid purchase money, and for general relief.

Effinger answered the bill. He said he was in the year 1862 appointed general receiver of the Circuit court; and on the 17th of October of the same year, he received from Irick \$4,269.89, which was paid by Irick and received by respondent, to the credit of the case of Beery's heirs, then pending in the court. This payment was made under an order of the court in that cause, and was paid in Confederate treasury notes. That he made his report regularly every year to the court, showing what he had in each case in court, and how it was invested; and these reports were received and approved by the court. He, at the commencement of his duties as general receiver, made investments to the amount of \$10,000 in State bonds; but before making any report to the court he changed the investment, by selling the bonds and pur-

chasing eight per cent. bonds of the Confederate States.

Irick, in his answer, says he purchased the land under the impression, from statements made by the commissioner, 617 *that one-third of the purchase money could be retained by the purchaser during the life of the widow; that such were not the terms of the sale, but that it was likely such an arrangement could be made. After his purchase he sold the land to different parties, and these parties applied to him to receive the money, and he, having full confidence in the money, did receive it; and intending that fund thus received to pay his debt on the land, he applied to the court that had rendered the decree of sale, and before which all parties then were—the said suit being still pending and undetermined—and the court, after hearing a full statement of the case, made an order directing him to pay over said money to the general receiver of the court, and directed the receiver to invest it in Virginia State bonds; all of which respondent believes was done. He received the same funds that he paid over as if it had been gold, and made no profit on the money. He is advised that all the parties being before the court, and the cause still pending, no motion was necessary to take any new order in the case.

Irick was examined as a witness by the plaintiffs. He states that the order for him to pay over to the receiver was made at the October term of the court for 1862. There was no opposition to the order that he was aware of; he never heard of any. As to the notice, he was not prepared to say whether the parties had notice or not. He gave the papers to Mr. Woodson, who he presumed would attend to it; or rather Mr. Woodson held the papers, bonds, &c., and said he would attend to the matter before the court.

Woodson was also examined as a witness. He states the terms of the sale, and the execution of the bonds, as stated in the bill, and that a lien was reserved upon the land, and that no deed had been made to the purchasers. That the annual payments were made regularly to the heirs, and the 618 interest to the widow. That *Irick generally made these payments, and took receipts which he handed to witness, and took up his bonds. That everything was regularly paid up to May 1862. He said he had no recollection of being at the Circuit court of Rockingham, either in May or October, and had no such recollection of what was done at these courts. Of one thing he was pretty sure, that he never considered he had any control over the principal of the third set apart, upon which the interest was to be paid to the widow; or had any right to collect the same or in any way to interfere with it, or control it; and never did. Has a distinct impression that by a decree of the court, Mr. Irick was authorized to pay the same into the hands of the general receiver of the court. The cause

continued on the docket until June 1864, when the papers were lost or burned.

It was in proof by one of the heirs, that he applied to Irick in 1863, for the interest on the widow's money, when he asked if she would take Confederate money; and witness told him she would not. This witness stated that neither the widow nor any of the heirs had notice of the purpose of Irick to pay the money into the hands of the receiver of the court, or to make any other disposition of it. Another of the heirs stated that he presented to Irick in 1865, an order from his mother for some of her interest; when Irick informed him, that he did not owe her anything; he had got an order from court and paid it over to the receiver. Witness asked him, if he had consulted Mr. Woodson on it. He told witness he had not.

The cause came on to be heard on the 1st day of November 1867, when the court dismissed the bill, so far as it sought to charge Irick and Effinger with the sum of \$4,269.89, paid by Irick to Effinger under the order of October 1862; and directed an account of the amounts to be paid by Irick to the heirs, on account of the payment which fell due in May 1862.

619 *In August 1869, General Canby, the military commander of the district, sent an order to the judge, to set aside the decree of the 1st of November 1867, and rehear the cause. And the plaintiffs having filed a petition for a rehearing of the decree, and also a bill of review, the court on the 27th of November 1869, set aside the decree, and the cause was continued until the commissioner should report on the account.

On the 25th of November 1870, the cause came on again to be reheard, when the court held that there was no error in the decree of November 1st, 1867; and that the same was final as to the matters therein decided; and that decree was re-affirmed. And it was decreed that the decree of the 27th of November 1869, be set aside and annulled as having been improvidently made, and without authority; and that the petition for a rehearing, and the bill of review of the plaintiffs, be dismissed with costs. From this decree the plaintiffs applied to this court for an appeal; which was allowed.

Fultz, for the appellants.

Baldwin & Cochran, for the appellees.

ANDERSON, J. delivered the opinion of the court.

A chancery suit was brought in the Circuit court of Rockingham county, in the year 1856, by the widow and heirs of Abraham Beery, for a partition of the lands, of which he died seized. The record of the suit has been lost or destroyed, or burned up, with the other records of the court, and we have only secondary evidence of what was done. There was a decree for the sale of the land, and the sale was made in February 1857, by John C. Woodson, who was

appointed a commissioner for the purpose; which sale was reported to and confirmed by the court. The terms of the sale were, one-third down, and the residue in five equal annual instalments. A. B. Irick, 620 the appellee, in connection *with one Stevens, whom he afterwards bought out, was the purchaser, at the price of \$12,437.08.

This suit was brought by the widow and heirs, to recover what is still due them of that fund, and to subject the land to its payment.

The original suit having been brought for partition by sale, it was one of the first duties of the court to determine what should be the widow's share in the proceeds. That was precedent to a partition among the heirs. They allege, and the commissioner proves, that one of the terms of the decree was, that one-third of the purchase money should be set apart, the interest on which should be paid annually to the widow, during her life, in lieu of dower; a disposition which seemed to be satisfactory to all parties concerned.

Accordingly an agreement seems to have been made between the widow and heirs and the purchaser, with the sanction of the commissioner, that he should pay the two-thirds of the cash payment, and of the deferred payments, to the heirs, as they were respectively due, and retain in his own hands the remaining one third; and to pay interest thereon annually to the widow, during her life; the same to be secured, together with the deferred payments to the heirs, by a lien upon the land. Irick in his answer says, that he purchased at the sale, "under the impression, and from statements made by the commissioner, that one-third of the purchase money could be retained during the life of the widow; that such were not the terms of the sale, but that it was likely such an arrangement could be made." And it seems that such an arrangement was made. The down payment with interest from the date of sale to the 8th of May 1857, when it was payable, amounted to \$4,203.73. Of this sum, he paid only two-thirds—the part coming to the heirs; and for the remaining third, gave his bond, the interest on which the widow was entitled to. For each of the deferred payments he gave two bonds, one

621 *for \$1,105.52 for the heirs; and the other for \$552.76, on which interest was to be paid annually to the widow. And it appears that he paid up regularly to the heirs their portion, as the bonds fell due, and the interest annually, to the widow until May 1862, upon the bonds set apart as a fund for her. Commissioner Woodson proves, that Irick generally made payment to the heirs, took their receipts and the widow's receipt for the interest, which he brought to him, and took up the bonds, and was credited for the interest paid to the widow. He also testified that he never considered that he had any control of the principal of the part set apart for the widow, "or that he had any right to collect the

same, or in any way to interfere with it or control it, and never did." Why would he not have had the right to collect it, if there had not been an agreement, as is alleged, as to the investment; or a decree to that effect?

The court is of opinion, from the adjustment made by the commissioner, and the widow and heirs, with the purchaser; from the subsequent acts of the parties, and from the testimony of the commissioner, that it was mutually agreed by them all, or so provided by the decree, that one-third of the purchase money should remain in the hands of the purchaser, during the life of the widow, as an invested fund, secured by a lien upon the land, the interest on which was to be paid to her annually, in lieu of dower.

It appears from the record, that all parties were satisfied with this arrangement, and that no change was desired, until October 1862. The circulating medium had then become greatly inflated, by the liberal issue of Confederate treasury notes, and had become greatly depreciated, rating at $2\frac{1}{4}$ for 1 in relation to gold as the standard. It was then that Mr. Irick conceived the idea of relieving himself of this indebtedness, by discharging his obligations in this depreciated currency.

He did not propose it to the widow 622 or heirs, the only *persons besides himself who were interested, to whom he had been making the payments theretofore; and with whom his agreement to retain the fund had been made. They had the right to receive it, if they were all willing and were sui juris. Nor did he apply to Commissioner Woodson to receive it. It seems that Woodson was authorized to collect the other bonds, and the interest on the widow's fund, and needed no further order of court to confer on him that authority. Why could he not in like manner collect the other bonds for the purchase money, which had not hitherto been collected, but only the interest annually for the widow, if there had been no agreement or provision of the decree, inhibiting their collection, and placing them on a different footing from the other bonds? The fact that the appellee deemed it necessary to apply to the court for an order, shows that he did not consider that he had a right to pay it without such order, and consequently was restricted in his right to pay, by his agreement with the other parties, or by a provision in the decree. He does not pretend that he applied to the commissioner to receive payment. But he says that he paid the fund to the receiver of the court, under an order of the court. He does not seem to have thought that he could pay it to the commissioner who was authorized to receive payment of the other bonds, and of the interest for the widow; but says in his deposition, "I gave the papers to Mr. Woodson, whom I presumed would attend to it; or rather Mr. Woodson had the papers, bonds, &c., and said (he does not now presume) he would attend to the matter before

the court." But Mr. Woodson does not seem to recollect any thing about it. He says he has no recollection of being at the Circuit court for Rockingham, either in May or October 1862; and has no recollection of what was done at those courts. And Henry C. Beery testifies, that he asked Mr. Irick, whether he had consulted Mr. Woodson on it, and he told him that he had 623 not. It *may have been the impression of Mr. Irick, that he had applied to Mr. Woodson to attend to getting the order for him; but he seems not to have had a distinct recollection when he gave his deposition; and the other evidence shows that he was probably mistaken. It is very evident that the motion in court was not made by Mr. Woodson. By whom it was made does not appear. It is not material in the decision of the cause to know; but in some aspects of the cause, it might have been to the advantage of Mr. Irick to have shown.

But of this there is no doubt, that the motion was made without notice to the widow and heirs; and that the order directing him to pay the money into the hands of the receiver of the court, was made not only without their consent, but without their knowledge. The widow seems to have known nothing of it in May 1863. She then sent to him for her interest. When asked for it by her agent, he inquired of him if he would receive Confederate money. Being answered in the negative, he did not even then inform him that he had paid the principal and interest to the receiver of the court, under its order, but suffered him to leave him under the impression, from what he said, that he still held the fund. And the widow and some of the heirs seem not to have been better informed (and it does not appear that any of them were), until after the termination of the war. There may have been no design on the part of the appellee to conceal the fact from the widow and heirs. And his withholding it from the agent of the widow, when he ought to have known that he was ignorant of it, may have been from want of reflection, and not from a design to withhold from the widow and heirs information which might lead to the institution of proceedings to undo what had been done. The court would be slow to believe that the order of court had been surreptitiously obtained; yet they cannot be blind to the proofs in the cause, which 624 look that way, though not deemed

sufficient *to justify the imputation.

But it is evident that the appellee obtained the order upon an ex parte motion, without the consent or knowledge of the widow and heirs, and without notice to them; and that they had no opportunity to resist the motion, which they doubtless would have done, and successfully, if they had had notice of it.

The court is of opinion, whether the investment of the widow's fund, as stated, was made by the decree of the court, or by the agreement of the parties, that no subsequent order upon the motion of the debtor,

who was not a party to the suit, changing that investment, is binding upon the widow and heirs, unless made by their consent, or upon notice to them. Upon one hypothesis it was to set aside a decree of the court; upon the other, it was to rescind an agreement—neither of which could be done on motion without notice.

The court is, therefore, of opinion that the order of the court authorizing the debtor, on his motion, to change the investment of the widow's fund and to pay it to the receiver of the court, being made without the consent of the widow and heirs, or notice to them, is not binding on them and cannot discharge the appellee from his obligations, or release the land from the vendor's lien.

The court is further of opinion that the payment made by the appellee to the receiver, being under an order of court which is null and void as to the widow and heirs, the relation of the debtor to them is as if such payment had not been made; and their right of action to have and demand the same of their debtor is direct and immediate, and no question as to the liability of the receiver can be interposed to impede its assertion. The liability of the receiver, or the extent of his liability, are questions between him and A. B. Irick; and do not concern the appellants. But whilst this is so, the receiver, having been made a party to this suit, if he is liable to Irick, 625 *the latter might have had a decree over against him, if he had asked it. But the court below has not passed upon the question of the receiver's liability to Irick, and has not been asked to do so. It would seem to be most proper, therefore, that this court, which has only appellate jurisdiction—though in a proper case it might do so—should not undertake, primarily in the state of the pleadings in this case, to decide upon their reciprocal rights and liabilities; but the parties should be allowed, when the cause goes back to the lower court, to litigate those matters, if they think proper, before that court, that the respective rights and liabilities of the said parties as to each other may be settled and determined in this suit.

The court is of opinion that so much of the decree of the Circuit court, of November 23, 1867, as dismissed the plaintiffs' bill, so far as it seeks to charge A. B. Irick and M. H. Effinger with liability for the sum of \$4,269.89, paid by the said Irick under the decree of October 1862, to the receiver and invested by him in Confederate States bonds, is erroneous, and that the Circuit court did not err in granting the plaintiffs leave to file their bill of review.

And the court is further of opinion, for reasons already stated, that the decree of the 25th of November 1870, is erroneous in re-affirming the decree of November 23d, 1867, and in dismissing the bill of review; and that the same, as also the decree of the 23d of November 1867, so far as it dismisses

the bill against Irick and Effinger, must be reversed.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the order of court of October 1862, authorizing A. B. Irick to pay to the receiver of the court the fund in his hands, which had been set apart for the widow of Abraham Beery during her life, *upon 626 which she was to receive the interest annually, in lieu of dower, was not binding on the widow and heirs, but was null and void as to them; and that the payment made by the said Irick to the receiver of the court, under said order, does not discharge his obligation to the widow and heirs, or release the land from the vendor's lien; and that the appellants are entitled to a decree against the said Irick for the principal of said bonds which had been set apart for the widow, to be safely invested by the court during the lifetime of the widow: and that she is also entitled to a decree against him for the interest which is in arrear and unpaid upon said bonds, subjecting the land to the payment of both principal and interest with a proviso, that if the said Irick shall pay up the interest due and in arrear to the widow in a reasonable time, to be designated by the Circuit court, and shall pay the balance which the said court may ascertain to be due on the bonds, which were set apart for the heirs, and shall execute his bond for the principal sum which was set apart as a fund for the lifetime of the widow, and punctually pay the interest accruing thereon annually, to the widow during her life, then and in that case the execution of said decree requiring the payment of the principal sum aforesaid set apart for the widow, shall be suspended during her life and for six months after her death, but shall be a charge upon the whole land, for which the said debt, as a part of the purchase money, was originally contracted by the said Irick.

It is, therefore, decreed and ordered by the court, that the decree of November 23, 1867, so far as it dismisses the plaintiffs' bill against Irick and Effinger, and the decree of November 25, 1870, re-affirming said decree and dismissing the plaintiffs' bill of review, be reversed and annulled; and that the appellee, Irick, pay to the appellants their costs expended in the prosecution of their appeal here. And the cause is remanded to the Circuit court of Augusta county, to be proceeded with in conformity 627 *to the principles of this decree; in which proceedings the said Irick and Effinger, or either of them, if they, or he, desire it, may litigate the question of liability of the latter to the former, and the extent of such liability, if there be any, to be settled and determined by the said Circuit court, and to be decreed accordingly. Which is ordered to be certified to the said Circuit court of Augusta county.

628 *Newton's Ex'or v. Bushong & als.

August Term, 1872, Staunton.

[12 Am. Rep. 553.]

Confiscation by Confederate Government—Executor.*

—Money received by an executor during the war, belonging to a citizen of Indiana, was confiscated by the Confederate government. **Held:** The Confederate government in the exercise of her belligerent rights, had authority to confiscate the property of alien enemies, and the executor is not responsible for the money confiscated.

This was a suit in equity in the Circuit court of Augusta county, brought in April 1866, by Samuel Bushong and others, legatees of Mary C. Bushong, against John Newton, as her executor, for an account of the estate of his testatrix, and the payment of their legacies.

Mary C. Bushong died in the year 1860, having made her will, which was duly admitted to probate, and John Newton qualified as her executor. He delivered to the legatees the specific articles bequeathed to them, sold the other personal estate on the 7th of September 1860, on a credit of nine months, and in November 1861, the commissioner reported his administration account to the court; showing the amount in his hands on the 1st of July 1861, to be \$1,720.24.

Mrs. Bushong by her will gave to her son Samuel, who lived in Indiana, one hundred dollars; to Peter V. Bushong, four hundred dollars; to her grandson Jacob Cox, who was a minor, and so continued during the war, fifty dollars; and the residue of her estate she gave to Peter V. and Mary A. Bushong.

Newton, the executor, gave his deposition in the case. *He says the settlement was made by the commissioner in June 1861; and when it was made Peter V. and Mary A. Bushong had gone on a visit to their brother and sisters, in Indiana; which prevented his paying them their legacies at the time the settlement was made. They went in March or April 1861, and did not return until the war was over. The money remained in his hands for a considerable time, until he was ordered by Thomas J. Michie, the receiver of the Confederate States government, to report the amount of the fund for confiscation. He reported that there was \$100 due to Samuel Bushong; and that was confiscated. He then stated to the commissioner the circumstances under which Peter V. and Mary A. Bushong had left for Indiana, in the spring of 1861, on a visit to their brother and sisters, with the positive assurance that they would return in a short time; and this induced Mr.

Michie not to require him to report their shares for confiscation. After which he deposited the amount he considered due the estate in the Central Bank of Virginia, where he kept it for some considerable time; when finding that Confederate money was depreciating very fast, he concluded to invest the fund in Confederate eight per cent. bonds; believing that to be safe and better than the money; and there it still remained. He was ready to pay it over at any time after the settlement, in the bonds or in the money, if the parties preferred it. The amount invested did not quite equal the amount due. There was a small legacy due a grandson, a minor, which he kept out to pay, but he never could get him to choose a guardian, and could not pay it. The Confederate bonds were procured in March 1863.

The accounts were referred to a commissioner; who reported, charging the executor with the whole fund in his hands, and crediting him with his payments made since the settlement of his account; and he reported that there was due of principal 630 to Peter V. Bushong, *\$831.63; to Mary A. Bushong, \$486.53, and to Samuel Bushong and Cox, their legacies.

John Newton having died, the suit was revived against his executor, Isaac Newton; and the cause came on to be heard upon the 12th of November 1870; when the court made a decree in favor of the plaintiffs respectively for the sums of money reported to be due to them, with interest from the 1st of April 1866. And thereupon Isaac Newton applied to this court for an appeal from the decree; which was allowed.

H. W. Sheffey & Bumgardner, for the appellant.

Fultz, for the appellee.

STAPLES, J. The important question in this case relates to the legacy of Samuel Bushong, a resident of the state of Indiana. This legacy was, in March 1862, reported by the executor to a Confederate receiver, and was confiscated as the property of an alien enemy. According to the statement of the executor the fund had been in his hands since July 1861, part of the proceeds of the sale of personal estate belonging to the testatrix. There is no evidence of his assent to, or his participation in, the act of confiscation. On the contrary, it is to be inferred that he only made the report and payment because he was ordered so to do by the proper authorities. The question is now presented, whether the payment thus made protects the executor against the claim of the legatee.

In order properly to discuss this question, the acts of confiscation or sequestration passed by the Confederate Congress must be briefly noticed. The first of these was passed 30th of August 1861, the second, amendatory thereof, the 15th February 1862. It is unnecessary to state in detail the various provisions of these acts. It will be seen by a reference thereto, it was made

***Confederate Government.**—The principal case is cited and strongly approved in several subsequent cases as authority for the proposition that the Confederate government had all the attributes of a *de facto*, if not a *de jure*, government. See *Dinwiddie Co. v. Stuart, etc.*, Co. 28 Gratt. 538; *Pilson v. Bushong*, 29 Gratt. 236; *Bier & Mann v. Dozler*, 24 Gratt. 10; *Ruckman v. Lightner*, 24 Gratt. 28; *Miller v. Cook*, 77 Va. 818.

the duty of every person having in his possession or under his control *the effects of an alien enemy speedily to inform the receiver in his district of the fact. A failure so to do was declared a high misdemeanor, punishable by fine and imprisonment, and also a forfeiture of double the amount, at the suit of the government. It was also provided, that any person who, after giving such information, should fail to pay over and deliver on demand made by the receiver, the money or effects in his hands, shall stand in contempt, and be proceeded against as in other cases of contempt. And the court or judge was authorized to imprison the offender until he should fully comply with the requirements of the act.

Under the provisions of the original act, the court was empowered to leave the sequestered property or effects in the possession of the debtor or other person, requiring security for its safe-keeping, and payment or delivery whenever required by the court. The amended act, however, makes a very material change in this respect. That act creates a distinction between persons in actual possession of, or having under their control, the effects of alien enemies, and persons owing debts to alien creditors. In the former case immediate payment or delivery was required to be made to the receiver without qualification or condition. In the latter case payment of interest was only exacted, and no execution could be issued during the war against the debtor who faithfully complied with the statute in giving information of his indebtedness. The reason of this distinction is apparent. A trustee, fiduciary or other person having property or money in his actual possession, or under his control, could not justly demand any delay or indulgence. There could be no valid reason why payment should not at once be made to the receiver. A mere debtor, on the other hand, might be subjected to considerable inconvenience in making such payment, and as by the laws of nearly all the states South, the collection of debts was stayed, the Confederate government extended the same indulgence

632 *to parties indebted to alien enemies.

In the present case the fund was deposited in bank to the credit of the executor, and was therefore under his control. He was within the express terms of the law, and the question is, was he bound to obey it.

It will be observed that these provisions were of a highly stringent character. That the Confederate government had the power to enforce them, no one familiar with the history of that period will question. It was a government of paramount force, to whose laws and mandates every citizen within its jurisdiction was constrained to yield implicit obedience. Indeed this was conceded in the argument. It was said, however, that this government was an unlawful and treasonable organization, and no act done under its authority prejudicial to the rights of loyal citizens of the United States can be recognized as valid by the courts.

In support of this view, an opinion of Chief Justice Chase, delivered at Richmond in *Keppell's administrator v. Petersburg Railroad company*, is relied on. It seems that Mrs. Keppell was a stockholder in that company, and that a part of her stock was confiscated and sold during the war. In a suit against the company by Mrs. Keppell's administrator, the company claimed a credit for the dividends paid to the Confederate receiver and to the purchasers of the stock sold. The learned Chief Justice conceded that if the dividends belonging to Mrs. Keppell had been set apart to her specially, and the money thus set apart had been taken from the officers of the company without their consent, by the application of force, either actual or menaced, under circumstances amounting to duress, the loss must have been borne by her. But nothing of the kind appeared. No dividends were set apart; there was no force actual or threatened. On the contrary, the conduct of the company afforded a reasonable inference that they were not involuntary accessories to the whole action

633 of the government. The *facts of the case are not reported in the volume to which we have been referred. It is therefore somewhat difficult to understand what is meant by the expression "application of force actual or menaced, under circumstances amounting to duress." We are not told how far the person holding the effects of an alien enemy was required to go—what amount of resistance he was expected to display in defence of property belonging to a loyal citizen of the United States.

A government of supreme authority denouncing the penalties of fine, imprisonment and forfeiture upon acts of disobedience to its proclaimed will, affords as strong an illustration of "menaced force" as can well be imagined. What does it matter that such a government is unlawful. A citizen may be justified in resisting tyranny and oppression, but he is under no obligation, nor can he be required to engage in a hopeless and dangerous contest with the government under which he lives, however illegal it may be, in defence of property confided to his care either as bailee, agent or executor. In *Thorington v. Smith*, 8 Wall. U. S. R. 1, Chief Justice Chase declared that obedience to the authority of the Confederate government in civil or local matters was not only a necessity but a duty. Why should a different rule be established with respect to this executor. Had he refused to pay over the money, everyone familiar with the history of that period, and the temper of the public mind, knows well the whole power of the courts and the laws would have been exerted against him to enforce obedience. What was he to do under such circumstances? How far was he to go in his resistance to the law? Was he to submit to fine and imprisonment, or would the threat of an attachment for contempt have excused him in surrendering the fund? I think the executor was well justified in refusing to incur these hazards. He wisely

declined a contest with a government which the whole naval and military power of *the United States could not subdue under four years. We are not disposed, however, to rest the decision of this case upon this narrow and restricted view. It may be placed upon a higher ground. In *Walker v. Christian*, 21 Gratt. pp. 291, 301, Judge Moncure, speaking for the court, said, "It is immaterial to enquire whether the Confederate government was de jure or de facto only; and if de facto only for what purpose and to what extent it was a de facto government. That it was such a government to a considerable extent and for many purposes, if not entirely and for all purposes, cannot be denied." It is said, however, by an eminent Federal judge that the Confederate government did not possess all the attributes of a government de facto in the highest degree. The reason, he assigns, is it never expelled the regular authorities from their customary seats and functions. It never held the national capital. It never asserted any authority to represent the nation. The conclusion he deduces therefore is, it must be regarded as an unlawful organization, and all its acts and proceedings for the confiscation of the property of loyal citizens must be treated as absolutely null and void.

The test here suggested may be a correct one, when applied to a people having but one central consolidated government. In such States or communities, as a general thing, the object of every revolutionary movement is to overthrow and expel the existing government, to occupy the capital and give laws to the nation. So long as the organization falls short of this result, it may be a question whether it possesses the attributes of a de facto government in the highest degree. However this may be, the test suggested cannot in justice be applied to the Confederate States. They did not attempt or desire to occupy the national capital as their seat of government, nor to give laws to the people of the United States. The whole scope and object of the movement was a separation from the Northern States: the formation of an
635 *independent confederation; the establishment of a new government over their own people within their own territorial limits and jurisdiction. How eminently successful this struggle was for four years, at least, in the attainment of these objects, let the Supreme court of the United States answer. In *Mauran v. Insurance Company*, 6 Wall. U. S. R. 1, the question was presented, whether a Northern insurance company was liable for the value of a vessel captured by the naval forces of the Confederate government. Mr. Justice Nelson, in discussing the principles governing the rights and liabilities of underwriters in such cases, used the following language: "Still it cannot be denied but that by the use of these unlawful and unconstitutional means a government in fact was erected, greater in territory than many of the old governments of Europe, complete in the

organization of all its parts, containing within its limits more than eleven millions of people, and of sufficient resources in men and money to carry on a civil war of unexampled dimensions; and during all which time the exercise of many belligerent rights were either conceded to it, or were acquiesced in by the supreme government; such as the treatment of captives both on land and sea as prisoners of war, the exchange of prisoners; their vessels captured, recognized as prizes of war, and dealt with accordingly; their property seized on land referred to the judicial tribunals for adjudication; their ports blockaded, and the blockade maintained by a suitable force, and duly notified to neutral powers, the same as in open and public war."

Again, elsewhere he declares, "We refer to the conduct of the war as a matter of fact for the purpose of showing that the so-called Confederate States were in the possession of many of the highest attributes of government, sufficiently so to be regarded as the ruling of supreme power of the country, and hence captures
636 *under its commission were among those excepted out of the policy by the warranty of the insured."

All will acknowledge the force of this description, the accuracy and truth of the picture. If the laws and mandates of a government thus organized and powerful, will not protect those who were subject to its jurisdiction and yielded it obedience, it is idle to say that the citizens or subjects of a mere de facto government in any case, can claim exemption under its authority. In *Thorington v. Smith*, Chief Justice Chase expresses the opinion, that the Confederate government may be classed among the governments of which those established at Castine and Tampico are examples. Let us see then what was decided with reference to Castine. It was an American port captured by British forces in 1814, and held in possession of British authorities until the treaty of peace in 1815. During that period foreign goods were received into the port, under regulations established by the enemy. Some of these goods remained in Castine until after the close of the war. The United States government then asserted a right to levy imports and duties upon them. The supreme court of the United States decided this claim could not be sustained; that by the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty. By the surrender the inhabitants passed under a temporary allegiance to the British government; and were bound by such laws, and such only, as it chose to recognize and enforce. Now, if the learned Chief Justice be correct in likening the Confederate government to the military occupation of Castine, it would seem that the same results must follow in both cases. The law of paramount force, which protected the citizen against the claim of the United States, would also protect the bailee or fidu-

637 ciary, who had surrendered the *fund in his hands to the supreme authority of the country. In such cases it does not matter that such authority is denounced as unlawful and treasonable. The same thing may be said of every mere de facto government. It is unlawful, because it is simply de facto. The right to confiscate the property of enemies during war does not depend upon the lawfulness of the government which enforces it. It is derived from a state of war, and is called the right of war. Accordingly, when things in action are confiscated, peace being made those which are paid are deemed to have perished; but those not paid revive and are restored to their true creditors. *Ware v. Hylton*, 3 Dall. R. 227; *Vattel* Book 3, chap. 8, § 138, and chap. 9, § 161.

In the prize cases, 2 Black. U. S. R. 636, the doctrine that the parties to a civil war are in the same predicament as two nations who engage in a contest, and have recourse to arms, was fully recognized and sustained. It was also there held, that the civil war between the United States and the Confederate States, attained such character and magnitude as to give to the United States the same rights and powers which they might exercise in the case of a national or foreign war. Among these was the right to blockade Southern ports against neutral nations; the right to treat as public enemies all persons residing within the territory controlled by Confederate authorities, and to seize and confiscate their property. These were declared to be belligerent rights resulting from a state of war—applicable alike to civil and to foreign wars. It was upon this principle the United States authorities seized and confiscated the cotton of Mrs. Alexander, a widow lady residing in the State of Arkansas, who did not even sympathize with the people of the South in the struggle for independence. The Supreme court of the United States sustained the act, declaring that the personal dispositions of individuals inhabiting enemy's territory, cannot in questions 638 of capture, *be the subject of enquiry. 2 Wall. U. S. R. 405.

According to the laws of nations, the justice of the cause being reputed equal between two enemies, whatever is permitted to one in virtue of a state of war, is also permitted to the other. *Vattel*, 382. It does not matter how the struggle terminated—who the victor and who the vanquished. The question is not one of right, but of power, appertaining to a state of war—power flagrante bello. The government of the United States may exercise both sovereign and belligerent powers. In its sovereign capacity it may punish treason by seizing and confiscating the property of the guilty party. This, however, can only be done by the conviction of the offender according to the forms and requirements of the constitution and laws. His guilt must be made to appear judicially. The constitution throws the shield of its protection

around the citizen, by declaring that no one shall be deprived of life, liberty or property, except by due process of law. When, however, civil war exists, and the government asserts the rights of a belligerent, such as appertain to a state of war between independent nations; treating all the inhabitants of the opposing section as public enemies; blockading their ports against neutral powers; seizing and confiscating their property without trial and without conviction; it must be content to accept all the results which flow from the position thus assumed. In the prize cases, it is admitted by Mr. Justice Grier, that the parties in a civil war usually concede to each other belligerent rights. In the same cases, Mr. Justice Nelson delivering a dissenting opinion, in which Judges Taney, Catron and Clifford concurred, said: "In the case of a rebellion or resistance of the people of a country against the established government, there is no doubt, if in its progress and enlargement, the government thus sought to be overthrown sees fit, it may by the competent power recognize or declare the existence of a state of civil war, 639 which will *draw after it all the consequences and rights of war between the contending parties, as in the case of a public war. And in defining the legal consequences resulting from a public war, he declares, "All the property of the people of the two countries on land or sea are subject to capture and confiscation by the adverse party as enemy's property; with certain qualifications as respects property in land.

In *Wheaton* the same doctrine is thus announced: "But the general usage of nations requires such a war (civil) as entitling both the contending parties to all the rights of war as against each other, and even as respects neutral nations. *Wheaton* Int. Law, page 296; *The Tropic Wind*, Law R., July 1861; *Hughes v. Letsey* et al., 5 Law R. 148; *Price v. Poynter*, 1 Bush. Ken. R. 387; *Coolidge v. Guthrie*, U. S. Circuit court for Southern district of Ohio, vol. 8 Am. Law Reg. 22.

It has been urged here and elsewhere that the government of the United States might at the same time exercise both belligerent rights and sovereign rights: belligerent with regard to the opposing section, and sovereign in punishing individuals engaged in resisting its authority. It might be demonstrated, I think, that inasmuch as the war was carried on by sovereign states, associated in a common confederacy, exercising the highest attribute of government, that no citizen taking up arms under the authority of that government, and yielding obedience to its laws and mandates, can be held amenable to the penalties of treason. It is, however, unnecessary for the purposes of this case to establish that proposition. Let it be conceded that the government having reduced the people of the South to submission has the right to treat them as rebels and traitors. The same may be said of every established gov-

ernment; and the argument carried to its legitimate results proves that in a civil war belligerent rights can only be exercised by the successful party.

640 *It may be that the laws of the Confederate government can no longer be enforced, and that no person can claim exemption from punishment for treason under that authority; but what is to be said in respect to contracts made, rights vested, payments made, liabilities incurred, duties and obligations enforced, whilst such laws were in operation. The government of the United States was unable to afford any protection to this executor at the time of this transaction. Its courts were not only closed against him, but he was declared an enemy of the United States; and his property liable to capture and confiscation by the authorities of that government. Whatever security he had against violence and wrong—whatever protection for person and property, was derived from the Confederate government. Protection and allegiance are correlative obligations. As the citizen is justified in obeying the laws which protect him, so his rights and liabilities in civil and local matters must be tested and settled by the rules of the government which has dominion over him.

The government of the United States obtained many important advantages by the exercise of belligerent rights during the war. It seized and confiscated millions of dollars worth of property belonging to southern citizens who had taken no part in the struggle. It was relieved from all responsibility for acts done on Southern soil and on the ocean by the armies and navies of the Confederate States. Its blockade of Southern ports was respected; and its right to exert against neutral commerce all the privileges of a party to a maritime war, fully recognized. The people of the Northern states approved this policy of their government, and reaped all the advantages flowing from it. For the losses they thereby sustained they must for redress look to the government which claimed their allegiance and received their services. Considerations of natural justice and equity,

the laws and usages of nations, require that the people *of the South shall not be placed in the position of insurers of funds in their hands lost by the accidents of war.

In considering this case, I have been content to concede that the government of the Confederate States was only a government de facto. Whether it was not during its existence something more, is a proposition in regard to which statesmen and jurists will differ so long as a trace of the struggle remains; so long as the fundamental principles of the government excite discussion among men. The decision of that question is not rendered necessary in any aspect of this case. Should it ever arise I trust this court will meet it with the gravity and deliberation its importance demands.

The other judges concurred in the opinion of Staples, J.

The decree was as follows:

This day came again the parties by their attorneys, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that as the sum of money due by John Newton, executor of Mary C. Bushong, to Samuel Bushong was confiscated to the Confederate States, and was paid by the said John Newton to Thomas J. Michie, receiver of the said Confederate States, the said John Newton was thereby discharged from all liability for the same to the said Samuel Bushong; and the Circuit court, therefore, erred in decreeing payment of the same, with interest thereon, to him. And as to the sums of money and interest decreed to be paid to Peter V. Bushong, Mary A. Bushong and Jacob Cox, respectively, the court, without now intending to express any opinion in regard to the liability of the said John Newton, or his estate, for the same, is of opinion that it was premature

in the said Circuit court to render a 642 decree *in that respect in the then state of the record; and that instead of doing so, the court should have directed an inquiry by a commissioner to ascertain whether the bonds taken from purchasers at the sale of the personal property of his testatrix, or any of them, and if any, which of said bonds and what amount remained uncollected at the end of the war; also whether he applied the funds of the estate of said testatrix, or any part thereof, and if any, how much thereof, to his own use; and whether, after receiving the said funds, he always kept them, or an equal amount, either in his own hands or in bank, or in some other safe or usual place of deposit, or invested in Confederate bonds, ready to be paid or handed over to the parties, respectively, entitled thereto, whenever he could do so, until the said funds or money so kept by him perished in consequence of the war. And the commissioner should also be required to state specially any other facts he may deem material, or which may be required by either of the parties to be stated.

Therefore, it is decreed and ordered, that the said decree of the Circuit court be reversed and annulled, and that the appellees, Samuel Bushong, Peter V. Bushong, Jacob Cox and Mary A. Bushong, pay to the appellant the costs by him expended in the prosecution of his appeal aforesaid here; and it is ordered that the cause be remanded to the said Circuit court for further proceedings to be had therein, in conformity with the foregoing decree: which is ordered to be certified to the said Circuit court of Augusta county.

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*Peyton v. Harman.

August Term, 1872, Staunton.

1. Necessary Words Omitted by Mistake—May Be Supplied When.—When it is obvious on the face of a paper, that a word or phrase has been omitted

by mistake, or inadvertence, and such words are obviously and naturally suggested, upon the mere inspection of the paper, as the words which the parties must have intended to use to express their meaning, such word, or words of like import, may be supplied.

2. **Debt on Bond—Endorsement Omitted—Demurrer.**—P executes his bond to H for \$5,500, payable with interest one year after date. On the bond there is an endorsement, that one twenty-fifth of the principal of the bond with the interest due at the end of the year, and so on from year to year, the credit not exceeding twenty-five years in all. H brings debt upon the bond against P, and declares upon the bond, omitting the endorsement. P cravesoyer of the bond and endorsement, and demurs.
HOLD:

1. **"To Be Paid" Supplied.**—The words "to be paid" have been obviously omitted from the endorsement by mistake, and they will be supplied.

2. **Effect of Endorsement.**—The endorsement changes the contract, from a contract to pay in a year, to a contract to pay the same amount in twenty-five annual payments; and the demurrer should be sustained.

3. **Debt on Bond—When Maintainable.***—Debt cannot be maintained on the bond, until the whole is due; and, therefore, the demurrer should be sustained.

This was an action of debt in the Circuit court of Augusta county, brought by M. G. Harman against William H. Peyton and T. P. Peyton. There was a verdict and judgment in favor of T. P. Peyton and against William H. Peyton; and he thereupon applied to this court for a supersedeas to the judgment; which was allowed. There were several questions made on the trial of the cause in the court below; but the case went off upon the demurrer to the declaration; and on this point it is sufficiently stated in the opinion of the court.

Michie & Michie and Smith & Elder, for the appellant.

Baldwin & Cochran, for the appellee.

CHRISTIAN, J., delivered the opinion of the court.

This is a supersedeas to a judgment of the Circuit court of Augusta. It was an action of debt upon a bond in the following words:

"One year after date we, or either of us, promise to pay to M. G. Harman, or assigns, the sum of five thousand five hundred dollars, with interest from date, for value received. Given under our hands and seals this 1st day of January 1860.

"(Signed.) Wm. H. Peyton, (Seal.)
"T. P. Peyton, (Seal.)"

On the back of this bond was the following endorsement:

"It is understood that one twenty-fifth of the principal of this note, and the interest at the expiration of the year, and

*The principal case is distinguished in *Carter v. Naland*, 86 Va. 571.

so on from year to year, the credits not exceeding twenty-five years in all.

'January 1st, 1860. (Signed) M. G. Harman."

The plaintiff, in his declaration, described the instrument according to its face-making profert of the bond, and declaring on the bond without any reference to the endorsement. The defendant cravedoyer of the bond and endorsement thereon, and demurred to the declaration. The demurrer was overruled, and thereupon the defendant filed a general plea of non est factum, upon which issue was joined, and tendered certain special pleas, which were rejected by the court. A verdict was found for the plaintiff for the whole amount of the bond; upon which judgment was entered. A supersedeas to that judgment brings up the case to this court.

The first question—and in our view of the case, the only question—necessary to be considered is, whether the Circuit court was in error in overruling the demurrer to the plaintiff's declaration?

It is too well settled by the decisions of this court, to admit of doubt or discussion, that a writing endorsed on a bond at the time of its execution, operating in favor of the obligor and signed by the obligee, is to be considered as part of the condition of the bond. *Gordon v. Frazier*, 2 Wash. 130; *Smith v. Spiller's ex'or*, 10 Gratt. 318, and cases there cited.

The endorsement under consideration bears date the same day with the bond, and must be read as a part of the obligation, operating with the bond as fixing the contract of the parties: provided, the endorsement is intelligible and operative without (upon the demurrer) the aid of evidence dehors the instrument.

It is insisted by the learned counsel for the appellee, that the words endorsed upon the bond are unintelligible; that the writing is incurably uncertain, and therefore inoperative, and must be wholly ignored.

It is true, if the contract which the parties have made is incurably uncertain, the law will not—or rather, cannot—enforce it. It will only declare such a contract no contract at all, and the parties are then left to the mutual rights and obligations which may then exist between them.

But on the other hand, the law will not pronounce a contract incurably uncertain, and therefore null, because of the omission of words obviously omitted by mistake, and which, if supplied, will make the contract intelligible and operative. 2 *Parsons on Contracts*, 73, 75. Courts of law, as well as courts of equity, may correct an obvious mistake on the face of an instrument, and supply words which have been omitted by the parties, and which are manifestly necessary to express their obvious meaning. *Benjamin on Sales*, 38; 2 *Parsons on Contracts*, 75; 2 *Lomax Digest*, 255; 16 *Gratt.* 311; **Wilson v. Wilson*, 5 *House of Lords Cases*,

40; Lord Say and Seale's case, 10 Mod. R. 40; Douglass R. 384.

I think the result of all the authorities is, that an agreement is not to be considered unintelligible because of some error, omission or mistake in drawing it up, if the real nature of the mistake is apparent, and can be corrected so as to make the bargain intelligible. In other words, whenever it is obvious on the face of the paper that a word or phrase has been omitted by mistake or inadvertence, and such words are obviously and naturally suggested, upon the mere inspection of the paper, as the words which the parties must have intended to use to express their meaning, such words, or words of like import, may be supplied.

Let us apply these principles to the endorsement under consideration. It is in these words: "It is understood that one twenty-fifth of the principal of this note and the interest at the expiration of the year, and so on from year to year; the credits not to exceed twenty-five years in all." It must be conceded that this deliberate act of the obligee, in writing this endorsement upon the bond at the same time when it was executed by the obligors, must have some meaning. According to the principles above stated, it will not be rejected as null and void, simply because it is unintelligible by the mere omission of an obvious word or phrase which, when supplied, makes the instrument plain, sensible and operative. The principle that all deeds and contracts in writing shall be construed favorably and as near the apparent intention of the parties as possible, has become a maxim of the law of the highest antiquity, *ut res magis valeat quam pereat*.

It is apparent from the endorsement that there was an omission of some word or words necessary to express intelligibly the meaning of the parties, and it is clear by its inspection what that omission was. Obviously the words "are to be paid,"

or words of like import, were
647 *the words omitted after the word "interest." These words, or words of like import, are naturally and necessarily suggested from the other words used, and if supplied, they give a reasonable and sensible meaning fairly deducible for the whole instrument. With these words supplied, the endorsement would then read: "It is understood that one twenty-fifth of the principal of this note and the interest [are to be paid] at the expiration of the year, and so on from year to year, the credits not to exceed twenty-five years in all."

The omission being supplied, the construction of the contract as to its meaning and legal effect is plain. While the face of the bond provided for the payment of the sum of money therein named, one year from its date, the endorsement divided that sum into twenty-five annual instalments, one of which, with the interest on the principal left, was to be paid at the end of each year until the entire debt was discharged.

By this endorsement it is plain that the contract of the defendants was changed from

an obligation to pay the whole amount named, one year after the date of the bond, to an obligation to pay the same amount in twenty-five annual instalments. This was the true agreement of the parties—a very different obligation from the one sued upon. There was, therefore, a variance between the obligation described in the declaration and that shown by the bond and endorsement set out on oyer, and for that variance the demurrer should have been sustained. It should have also been sustained upon the further ground that the contract, as evidenced by the bond and endorsement set out on oyer, was not an obligation on which the action of debt could be maintained. The obligation is to pay a sum of money in twenty-five annual instalments, upon which debt will not lie until the whole amount becomes payable. The proper remedy would be an action of covenant for the recovery of the instalments as they fall due.

648 *We are of opinion that the judgment of the Circuit court of Augusta should be reversed.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the Circuit court erred in overruling the defendant's demurrer to the plaintiff's declaration. Therefore, it is considered that the judgment overruling said demurrer be reversed and annulled, and that the defendants do pay to the plaintiff his costs by him expended in the prosecution of his writ of supersedeas aforesaid here; and this court proceeding to pronounce such judgment as the said Circuit court ought to have rendered—It is further considered, that the plaintiff's declaration is not sufficient in law for him to have and maintain his action against the defendant, and that the judgment of the said Circuit court, overruling said demurrer, and all subsequent proceedings, including the verdict and judgment thereon, be set aside and annulled; and that the plaintiff in error recover against the defendants in error his costs by him, about his defence in the said Circuit court expended. Which is ordered to be certified to the said Circuit court of Augusta county.

649 *J. B. Campbell's Ex'ors v. A. C. Campbell's Ex'or.*

August Term, 1872, Staunton.

1. Decree—Final and Irreversible—Second Appeal.†—

The decree of the Court of Appeals upon a question decided by the court below is final and irreversible; and upon a second appeal in the cause, the question decided upon the first appeal cannot be reversed.

2. Same—Same—Interlocutory or Final Decrees.—In such a case the conclusiveness of the decree of the

*For monographic note on Bills of Review, see end of case.

†Decree Final.—The rule laid down in the principal case, that the decree of the court of appeals upon a question in the cause is final and irreversible on the

Court of Appeals is the same, whether the first appeal was from a final or interlocutory decree of the court below. All the decrees of the appellate court are in their nature final; except possibly where that court disposes only of a part of the case at one term, and reserves it for further and final action at another.

3. **Same—Bill of Review—After-Discovered Evidence.***—When the Court of Appeals makes a decree and sends the cause back for further proceedings, there cannot be a bill of review to correct the decree of the Court of Appeals for errors apparent on the face of the record. But there may be such a bill to correct the decree on the ground of after-discovered evidence.

4. **Same—Same—Same—Kind of Evidence.**†—But to second trial, and that on a second appeal in the cause, the question decided upon the first appeal cannot be reversed, and that this is so, whether the appeal was from a final or interlocutory decree of the court below and though the court is satisfied its former decision is erroneous and wished to change it, has been followed in many subsequent cases, citing the principal case as authority on the point. See *Bank of Old Dominion v. McVeigh*, 29 Gratt. 564; *Frazier v. Frazier*, 77 Va. 788; *McCormick v. Wright*, 79 Va. 588; *Effinger v. Kenney*, 79 Va. 553; *Cobbs v. Gilchrist*, 80 Va. 509; *Stuart & Palmer v. Preston*, 80 Va. 626; *Findlay v. Trigg*, 83 Va. 543, 3 S. E. Rep. 142; *W. O. & W. R. Co. v. Cazenove*, 83 Va. 751, 3 S. E. Rep. 483; *Woodson v. Leyburn*, 83 Va. 847, 3 S. E. Rep. 873; *Alexandria Sav. Inst. v. McVeigh*, 84 Va. 48, 3 S. E. Rep. 885; *Beecher v. Lewis & Bagby*, 84 Va. 633, 6 S. E. Rep. 367; *McCullough v. Dashiell*, 85 Va. 40, 6 S. E. Rep. 610; *Lore v. Hash*, 89 Va. 278, 15 S. E. Rep. 549; *Hawthorne v. Beckwith*, 89 Va. 799, 17 S. E. Rep. 241; *Osburn v. Throckmorton*, 90 Va. 316, 18 S. E. Rep. 285; *White v. Omeld*, 90 Va. 339, 18 S. E. Rep. 436; *Krise v. Ryan*, 90 Va. 718, 19 S. E. Rep. 783; *Holleran v. Meisel*, 91 Va. 148, 21 S. E. Rep. 658; *Rosenbaum v. Seddon*, 94 Va. 579, 27 S. E. Rep. 425; *Stuart v. Peyton*, 97 Va. 814, 34 S. E. Rep. 696; *Hall & Smith v. Bank of Va.*, 15 W. Va. 331; *Renick v. Ludington*, 20 W. Va. 537; *Armstrong v. Poole*, 30 W. Va. 609, 5 S. E. Rep. 258; *Morgan v. Ohio River R. Co.*, 39 W. Va. 25, 19 S. E. Rep. 591; *Newman v. Mollohan*, 10 W. Va. 502. See also *Kingsbury v. Buckner*, 10 Sup. Ct. Rep. 645.

Errors Apparent on the Record.—Many cases quote and approve the following words used by the court in the principal case: "An appeal from a decree brings up the whole proceedings in the case prior to the decree; and either party can have any error against him in those proceedings corrected without the necessity of a cross-appeal in any case. If a party fail to complain of any such error, and a decree be made upon the appeal, without correcting or noticing the error, such party will be concluded by the decree from appealing afterwards." See *Findlay v. Trigg*, 83 Va. 543, 3 S. E. Rep. 142; *W. O.*, etc., *Co. v. Cazenove*, 83 Va. 751, 3 S. E. Rep. 483. See also *Frazier v. Frazier*, 77 Va. 788; *Kingsbury v. Buckner*, 10 Sup. Ct. Rep. 645.

***After-Discovered Evidence.**—Several subsequent cases cite the principal case as authority for the proposition that a bill of review may be filed to correct the decree on the ground of after-discovered evidence. See *Connolly v. Connolly*, 32 Gratt. 661, and *foot-note*; *Reynolds v. Reynolds*, 88 Va. 152, 13 S. E. Rep. 598; *Davis Sewing-Machine Co. v. Dunbar*, 82 W. Va. 341, 9 S. E. Rep. 240.

†**Same—Kind of Evidence.**—See *Diamond State Iron*

sustain a bill of review in such a case, the greatest caution should be observed; and the new matters to be sufficient ground for the reversal of the decree, ought to be very material, and newly discovered, and unknown to the party seeking relief at the time the decree was rendered, and such as could not have been discovered by the use of reasonable diligence.

5. **Case at Bar—Immaterial Answers.**—Just before the death of C he assigns all his bonds and notes to his brother B for himself and his brothers. The wife of B survives him only two months. In a suit by her executors against the executors and legatees of C for a settlement of the executorial accounts, the validity of the assignment by C of his bonds and notes, as against his wife, is in question, and the Court of Appeals decides it is invalid, and sends the cause back for an account, with authority to the plaintiffs to propound to the defendants such interrogatories as may be pertinent and material to take the account according to the principles of the decree. The plaintiffs enquire what notes and bonds were assigned, and their amount, and when and how they had been distributed among the parties, which had and which had not, been collected,

650 and the present condition of them. The defendants have no right to avail themselves of these questions for the purpose of making such answer as might tend to show the validity of such assignment; and then rely on these answers as ground for reversing the decree of the Court of Appeals. Such answers are impertinent and immaterial, and not according to the principles of the decree; and afford no ground for reversing it.

6. **Statute—Order to Invest in Confederate Money—Three Conditions Must Concur.**‡—To authorize the order of a judge in vacation for the investment of Confederate money by a fiduciary, under the act of March 5, 1863, *Seas. Acts 1863-68*, ch. 46, p. 81, three things are necessary: 1st. The money must be in the hands of the fiduciary; 2d. It must have been received in the due exercise of his trust; 3d. For some cause he must be unable to pay it over to the parties entitled. If they do not all exist, the order of the judge is null, and the fiduciary is responsible for the money.

Co. v. Rarig & Co., 93 Va. 601, 25 S. E. Rep. 894; *Davis Sewing-Machine Co. v. Dunbar*, 32 W. Va. 341, 9 S. E. Rep. 240, both citing the principal case as authority on this subject.

‡**Statute—Three Conditions Must Concur.**—The rule laid down in the principal case as to the three things that must concur to authorize the order of a judge in vacation for the investment of confederate money by a fiduciary under the act of March 5, 1863, has been approved and sustained by many subsequent decisions, citing the principal case as authority. See *Crickard v. Crickard*, 25 Gratt. 431; *Kirby v. Goodykoontz*, 26 Gratt. 302; *Ammon v. Wolfe*, 26 Gratt. 626; *Carter v. Dulaney*, 30 Gratt. 197; *Crawford v. Shover*, 129 Gratt. 81.

Investment in Confederate Bonds.—See *Cole v. Cole*, 28 Gratt. 368, and *foot-note*; *Mills v. Mills*, 28 Gratt. 479, and *foot-note*; *Patteson v. Bondurant*, 30 Gratt. 96, and *foot-note*; *Carter v. Dulaney*, 30 Gratt. 198, and *foot-note*, all citing the principal case as authority.

See the principal case distinguished in *Broun v. Hull*, 33 Gratt. 23.

7. **Confederate Money—Executor.**—When Confederate money is received by an executor for a good anti-war debt, that he may invest it under the order of a judge: he has not received it in the due exercises of his trust, and, therefore, it is not protected by such order.

8. **Bonds and Notes—Assignment—Assets.**—Until the decree of the Court of Appeals, deciding that the assignment of the bonds and notes was invalid, they could not be considered as assets in the hands of the executor of C; and if within twelve months after that decree they laid before the commissioner directed in the suit to settle the account, a statement of the receipts, they should be allowed their commissions upon that fund.

In October 1852, James B. Campbell, late of the county of Highland, departed this life, leaving a widow, Alcinda C. Campbell, who survived him only about two months, and leaving no issue. His seven brothers were his only heirs at law and next of kin. He owned a large estate, consisting mainly of notes and bonds, amounting at least to fifty thousand dollars. He made a will a few weeks before his death, to wit: on the 2d of October 1852, and during the last illness both of himself and his wife; his sickness being pneumonia, and hers consumption. He appointed two of his brothers, to wit: Thomas Campbell and Benjamin B. Campbell, his executors. About the same time that he made his will he made an assignment of his notes and bonds in these words:

651 "I assign all my notes and bonds to Thos. Campbell this 1st day of October, 1852.

"J. B. Campbell."

"Witness, Benj. B. Campbell."

His avowed object in making this assignment was to give his notes and bonds to his brothers, and thus to prevent his wife from having any distributive interest in the said notes and bonds in the event of her surviving him. She did survive him about two months, and on the 8th of November 1852 she duly renounced the provisions made for her by her husband's will, and on the 30th of December 1852 she made a will, appointing her brother, Samuel Lightner, and her brother-in-law, J. W. Hedges, her executors. The wills, both of her husband and herself, were duly provided and recorded, and the executors appointed by them respectively duly qualified as such. Thomas Campbell, claiming the notes and bonds as assignee thereof for the use of himself and brothers, received possession of them shortly before or after the testator's death, and not long thereafter divided them among himself and his brothers. In May 1854, the said Lightner and Hedges, executors of the said Alcinda C. Campbell, filed their bill in the Circuit court of Highland county, against the said Thomas Campbell and Benjamin B. Campbell in their own right and as executors of said James B. Campbell, and John, Samuel C., Wm. M., A. Hanson, and Edgar Campbell, the brothers of the said Thomas and Benjamin B. Campbell; also Mary Catherine Campbell and Alice P.

Lightner, legatees under the will of said James B. Campbell; the object of which bill was to compel the executors of said James B. Campbell to render before a commissioner of the court a just, true and full account of all the personal estate which came or ought to have come to their hands as executors; especially the bonds, notes, accounts and money which were in possession of said James B. Campbell up to within a few days of his death; also
652 a true *account of the interest of said James B. in the various mercantile firms in which he was interested. And to compel the other defendants to show what distribution of said estate has been made to each of them, and especially what bonds, notes, money, accounts or other thing they have received since the death of said James B., which at the time constituted part of his property or estate; and to obtain a full and fair distribution of said estate to the plaintiffs as executors of said Alcinda C. Campbell, and her distributive interest in the estate of her said husband, and for general relief. The plaintiffs, among other things, charged in the said bill, that the executors of said James B. Campbell, in violation of the rights of the plaintiffs, and upon the most fraudulent and groundless pretenses, had gone on, long before the expiration of a year from the date of their qualification as executors, to make distribution of all the bonds, notes, accounts and money belonging to the estate of said James B. Campbell, equally among themselves, the executors and their brothers.

In October 1854, Thomas and Benjamin B. Campbell severally filed their answers, both in their own right and as executors of James B. Campbell, and the said Thomas professing also to answer as assignee of said James B. and trustee for himself and brothers. They both claimed that the said James B., during his last illness, assigned all his notes and bonds to said Thomas for the use of himself and his brothers, and that thereby the said James B. fully and completely divested himself, in his lifetime, of the said notes and bonds, which therefore constituted no part of his estate at his death; and they set out in their several answers the details in regard to the alleged assignment. The said Thomas also said in his answer, among other things, that the said Benjamin B., at the request and in the presence of said James B., delivered the said notes and bonds to respondent, the said James B., remarking at the same
653 *time, "take them; I have given them to you." The assignment was also handed to respondent by said Benjamin B. "The notes and bonds were held, ever after, under said assignment, until divided in accordance with the direction of said James B. among his brothers, without possession ever having been surrendered by respondent, or any claim to or demand of them by said James B. in his lifetime." The said Benjamin B. also said in his answer, among other things, that said

James B., during his last illness, addressed respondent, as near as he can recollect, in the following words: "You had better help me to make a will; you will lose nothing by it." After some time had intervened, and when said James B. and respondent were alone in the room, he, of his own accord, commenced giving directions how he wished to dispose of his property. He said he wished to assign his notes and bonds to his brother Thomas, and in accordance to his directions respondent drew an assignment in the following words: "I assign all my notes and bonds to Thomas Campbell, this 1st day of October 1852." This was signed by said James B., and at his request witnessed by respondent; and by the direction of said James B. was retained by respondent to be handed to said Thomas with the notes and bonds. Said James B. assigned as a reason for thus disposing of his notes and bonds that if his wife survived him she would, by law, be entitled to one-half of them, and they could do her no good, because if she survived him at all, it could only be for a short time, and then one-half of his estate would go to the Lightner family, in exclusion of his own blood relations. This, he said, "would not be right." Respondent, then at said James B.'s request, drew his will, which was duly executed and attested, and said James B. then gave it to respondent for safe-keeping. A few days after the said will was executed, said Thomas came to see his sick brother, when said James B. directed respondent to get his saddle-bags which contained his notes and bonds and take them out and give them to his brother Thomas. This was done by said James B. in order to consummate the assignment which he had previously made, remarking to said Thomas at the time "I deliver to you these notes and bonds; take care of them." The notes and bonds were accordingly taken possession of by said Thomas, who continued to hold them under the assignment aforesaid. Respondent denied that the notes and bonds assigned and handed over by said James B., in his lifetime, to said Thomas can properly be regarded as assets of his estate. All his right, title and interest in said notes and bonds had been clearly and unconditionally parted with, and absolutely vested in said Thomas, in the lifetime of said James B., so that in no sense could it be said that said James B. died possessed of them. And this disposition is confirmed and established by the clause of said will, which says, "My notes and bonds I have assigned away in my lifetime." Respondent concluded his answer by saying that he and his co-executors were ready to settle their executorial accounts at any time the court might require it of them.

A large number of depositions having been taken both by the plaintiffs and the defendants, and other proceedings having been had in the cause, it came on to be heard by the said Circuit court on the 3d day of October 1856, when the said court was of opinion, for reasons set forth in

writing and filed with the papers in the cause, that James B. Campbell in his lifetime, to wit: on the 1st day of October 1852, made a valid assignment of all his bonds and notes to the defendant, Thomas Campbell, and that by said assignment the right and title in said notes and bonds were completely divested from the said James B. Campbell and invested in the said Thomas Campbell, so that they were no part of the estate of said James B. Campbell, at the time of his death; and that the plaintiffs, therefore, have no right to require the defendant, Thomas Campbell, or the defendants, Thomas and Benjamin B. Campbell, as executors of said James B. Campbell, or the defendants, the brothers of said James B. Campbell, to account for said bonds and notes so disposed of by said James B. in his lifetime. But the court was of opinion, that the plaintiffs have a right to demand of the defendants, Thomas and Benjamin B. Campbell, as executors of said Jas. B. Campbell, an account of all the personal estate of which said James B. died possessed, and which came to their hands, in pursuance of the provisions of his will, to be by them administered; and that plaintiffs' testatrix having renounced the provisions of the will of her husband, the said James B., the plaintiffs, as her representatives, are entitled to such a portion of the personal estate of which said James B. died possessed, as the plaintiffs' testatrix would have been entitled to had said James B. died intestate. The court, therefore, decreed that Commissioner Stephenson should state and settle the accounts of the defendants, Thomas and Benjamin B. Campbell, as executors of James B. Campbell, ascertaining what portion the widow would have been entitled to upon the principles above declared. And said commissioner, in taking said account, was directed not to include the bonds and notes due and payable to said James B. Campbell on the 1st day of October 1852; and he was directed to report his proceedings to the court, in order to a final decree. And leave was granted the plaintiffs to propound to the defendants, Thomas and Benjamin B. Campbell, executors aforesaid, before said commissioner, such interrogatories as he should deem pertinent to the matter before him and material, in order to enable him to take the account aforesaid upon the principles settled by the said decree.

In August 1857, the plaintiffs, the executors of Alcinda C. Campbell, obtained from this court an appeal from the said decree. And on the 28th day of August 1858, this court being of opinion, for reasons stated in writing and filed with the record, that the said decree was erroneous, reversed and annulled the same, with costs to the appellants; and proceeding to render such decree as the said Circuit court should have done, this court further decreed that the assignment purporting to have been made by the said testator, James B. Campbell, on the 1st day of October 1852, to the said Thomas

Campbell, and relied upon in the answers as constituting a valid gift of the notes and bonds of the testator, did not operate as a valid gift thereof in the lifetime of the testator, so as to bar the widow from recovering her distributive share thereof, she having renounced the provisions made for her by the will of her husband. And the court further decreed that the cause be referred to the master commissioner of said court to take, state and settle the account of the appellees, Thomas and Benjamin Campbell, as executors of James B. Campbell, ascertaining what should be the distributive share of the widow in the personal estate of her husband, treating said bonds and notes purporting to have been assigned as aforesaid as part of said personal estate and assets of the deceased, and charging the executors therewith. And leave was given to the appellants to propound to the appellees, and each of them, such interrogatories as may be pertinent and material to take the account according to the principles of that decree. And leave was given to the appellants to amend their bill so as to make the securities of said executors parties defendants, and also to follow the said assets into the hands of those to whom they may have been delivered by said executors, or either of them.

The said decree of this court was certified to the said Circuit court, and on the 6th day of October 1858, was adopted and entered as the decree of the said Circuit court, and by

that court the cause was referred to
657 Commissioner *Stephenson to take, state, settle and report to the court the account of Thomas and Benjamin B. Campbell, as executors of James B. Campbell, in conformity with the directions of the decree of this court; and other provisions were made as are contained in that decree.

In 1859 interrogatories were propounded by the plaintiffs to the executors of James B. Campbell and other defendants, and answers were given, to some of which exceptions were filed, and other interrogatories were propounded and answered.

On the 24th of March 1860, the report of Commissioner Stephenson was returned and filed; to which the plaintiffs afterwards filed exceptions. And in May 1860, on the motion of the plaintiffs, the said report of Commissioner Stephenson was recommitted to Commissioner Strichler, with instructions to state and settle the accounts of T. and B. B. Campbell, executors of J. B. Campbell, in accordance with the decree of the Court of Appeals and the last decree of the Circuit court.

On the 1st of October 1860, the report of Commissioner Strichler was returned and filed; to which the defendants afterwards filed exceptions.

On the 15th of March 1861, a vacation order was made in the cause by the judge of the Circuit court (J. W. F. Allen), the cause having been submitted in vacation, and involving sundry exceptions, both of the plaintiffs and defendants, to the several accounts and reports of Commissioners

Stephenson and Strichler; by which order the court, without deciding any of the questions involved in the cause, other than those connected with the said exceptions and the accounts reported, decreed that the said accounts and reports be recommitted to Commissioner Strichler, in order that the same might be modified, in conformity with the principles and instructions embodied in the opinion of the court accompanying the said order.

658 *Before the last mentioned order

was made, to wit: in July 1859, a cross bill was filed in the same court by Thomas Campbell and the other brothers of James B. Campbell, except Benjamin B. Campbell, against Samuel Lightner and John W. Hedges, in their own right and as executors of Alcinda C. Campbell, in which bill, after setting out in general terms the substance of the original bill, and the proceedings which had been had in the suit, the plaintiffs say that it will be seen, by an inspection of the record, that the only question submitted for the decision of the court was, whether said James B., in his lifetime, had divested himself of all right to said notes and bonds, by gift or assignment, with actual delivery to said Thomas; that it will also appear that the will of said James B., and the assignment aforesaid, were drawn by said Benjamin B., and the said assignment was witnessed by him; that the assignment of said notes and bonds was affirmative matter, and though well known to the plaintiffs at the time of filing their bill, it was for the first time set forth in the answers of the executors of James B. Campbell; and as it was not responsive to the allegations of the bill, the plaintiffs availed themselves of the right to call for full proof thereof; that said Benjamin B. having an interest in the trust declared by the said James B., in regard to the said notes and bonds, and being a party to the suit, the plaintiffs in the cross bill were thus deprived of the evidence of the only witness whose testimony could disclose all the facts and circumstances connected with the assignment and delivery of said notes and bonds to said Thomas; that the plaintiffs in the cross bill had no means of restoring the competency of said Benjamin B. as a witness in the case, which could only be done by his own voluntary action; that since the decision of the cause in the Court of Appeals, said Benjamin B. has voluntarily released and surrendered all
interest whatever in the subject matter of the controversy between *the parties, and that said plaintiffs are
659 advised they are now entitled to the benefit of his testimony, and that his competency is restored in full time to enable them to defend themselves against the claims of the plaintiffs in the original bill. The plaintiffs in the cross bill further say, that the executors of said Alcinda C., in a few days after the assignment and delivery of said notes and bonds, and in the lifetime of said James B., had full knowledge of said assignment and delivery, and at the

time of their qualification they well knew that said notes and bonds were no part of the personal estate of said James B.; and that they are advised they have a right to a full discovery from said Lightner and Hedges as necessary for their defence to the original bill. And the plaintiffs in the cross bill further charge that the said Alcinda C., shortly before and after the death of said James B., through the agency and assistance of said Lightner and Hedges, took and carried away from the house of said James B. a large quantity of beds, bedding, plate, and other articles of property, including a gold watch, belonging to said James B.'s estate, of the value of from three to five hundred dollars, or upwards; that plaintiffs are not able to specify all of said property, because it was taken and carried away without their knowledge or consent, and so far as they have any reason to believe, without any intention on the part of said Lightner and Hedges to account for the same; and that plaintiffs are advised that said Lightner and Hedges are bound to account for the value of said property in the settlement of said estate, and that it is the right of plaintiffs to have a full discovery of the various articles of said property; with the value of each, in order that the estate of said Alcinda C. may be charged with the same. The plaintiffs, therefore, pray for a discovery, according to the allegations of the bill, and for general relief.

There is filed as an exhibit with 660 the bill, a copy of *such a deed of release as referred to therein, which appears to have been duly executed and recorded.

The defendants demurred to the cross bill, and also filed their several answers thereto; and there was filed with the answer of one of them, John W. Hedges, a list of articles taken by Mrs. Campbell when she removed from Highland county, amounting in value to sixty-five dollars.

In September 1859, the depositions of Benjamin B. Campbell and others were taken to be read as evidence in the cross cause; and in April 1860, the deposition of A. Lockridge was taken for the same purpose. The object of taking these depositions was, to prove that there was such an assignment of the notes and bonds of James B. Campbell in his lifetime, as to be valid and effectual against the claim of his widow to a distributive share thereof.

In May 1861, the two causes, the original and the cross cause, came on to be heard together; when the court was of opinion and decreed, that the plaintiffs in the cross bill were entitled to no other relief under their said bill, except to a discovery from the plaintiffs in the original bill of any assets of the estate of James B. Campbell, which might have come to the hands of A. C. Campbell, or of her said executors, which discovery had been made by the answers of said executors; that the other discovery asked by the cross bill, of the knowledge of the executors of A. C. Camp-

bell of the assignmemnt and delivery by James B. Campbell of his notes and bonds to Thomas Campbell in trust, &c., would not have been enforced by this court, as it was never asked for until after the decision of the question of said assignment by the Court of Appeals in the said original cause, and if such discovery had been desirable, it should have been claimed by the plaintiff in the cross bill before that decision was made; that so far as said cross bill may have been intended in the nature of a 661 bill of review, *it should be dismissed, as no leave of the court was ever asked for or given to file it, and because no competent evidence had been offered by the plaintiffs therein to authorize or justify a review or rehearing of the former decree of the said court in the original cause, the evidence offered by the plaintiffs in the cross cause being merely cumulative, and the deposition of B. B. Campbell being incompetent for any purpose in the cause, both on the ground of public policy, and on the ground of interest, of which he had not divested himself, and in the opinion of the court, could not divest himself. It was, therefore, decreed that the said cross bill, so far as it was intended as a bill for review or rehearing of the decree in the original cause, should be dismissed.

The next step in these proceedings appears to have been taken on the 18th of June 1863, when Thomas Campbell and B. B. Campbell presented a petition to Judge Thompson, judge of the Eleventh Judicial Circuit (not embracing the county of Highland), referring to the proceedings in the original suit; stating, that the object of it was to ascertain what amount of assets went into the hands of the petitioners as executors of James B. Campbell, and who was properly entitled to receive them; that there had been no decision of the cause, and it was pending before a commissioner upon a recommended report; that since the war broke out, the said commissioner had absented himself; that said S. M. Lightner had departed this life, and had no personal representative known to petitioners; that said Hedges had become permanently domiciled in the State of Pennsylvania, and under the sequestration laws of the Confederate Congress, would be regarded as an alien enemy; that petitioners had a large amount of assets in their hands as executors, and were so situated that if it were ascertained what was properly due from them, there was no person to whom they could safely pay any part of it; and praying for an order permitting them to invest 662 the *assets in their hands, in accordance with the provisions of the act of the General Assembly of Virginia, passed March 5th, 1863.

There was an affidavit of B. B. Campbell, written at the foot of the petition, stating that the facts therein set forth were true; and on the same day on which it was presented to Judge Thompson, he endorsed thereon, "Leave granted the petitioners to invest according to the prayer of the within

petition." It appears that Confederate bonds to the amount of about \$37,000 were afterwards purchased by said petitioners claiming to act under this order.

No other step was taken in the cause until May term 1866, when, it appearing to the court that S. M. Lightner, one of the plaintiffs, had departed this life, it was ordered that the cause be revived, and thereafter proceed in the name of the plaintiff, John W. Hedges, surviving executor of said Alcinda C. Campbell; and by consent of parties, it was further ordered, that the cause be referred to Commissioner Myers, who was directed to execute the said order made in the cause on the 15th day of March 1861, and make report to the court.

The execution of the said order of May term 1866, was delayed for some time, in consequence of the loss of Judge Allen's opinion referred to in the vacation order of the 15th of March 1861, aforesaid; but a copy of that opinion having been found, the commissioner proceeded to execute the said orders. And further interrogatories having from time to time been propounded by the plaintiffs to the defendants or some of them, and answered by them, Commissioner Myers returned and filed his report on the 24th of April 1867; to which report, both the plaintiffs and the defendants excepted. About this time, to wit: on the 29th of April 1867, T. and B. B. Campbell, executors of J. B. Campbell, filed a petition that time might be allowed them to take

their depositions before the cause
663 should be heard upon the *report of Commissioner Myers; but it does not appear that said petition was ever acted upon, or ever presented to the court.

On the 26th day of September 1867, the cause came on to be heard, on the papers formerly read and the report of Commissioner Myers with the exceptions thereto, when the court, for reasons set forth in a written opinion filed as a part of the decree, overruled the plaintiffs' exceptions, sustained some of the defendants' exceptions in whole or in part, and overruled the rest in whole or in part, and referred back the cause to the same commissioner, who was required at once to reform and restate his account in conformity to the foregoing decision and the said written opinion, and make report to the then present term of the court, in order to a final decree. Among the exceptions of the defendants which were overruled as aforesaid, was the 3d.: "because said commissioner did not, as requested by the executors of said J. B. Campbell, credit them with \$37,000, funded by them in pursuance of the act of Assembly, passed 5th March 1863." On the 27th of September 1867, Commissioner Myers made and reported a restatement according to the directions of the last mentioned decree, to which restatement both parties filed exceptions. And the defendants objected to the court rendering any decree upon the amended report at that term, and asked that the cause might be continued until the next term, to give them an opportunity of

examining the amended report, and to see that it had been made in accordance with the decree rendered on the day before.

On the 29th of September 1867, the cause came on again to be heard on the papers, &c., and the said amended report made during the same term, with the exceptions thereto, when the court, overruling all the said exceptions, confirmed the said amended report; and it appearing from said report, that there was due to the plaintiffs from the defendants, the executors of J. B.

664 *Campbell, the sum of thirty-three thousand eight hundred and sixty-two dollars and twenty-nine cents, with lawful interest on twenty-five thousand and twenty-three dollars and thirty-nine cents, part thereof, from the 20th day of January 1861, till paid; it was therefore further decreed, that the said defendants, Thomas and B. B. Campbell, executors of J. B. Campbell, should, out of their own estates, pay to the plaintiff as surviving executor of Alcinda C. Campbell, the said sum of \$33,862.29, with interest on \$25,023.39, part thereof, from the said 20th day of January 1861, till paid. And on the motion of the plaintiff, leave was given him, in accordance with the decree of the Court of Appeals, to amend his bill so as to make the securities of said executors in their official bond defendants in this cause, and also to follow the assets of the estate of J. B. Campbell into the hands of those to whom they may have been delivered by his executors, or either of them, and to take such other proceedings in said cause as might be necessary in order to a final decree. And it was further ordered, that as to such assets of the estate of J. B. Campbell as are uncollected, the defendants, his executors, should proceed as rapidly as possible to collect the same as far as they can, and make report to the court of all such further collections. And the court overruled the motion of the defendants for leave to file another cross bill in the cause.

From the said decrees of the 26th and 29th of September 1867, the defendants, Thomas and B. B. Campbell, executors of J. B. Campbell, applied to a judge of the late District court holden at Charlottesville for an appeal to said court, which was accordingly allowed. And as the said appeal remained pending in the said District court when the present constitution took effect, it was transferred by law to the Supreme Court of Appeals; and being a cause which the said court had jurisdiction to try, it was deemed proper by the said court to be tried at Staunton, and ordered accordingly.

665 *The case was argued by Fults, Terrell, Baldwin & Cochran, for the appellants, and Michie & Michie and Robertson, for the appellees.

MONCURE, P. delivered the opinion of the court.

The main, though not the only, questions arising in this case are, first, whether the decree pronounced by this court on the 28th day of August 1858, declaring "that the

assignment purporting to have been made by the testator, James B. Campbell, on the 1st day of October 1852, to his brother, Thomas Campbell, and relied upon in the answers as constituting a valid gift of the notes and bonds of the said testator, did not operate as a valid gift thereof in the lifetime of the testator, so as to bar the widow from recovering her distributive share thereof, she having renounced the provisions made for her by the will of her husband," is or is not a final and conclusive decision of the question as to such validity in this case? And if not, then, secondly, whether, upon the whole case as it now stands, that decree was right or wrong?

The second of these two questions was very fully argued by the counsel in the cause; and the counsel for the appellees earnestly and ably contended that, treating the question as *res integra*, and looking at all the testimony in the cause, including that of Benjamin B. Campbell, supposing him to be a competent witness, this court would have to make the decision now which it made when the case was formerly before it; while, on the other hand, the counsel for the appellants, just as earnestly and ably, contended for the contrary. If we had to decide the question thus at issue between the counsel, we might have some difficulty in doing so. But we are relieved of this difficulty by the views we entertain of the question first above stated. And we will now proceed to present those views:

Then, recurring to the first question, 666 we enquire "whether the said decree of this court of the 28th day of August 1858, is or is not, a final and conclusive decision as aforesaid? Or, in other words, whether this court can now reverse or alter that decision?

In *White v. Atkinson*, 2 Call 376, decided in 1800, it was held that the court of chancery cannot make any alteration in the terms of a decree of this court certified thither, in order that a final decree may be made in the cause.

In *Price v. Campbell*, 5 Call 115, decided in 1804, the same doctrine was held. Tucker, judge, said: "The single question is whether the chancellor could, upon the same facts, change the decree of this court? The case of *White v. Atkinson*, 2 Call 376 (*supra*), decides that he could not; and I approve of that decision. It makes no difference that it does not appear, that the mistake was noticed at the time of affirming the former decree; for the point was fairly presented upon the record, and it cannot be admitted that the court did not advert to it. A contrary doctrine would overthrow the whole theory of the law; which supposes everything contained in the record to have been decided on; and has wisely established the rule that *interest reipublicae res judicatas non rescindi*." Carrington, Judge, was of the same opinion; and said the decision in *White v. Atkinson* "ought to be adhered to, or there will be no end to controversies; and parties will never be certain as to the result of the suit."

In *Campbell v. Price, &c.*, 3 Munf. 227, decided in 1812, it was held that the court of Chancery cannot correct by bill of review any error apparent on the face of the proceedings in a decree which has been affirmed by the Court of Appeals. It had before been held (in *Price v. Campbell*, 5 Call 115, cited *supra*), that such an error could not be corrected on motion. The error here was most palpable, the sum decreed being currency, when it should have been sterling money.

667 *In the *Bank of Virginia v. Craig*, 6 Leigh 399, it was held that this court cannot examine the propriety of a decree made at a former term *inter partes*, nor set aside such a decree of a former term, on the ground that it decided matters *coram non iudice* at the time. This was a case of very great hardship, a decree having been rendered by this court against a surety who was no party to the appeal, and as to whom no decree had been rendered by the court below. The distinguished counsel for the surety moved the court at a succeeding term to set aside the decree; and he took this distinction: that though a decree made in a cause and between parties before the court, and which the court had jurisdiction to make, could not be set aside at a subsequent term, yet a decree made in respect to matters or parties *coram non iudice*, a decree, in other words, which the court had no jurisdiction to make, might be set aside at a subsequent term. But this court overruled the motion on the ground that it could not then set aside the decree entered at the former term, whether it was prematurely entered or whether it was objectionable on its merits or not. In *Towner v. Lane's adm'r*, 9 Leigh 262, decided in 1838, upon a petition for a rehearing on a cause in this court, at a term subsequent to that at which the court has entered a decree, but before that decree has been certified to the court below, on the ground that the decree was founded on a mistake in point of fact; the question was whether it was in the power of the court to allow the rehearing? And upon this question four judges present were equally divided in opinion. The rehearing was therefore refused. Judges Cabell and Brooke were for granting a rehearing in the case, because the decree of this court had not been certified to the court below, and they considered the case as still in the power and under the control of this court. Judges Parker and Brockenbrough were opposed to a rehearing, notwithstanding the decree had not been certified to the court below.

668 *Some of the judges reviewed the authorities, both in England and in this state, on the subject, and the remarks of some of them are very striking and appropriate to the case we now have in hand for decision. Judge Parker said: "It is just and expedient that there should be some termination to litigation. Particular cases of hardship must yield to general rules of convenience. We must fix some period at which cases shall be considered as finally

ended, or this court will be overwhelmed with applications for rehearing, and parties will be kept in continual uncertainty of their rights. Fix on any we may, individual injustice may be done; but upon the whole, the public good will be promoted by avoiding the mischiefs of uncertainty and long protracted law suits. This is one of the chief reasons why we adhere to erroneous precedents. Whatever the period may be, it ought to be certain, well defined and inflexible, or the evil is not remedied." After assigning reasons for fixing the end of the term as the period, he said: "For these reasons I should incline, on principle, to say that the end of the term should be the end of the litigation, so far as this court is concerned; and I think this rule is established by authority:" and he then proceeded to review the authorities.

Judge Brockenbrough, whose opinion immediately follows that of Judge Parker, said: "I concur in the opinion just expressed. I have always understood that when the term of the court ends, the case is no longer within the breast of the court, but constitutes part of the unchangeable records of the court. If it is afterwards deemed to be within the discretion of the court to reopen the record, what limit is to be placed to that discretion?" After showing that the same reason which would justify the court in granting a rehearing at any time before the decree is certified to the court below, would also justify it in so doing, even after proceedings had in that court, to enforce that decree, he proceeded

669 to say: "At that moment a discovery is made that the judgment or decree of this court is palpably erroneous; ought not this court, in the exercise of the discretion which is claimed for it, to reopen and review the cause, and correct its own mistakes? Certainly it ought to do so, on the principles contended for. But we have a recent and express authority that this cannot be done. In the case of the Bank of Virginia v. Craig, a decree was entered against the sureties in a guardian's bond, who, although they were parties in the court of Chancery, were neither appellants nor appellees in this court. An execution was issued, and Mr. Hooe, one of the sureties, had given a forthcoming bond. He applied to this court for a rehearing at a subsequent term; and surely if the court had had the discretion which is now contended for it would have been granted to him, for a case of greater hardship can hardly be imagined. Yet the court refused to rehear it, on the ground that it could not now set aside the decree entered at the former term, whether it was prematurely entered or whether it was objectionable on its merits or not."

These seem to be all the material decisions of this court on the subject we are considering, to which we have been referred by counsel, or which we have met with, and they seem conclusively to show that after the end of the term of this court at which a judgment or decree may be

rendered by it—or at all events, after such judgment or decree has been certified to the court below, it is too late to have the case reheard in this court, upon any ground of error of law or of fact apparent upon the face of such judgment or decree, or of the record on which it was rendered. Whether the rule be founded on principle, or be merely a rule of practice, it is alike absolute and inflexible. Public policy, if not necessity, requires that it should be strictly enforced, even in cases of the greatest individual hardship. The law has been

670 settled by these cases, and has *ever since been acquiesced in, and hence no more recent cases on the subject are to be found in our reports. Applications for rehearings after the end of the term have often since been made to this court, but have always been refused, and there the cases have ended. There is a recent statute authorizing the court, under certain circumstances, to rehear and review a case decided at the preceding term. Acts of Assembly 1869-70, p. 228, chap. 171, § 10. But that statute has no bearing on this case.

According to the authorities before referred to, we think it very clear that we have now no right to review and reverse the decree pronounced by our predecessors in this cause on the 28th of August 1858, more than fourteen years ago, and that we would have no such right, even if it were plain that that decree is erroneous. We have seen that this court has refused to review and reverse, or even amend, its own decree, made at the next preceding term, although the error in such decree was palpable and occasioned great injustice, and although it obviously proceeded from a mere oversight of the court. Here the cause was first decided in the court below on the 3d of October 1856, more than two years after the institution of the suit, when the parties had had the fullest opportunity of preparing for the trial, of which opportunity they fully availed themselves. After the appeal from that decision had been pending for a year this court, on the 28th of August 1858, upon full and able argument, pronounced a decree reversing that of the court below, and settling forever, as was supposed, the principles involved in the cause, and leaving only an ordinary administration account to be settled, and the widows' distributive share of the personal estate of her husband to be assigned to her or her representatives. And now, after the lapse of fourteen years since that decree, this court is asked to review and reverse it,

upon evidence which, to say the most of it, and including as *part of it the incompetent testimony of B. B. Campbell, an interested party and the chief actor in the transaction from which the controversy arose, presents only a case of doubt as to the correctness of that decree! A bare statement of the case would seem to be an all-sufficient answer to the application.

But it is contended by the learned counsel of the appellants, that while the decree of

this court, of the 28th of August 1858, would have been conclusive, even upon the court itself, if it had been a final decree, yet that it was interlocutory only, and though conclusive upon the court below as long as it stands, it may be, and ought to be, reversed by the Court of Appeals itself for error on the face of the decree and record as they then stood.

We know of no warrant for any such distinction as is thus attempted to be drawn between what are called final and interlocutory decrees of this court; and we have been referred to no authority in support of this review. As was correctly said by the learned counsel of the appellees in their argument of this case, all the judgments and decrees of this court are final, and none of them are interlocutory; at least, when they (as they almost always do) dispose of the whole case involved in the appeal; even though the appeal be from an interlocutory decree, and even though the cause be remanded to the court below for further proceedings to be had therein. There may possibly be an interlocutory decree in the Court of Appeals, as where that court disposes only of a part of the case at one term, and reserves it for further and final action at another. We have something like an example of such a case in *The Commonwealth v. Beaumarchais*, 3 Call 107, 151, referred to by Judge Parker in *Towner v. Lane's adm'r*, 9 Leigh, 262, 280. But such cases must be extremely rare. The decree of this court is certainly not interlocutory, and is none the less final because it is upon an appeal from an interlocutory decree of the court below. The latter decree does not impart its interlocutory nature to the decree of this court, which affirms or reverses it in whole or in part, or adjudicates the principles of the cause. The case made for the Court of Appeals by an appeal from a decree of the court below, whether final or interlocutory, is, as to the Court of Appeals, a complete case in itself, and the decree of that court therein is final and conclusive between the parties, as well upon that court itself as upon the court below; and the Court of Appeals can do nothing more in the course of the same litigation until a new and different appeal is brought up to it from some decree of the court below, rendered in the cause upon subsequent proceedings in that court; and then the Court of Appeals can only review and revise that decree without interfering with its own former decree. The two appeals are different and independent cases in this court. The decision of this court is not only final in regard to the decree appealed from, but also in regard to all the prior orders and decrees in the case between the appellants and appellees. An appeal from a decree brings up the whole proceedings in the case prior to the decree; and either party can have any error against him in those proceedings corrected without the necessity of a cross appeal in any case. If a party fail to complain of any such

error, and a decree be made upon the appeal, without correcting or noticing the error, such party will be concluded by the decree from appealing afterwards. *Burton v. Brown*, not yet reported. See also *Walker's ex'or, &c., v. Page, &c.*, 21 Gratt. 636.

The counsel for the appellants did not contend that this court could, or would, upon mere motion or petition, review and reverse its decision at a former term; but contended that the court could, and in a proper case should, do so upon an appeal from a subsequent decree of the court below in the same case. It seemed to be supposed by the learned counsel that an appeal from a *subsequent decree would bring up the whole case to this court, and thus empower it to make such decree in it as justice might require. Now that is not the true theory. Such an appeal brings up only the proceedings in the case subsequent to the decision of this court on the former appeal. And the function of this court in the case is prescribed by section 23 of chapter 182 of the Code, as amended by the act approved June 23d, 1870, which declares that "The appellate court shall affirm the judgment, decree or order, if there be no error therein, and reverse the same, in whole or in part, if erroneous, and enter such judgment, decree or order as the court whose error is sought to be corrected ought to have entered, affirming in those cases where the voices on both sides are equal; provided, &c." This is the only authority conferred upon the court in regard to the appeal, and it contains no power to interfere with a decree of the court upon a former appeal. Such a decree is *coram non iudice*.

We are, therefore, of opinion, that the former decree of this court in this cause ought not to be reversed, and cannot be reversed, for error on the face of the decree and record as it then stood, even supposing that such error actually exists.

But however that may be, it was further contended by the counsel for the appellants "that for new matter, not available at the first hearing below, and not in the record on the former appeal, the court below ought to have reheard and reversed the former decree; and for its failure to do so, the final decree should be reversed, and the former decree be now reheard and reversed."

That a decree of the Court of Appeals which has been certified to and entered as the decree of the court below may be reviewed and corrected, or reversed, on a bill of review filed in the latter court, founded on new matter, seems to be true. Although it is strange that no case, as we believe, is to be found in our reports in *which the question has been expressly decided.

There are a few cases, however, from which it may be inferred that such a proceeding is lawful. As in the case of *Campbell v. Price, &c.*, 3 Munf. 227, the court, in its opinion, said that after a decree of affirmance by the Court of Appeals, a bill of review cannot be received on the ground of

any error in the decree, which is apparent on the face of the record: Thus leaving it to be inferred that there might be a bill of review in such a case founded on new matter. In the case of *McCall v. Graham, &c.*, 1 Hen. & Munf. 13, such a bill of review was filed; but the chancellor held that it ought not to have been received, because "the new evidence now produced does not materially vary the case from its aspect at the former hearing. Nor does it satisfactorily appear that the complainant could not have produced it then; indeed, the same or similar evidence must have been in her knowledge then." And in *Randolph's ex'or v. Randolph's ex'or, &c.*, Id. 181, a special court of appeals held "that the bill of review ought not to have been received or allowed by the High court of Chancery, as it does not show any new matter, or disclose or refer to any new evidence, sufficient to ground a bill of review or reversal of the decree prayed to be reviewed and reversed; nor does the new evidence produced in any manner warrant such review and reversal:" thus not denying the competency of the court below to allow such a bill of review if the ground had been sufficient.

But while it is no doubt true, that a bill of review may be allowed in such a case, the fact that there have been so few cases in our courts in which a bill of review has been received in such case; and none, we believe, so far as our reports show, in which a decree of this court has been reversed on a bill of review, shows that the greatest caution should be observed in such cases, and the new matter, to be sufficient ground for the reversal of the decree, ought
675 to be very material, and *newly discovered, and unknown to the party seeking relief at the time the decree was rendered, and such as he could not then have discovered by the use of reasonable diligence. This is necessary even in an ordinary case of a bill of review of a decree of the same court in which the bill is filed, on the ground of new matter. A fortiori, it must be necessary, when the object is to reverse a decree of the Court of Appeals, in favor of the finality of which there are so many reasons founded on public policy and convenience.

This being the state of the law and our decisions on the subject, we now proceed to enquire, whether a case is made out by this record for a reversal of the former decree of this court, upon the ground of newly discovered matter?

In this case no bill of review has ever been filed. To reverse a final decree, even of the court below, on the ground of newly discovered matter, a bill of review is necessary; and such a bill can only be filed by leave of the court, and must be sworn to. A fortiori, are these precautions necessary, when the decree sought to be reversed is that of the court of last resort. There was a cross bill filed in July 1859, about a year after the decree of the Court of Appeals; but that bill was neither sworn to, nor filed by leave of the court. It has been treated

in the argument of the counsel for the appellants as substantially a bill of review. Let us so consider it, for the purposes of this case, and see if it presents sufficient grounds for the review and reversal of the former decree of this court.

Now, this bill does not state any material fact occurring since that decree, nor any new matter since then discovered which could not by the use of reasonable diligence have been discovered before, and which could have had any effect in producing a different decree if it had then been in the record. The only grounds on which it can be said to claim relief as a bill of review are:

676 1st. *That the plaintiffs in the original bill, the executors of Alcinda C. Campbell, in a few days after the alleged assignment and delivery of the notes and bonds of her husband, James B. Campbell, and in his lifetime, had full knowledge of said assignment and delivery, and at the time of their qualification well knew that said notes and bonds were no part of the personal estate of said James B.; and that the complainants in the cross bill had a right to a full discovery from the said executors as necessary for their defence to the original bill; and, 2dly. That Benjamin B. Campbell, having drawn the said assignment, and the will of James B. Campbell, was alone cognizant of material facts affecting the validity of said assignment; that he had an interest in the subject which deprived the complainants of his testimony on the former hearing of the cause in the court below; that they had no means of restoring his competency, which could only be done by his own voluntary release; that since the decision of the cause in the Court of Appeals, said Benjamin B. had voluntarily released and surrendered all interest which he had in the subject by his deed duly executed and exhibited with the cross bill; and that the complainants in that bill had then a right to the testimony of said Benjamin B., which would fully explain and prove the assignment and delivery of said notes and bonds; facts of which he alone was cognizant, and which could not be established so long as he thought proper to retain an interest in the cause.

As to the first of these two grounds, a complete answer to it is, that whatever knowledge the executors of Alcinda C. Campbell may have had in regard to the assignment and delivery of the notes and bonds aforesaid, the fact of such knowledge was known to the complainants in the cross bill before the decree in the original suit was rendered; or, at all events, it is not pretended in the cross bill that said complainants discovered that fact, for the first time, after such decree; and the cross
677 bill *might, and ought, therefore, to have been filed before such decree, instead of after the decree of the Court of Appeals.

And as to the second of the said two grounds, a complete answer to it is, that it is not pretended in the cross bill that the

complainants did not know before the original decree was rendered, what facts material to the case were within the knowledge of Benjamin B. Campbell, or that he then refused or was unwilling to release his interest in the subject of controversy; and the complainants should not be allowed to take their chances for obtaining a decree without the evidence of said B. B. Campbell, and, failing in that, to have the benefit of the said evidence to reverse the decree of the Court of Appeals. Another complete answer is, that though the release executed by B. B. Campbell may have been sufficient, if it was, to divest him of any interest in the notes and bonds, it certainly did not release him from his liability to the executors of Alcinda C. Campbell for the devastation committed by him in regard to said notes and bonds, which liability could only be released by the said executors themselves. He therefore still remained an incompetent witness after the execution of said release.

The only grounds relied on in the cross bill for a review of the said decree being wholly insufficient, the Circuit court, therefore, in May 1861, properly dismissed the said cross bill, so far as it was intended as a bill for review or rehearing of the said decree.

But there is another ground, not taken in the cross bill, upon which it was contended that there should be a rehearing and reversal of said decree; and that ground is thus presented in the additional brief for the appellants, being the fourth of the grounds there taken: "That the examination of the defendants on interrogatories, gives to their answers the force and effect of answers to bills of discovery, and renders the
678 whole of *those answers evidence in the cause, such as, taken in connection with the other facts in the cause, required a rehearing and reversal of the former decree, which it was error to refuse."

It would be a novel proceeding for the court below to review and reverse a decree of the Court of Appeals, without any bill of review at all, and merely upon evidence subsequently taken in the cause; however strongly that evidence might tend to show that such decree was erroneous.

But there was no such evidence which could be used for any such purpose, even if it had been duly presented in a bill of review; and indeed, we think, there was no evidence which can be said to be in conflict with the decree of the Court of Appeals. The most that can be said is that the whole evidence raised a question of doubt about which there might well be a difference of opinion; and that this court decided it wrongly in the opinion of the counsel for the appellants. This court distinctly decided that the alleged assignment did not operate as a valid gift of the notes and bonds aforesaid, so as to bar the widow from recovering her distributive share thereof; and that the said notes and bonds were to be regarded as a part of the testator's estate, so far as the widow's

right to a distributive share thereof was concerned. And nothing remained to be done after that decree, but to carry it into execution, by taking the proper accounts, following the assets into the hands of those to whom they may have been delivered by the executors, and to subject the said executors and their securities to liability for the amount which might be found to be due to the representatives of the widow. And the decree, after deciding the question in controversy in the cause, merely gave the necessary directions for carrying the decree into execution as aforesaid. Among those directions, leave was "given to the appellants to propound to the appellees and each
of them such interrogatories as

679 *may be pertinent and material to take the account according to the principles of this decree." The appellants availed themselves of this leave, and propounded many interrogatories to the executor of James B. Campbell and his other brothers; but they were all propounded alone with the view of ascertaining, not whether the alleged assignment of the notes and bonds was valid or not, for it had been already decided in the case to be invalid; but what notes and bonds were the subject of the said alleged assignment; what was their amount; when and how they had been distributed among the parties who had claimed them; which of them had been collected, and when; which of them remained uncollected, and why; what was the present condition of them, &c., &c.? All such enquiries were "pertinent and material to take the account according to the principles of the decree." The defendants had no right to avail themselves of these questions for the purpose of making such answers as might tend to show the validity of such assignment, and then rely on those answers as a ground for reversing the decree of this court. Such answers were impertinent and immaterial, and were not according to the principles of the decree. They tended to disprove what had been conclusively settled by the decree, and what was res adjudicata in the cause. Take, for instance, the 5th interrogatory and answer thereto, which were specially noticed in the argument. The 5th interrogatory was, "Did you not receive from James B. Campbell, during his last sickness or shortly before, bonds, notes, claims, accounts or other assets or moneys due from yourself or others to him, or a surrender of debts, bonds or accounts or claims due from you to him. If you did, render before said commissioner a full and minute account thereof in writing?" To that question, Thomas Campbell's answer was: "I did receive from J. B. Campbell during his last sickness notes and bonds," &c., "but all his right and title to the same he conveyed to me by an assignment
680 *and delivery of said bonds to me,"

&c. Now the latter part of this answer was irrelevant, and not responsive to the question according to its well understood meaning, and might have been stricken out,

and must be disregarded as if it had not been made. Such an answer can certainly afford no ground for reversing the decree of this court.

We have said, we think there was no evidence in the cause in conflict with the decree of this court. None of it seems to be in conflict with the idea that if the testator intended to make any gift at all of his notes and bonds independently of his will, it was a gift intended to operate, not *inter vivos*, but *causa mortis*. To the validity of each of these gifts, delivery of possession is necessary. But a gift *causa mortis*, being revocable at the pleasure of the donor in his lifetime, is not effectual against the right of the wife of the donor to a distributive share of his personal estate. The decree of this court was that the alleged assignment did not operate as a valid gift of the notes and bonds in the lifetime of the testator, so as to bar the widow from recovering her distributive share thereof. The gift might not operate as a valid gift for that purpose, either because there was no delivery of the notes and bonds, or because, there having been such a delivery, it was in execution of a gift *causa mortis*. "It appears," said this court in its opinion delivered when the said decree was pronounced, "that there was no such absolute and irrevocable gift and parting with possession, as to constitute a valid gift *inter vivos*. The facts do not prove that at the time the testator intended to part with all dominion over the subject. The testator was in his last illness; a disposition of property made under such circumstances is most likely to be testamentary, unless the contrary clearly appears."

We think the record affords no ground for reversing the former decree of this court, and that the same ought still to remain in full force.

681 *We now proceed to consider the other errors assigned in the petition and the briefs, or such of them as it may be material to notice.

As to the dismissal of the cross bill so far as it was intended as a bill of review, we have already said that the Circuit court did not err in that respect. Nor would it have erred if it had dismissed that bill out and out. There was no occasion for it for any purpose. But the cross cause seems to have been in effect dismissed, as no further notice seems to have been taken of it since the decree at May term 1861.

As to the third assignment of error in the petition, that "the court erred in rejecting the application of your petitioners for leave to take their depositions, under the provision of the act of Assembly passed February 7th, 1867," it is sufficient to say that it does not appear that such application was rejected, or even acted upon by the court; and it was admitted by the counsel for the appellants that this assignment of error is unfounded in fact. It will not, therefore, be further noticed.

As to the fourth assignment of error in the petition, that "the court should have

sustained the thirteenth (meaning the third) exception of your petitioners to Commissioner Myer's first report." That exception is in these words: "3. Because said commissioner did not, as requested by the executors of said J. B. Campbell, credit them with \$37,000 funded by them in pursuance of the act of Assembly passed 5th March, 1863. See petition for leave to fund, with the proper endorsement of the judge thereon, together with the bonds procured, here exhibited as part of this exception, marked Z. The said act of Assembly was passed for the relief of fiduciaries situated as the executors of J. B. C. were, and they availed themselves of the benefit of it, in order to place the said sum of \$37,000 at the control of the court, for the special purpose of meeting the claim of *A. C. Campbell's executors and legatees, should it be ultimately decided that they are entitled to it, the proceedings having been regular in all respects, and the funding in accordance with the requirements of the statute. The executors should have been credited with the amount of said bonds as so much disbursed by them under the authority of said statute."

This exception presents one of the most important questions arising on this record, looking to the large amount involved. The act of March 5th, 1863, under which the alleged investment is claimed to have been made, enacted "that whenever any guardian, curator, committee, executor, administrator, or other fiduciary or trustee, may have in his hands moneys received in the due exercise of his trust, belonging to the estate or trust fund held by him as fiduciary or trustee, which moneys any such fiduciary or trustee may, from the nature of his trust, or for any cause whatever, be unable to pay over to the cestuis que trust, or parties entitled thereto, it shall be lawful for such fiduciary or trustee to apply, by motion or petition, to any judge of a Circuit court in vacation, for leave to invest the whole or any part of such moneys in interest-bearing bonds, or certificates of the Confederate States, or of the State of Virginia, or any other sufficient bonds or securities of or within the said State; and the said judge may, in his discretion, grant such leave. The bonds, when practicable, shall be taken in the name of such fiduciary or trustee in his fiduciary character; and whenever such investment shall be made, such fiduciary or trustee shall be released from responsibility for the moneys thus invested; but it shall be his duty to preserve the bonds thus taken, and to exercise due diligence in collecting the interest accruing thereon and in making a proper application thereof; provided, that nothing herein contained shall authorize said fiduciary or fiduciaries to change the character of an existing investment, nor

683 any *investment made under the provisions of this law, until authorized by the decree of a Circuit court of competent jurisdiction; and provided further, that the provisions of the foregoing section shall

not be, so construed as to interfere with the powers now exercised by courts of chancery over the subject." Acts of Assembly 1862 and 1863, p. 81.

On the 18th of June 1863, Thomas and B. B. Campbell presented a petition to Judge Thompson, of the Eleventh Judicial Circuit (not embracing the county of Highland), praying for an order permitting them to invest the assets in their hands as executors of J. B. Campbell, in accordance with the provisions of the said act of March 5th, 1863. In their petition they referred to this suit; stated that the object of it was to ascertain what amount of assets proper went into their hands, and who was properly entitled to the same; that there had been no decision of the cause; that one of the executors of Alcinda C. Campbell was dead and the other lived out of the country, &c.; and that the petitioners had a large amount of assets in their hands as executors, and were so situated that if it were ascertained what was properly due from them, there was no person to whom they could safely pay any part of it.

This petition was sworn to by B. B. Campbell, one of the petitioners, and on the same day Judge Thompson, in vacation, by an endorsement on the petition, granted leave to the petitioners to make the investment accordingly.

Under the act of assembly, petition and endorsement aforesaid, the investment of \$37,000 in Confederate bonds, referred to in the appellants' third exception, is claimed to have been made by them; and the question is, whether they were entitled to credit for the same, as they insisted, against such distributee or distributees as had not received his or her distributive shares; 684 in other *words, against the representatives of the widow of James B. Campbell?

At the time the investment was made Confederate money was greatly depreciated in value below its nominal amount, and property of almost every kind was sold at greatly inflated prices. The manifest object of the executors of James B. Campbell and their brothers was to relieve themselves of the heavy debt they owed his widow or her representatives, by preparing to pay the same in Confederate notes or bonds at par. The act expressly provided that wherever a fiduciary had in his hands moneys received in the due execution of his trust, which from the nature of his trust, or any cause whatever, he was unable to pay over to the parties entitled thereto, it should be lawful for him to apply by motion or petition to any judge, &c. The money was required to be in hand, and to have been received in the due exercise of his trust, and he, for some cause, must be unable to pay it over to the parties entitled. These three conditions must have concurred to give a judge in vacation lawful power, on an ex parte motion or petition of a fiduciary, to grant him leave to make an investment of the trust fund. Accordingly the petitioners in this case framed their

petition with a view to show that the required conditions existed in regard to the investment they asked leave to make. But the record shows that none of these conditions in fact existed in the case.

In the first place they said, at least by strong and plain implication, that the controversy involved in the suit brought against them by the executors of Alcinda C. Campbell had not been decided; whereas that controversy had been decided by this court in 1858, nearly five years before the petition was presented. That decision was that the notes and bonds in controversy were part of their testator's estate; and 685 his widow's representatives *became thenceforward clearly entitled to a distributive share of that estate, including the notes and bonds as part thereof. They had then had about six years since the death of their testator for the collection of his assets, and ought then to have had a large fund in hand for distribution. It was their duty to have proceeded with due diligence after that decree to collect the assets of the estate, including the notes and bonds, which still remained outstanding, pay off the remaining debts of the estate, if any, and distribute the surplus among the parties entitled thereto, and at all events pay the distributive portion of the widow. Had they done so, they probably might, before the war commenced, have settled up the estate and paid the widow's portion of it. Instead of that, although her husband died twenty years ago, leaving a personal estate worth from fifty to a hundred thousand dollars, to one-half of which she was entitled, she and her representatives have, to this day, received nothing but the few articles she carried with her when she went away from his house, after his death, and a small sum of money paid her by the executors about that time. The only step which they seem to have ever taken towards a settlement of her distributive share of the estate was the investment which they made in Confederate bonds for that purpose in 1863-'4.

In the second place, they said in their petition that they had a large amount of assets in their hands as executors, meaning, of course, moneys received in the due execution of their trust, according to the language of the act. Whereas they had no assets, or at least no moneys, in their hands as executors. They had divided the notes and bonds among themselves and their brothers a short time after their testator's death. They thus converted the subject to their own use, and became debtors to the estate on that account. The money invested in Confederate bonds, or nearly all of it, was raised after the order for investment, and by contributions 686 made by *the brothers among themselves for the purpose; and they generally derived the sums they contributed, or the greater part thereof, from the sale of real estate—of course at the inflated Confederate prices of the time. For the value of the notes and bonds alleged to have

been assigned by the testator to his brothers, his executors and their securities were liable. And the brothers were also liable for the portions received by them respectively in the distribution of the notes and bonds made among themselves. The debt to the estate on account of these notes and bonds was therefore most amply secured. And it was a devastavit to call in that debt or any part of it, for the purpose of making an investment in Confederate bonds. The investment act contained an express proviso, that nothing therein contained should authorize a fiduciary to change the character of an existing investment.

In the third place, they said they were so situated that if it were ascertained what was properly due from them, there was no person to whom they could safely pay any part of it. They could certainly have paid it to the representatives of the widow before the war, if not to their counsel during the war. Why did they not raise the money by contributions among themselves and pay it before the war, when money was good, instead of raising it in the same way and investing it in Confederate bonds during the war, when money was very bad?

Certainly Judge Thompson would not have made the order he did if he had known the facts. And the executors of J. B. Campbell not having informed him of the facts, as it was their duty to have done, they can derive no benefit from the order, and the same is null and void as to the representatives of the widow. It does not appear that they or their counsel had any intimation of the fact of the investment until after the war. It would have been a very easy matter to have given notice of the fact, at least to their counsel.

687 *As to the sums of \$1,200 received of Pullins, and \$2,500 received of Stephenson, by the executors, in the summer of 1863, in Confederate notes, which constituted part of the said investment, and which their counsel insist were received, in the due exercise of their trust, we think, for reasons already assigned, that they had no right to receive the said sums for the said purpose, and therefore did not receive them in the due exercise of their trust.

Surely it cannot be necessary to say anything more for the purpose of showing that the said executors are not entitled to be credited with the amount of said investment, at least so far as the widow and her representatives are concerned. And we are of opinion that the said third exception was properly overruled.

[The judge then proceeded to consider the other exceptions to the commissioner's report; but as they relate to mere matters of fact, this part of the opinion is omitted. He then proceeded as follows:]

We have thus disposed of all the appellee's exceptions to the reports of Commissioner Myers; but they complain of other alleged errors in the prior proceedings in the cause, some of which at least it is now proper to notice.

In the first place, they complain that the court erred in not dismissing the appellants' cross-bill and bill of review, out and out. We have already sufficiently noticed this subject.

In the next place, they complain that the opinion of the court, which formed a part of the order of the 15th of March 1861, recommitting the cause to Commissioner Strickler to modify the report of Commissioner Stephenson, in conformity with the principles and instructions embodied in the said order, was erroneous in several respects. And

1st. That the instructions of the court overruled the second exception of the 688 appellees to Commissioner *Stephenson's report, for allowing commissions to the appellants, when they never made any settlement at all.

That said second exception to Commissioner Stephenson's report, which was filed on the 24th of March 1860, was not renewed to Commissioner Myers' report, which was filed on the 24th of April 1867; nor was there any exception to the latter report on account of commission allowed to the executors of J. B. Campbell, although exceptions were taken by the appellants to that report on other grounds. Conceding, for the purposes of this case, that their failure to renew their exception on that ground, to Commissioner Myers' report, was not a waiver of it; let us enquire: 1st. Whether there was any error in the said opinion of the court in that respect; and if not, then 2ndly. Whether the report of Commissioner Myers does not conform to the instructions of the court in regard to commission; or, at least, must not be considered as having so conformed, in the absence of any exception to the said report for non-conformity?

1st. Was there any error in the said opinion of the court in regard to commission?

That opinion is as follows: "As to the allowance of commission to the executors, the court is of opinion, that unless a statement of receipts other than those embraced by the assignment, was within six months after the expiration of any year, laid before a commissioner by the executors, no commission should be allowed them thereon unless such statement was given by them to those entitled to the money and it was actually settled with them. As to the notes and bonds included in the assignment, the executors of J. B. Campbell did not regard them as assets, until the decree of the Court of Appeals, and they could not properly be regarded as received by them in that character prior thereto. If a statement of the receipts thereof was laid before a commissioner in this suit, who was directed to settle the same, within twelve months

689 after such decree, then commission *should be allowed. In other words, the court recognizes that the defendants ought to be regarded as in default, and liable to forfeit their commission on the assigned paper, until it was declared by the Court of Appeals to be assets; that all the receipts prior to that day by their transferees should, as of that date, be held

to be in the hands of the executors; and that if they complied with the provisions of the statute then, their commission is not forfeited. The same principle will apply to any subsequent receipts."

Now we see nothing in this opinion which we consider erroneous. There is nothing in the record to show that the executors and their brothers did not act bona fide in claiming the notes and bonds under the assignment, until the Court of Appeals decided that the assignment was null and void as to the widow of the testator. He had an undoubted legal and moral right to give away his notes and bonds by a completed gift inter vivos, and thus to give them away for the purpose of preventing his wife from succeeding to half of them as his distributee. He attempted to give them to his brothers, who, with his wife, were his only next of kin, and she was in her last illness of consumption. Whether the gift was valid or not against the wife was the only question in the case; and that was a pure legal question. Thomas Campbell received and held the notes and bonds as assignee, and not as executor, though he was one of the executors, and he made a division of them between himself and his brothers, in pursuance of what he, no doubt, honestly supposed to be a valid trust reposed in him by the donor. A suit was in due time brought by the executors of the widow, to test the validity, as against her, of the assignment. That suit was in due time tried in the Circuit court, which decided in favor of the validity of the assignment. The executors of the widow appealed from the decree of the Circuit court; and this court reversed that decree and decided

690 against *the validity of the assignment, and that the notes and bonds were part of the testator's estate, of which his wife was entitled to a distributive share. Until the decree of this court the question of title to the notes and bonds was undecided, and they were not in the hands of the executors as such. They could not, until then, be brought into their executorial accounts. They were not in default for not having themselves brought a suit to have the question decided earlier. A suit for that purpose was brought in due time by the conflicting claimant, and there was no want of diligence in the executors in regard to the subject until after the decree of the Court of Appeals in August 1858. Then there was no error in the opinion, that the notes and bonds should not be considered as part of the estate in the hands of the executors until after the decree of this court. Nor do we think there was any error in the said opinion as to the right of the executors to commission afterwards, or as to their duties and the means to be used by them to avoid a forfeiture of their commission. We see no error in the opinion, in any respect, in regard to commission. Then,

2dly. Does not the report of Commissioner Myers conform to the said opinion in regard to commissions; or, at least, must it not be

considered as having so conformed in the absence of any exception to the said report for non-conformity?

Commissioner Stephenson commenced the taking of the account decreed to be taken by the Court of Appeals in due time thereafter, and there is nothing in the record to show that the executors did not place their accounts and vouchers in his hands in full time to be entitled to commission, according to law and the principles settled by the said opinion of the court. It is said there were other assets which came to their hands besides the notes and bonds, on which they forfeited their commission. Those

other assets must have been of 691 *small amount. But there is nothing apparent on the record which enables us to say with certainty that the executors incurred a forfeiture in regard to any of their commission, and we must, therefore, say that they conformed to the law, in the absence of any exception to the report of Commissioner Myers for non-conformity. The executors were certainly entitled to some commission. They did not forfeit all, if any. Which did they forfeit? The appellees should have laid their finger upon it by an exception. There was no such exception. And we, therefore, think, that no objection can now be taken here to the allowance of commission made to the executors by Commissioner Myers.

Without specifying the other objections made by the counsel of the appellees to that opinion, it must suffice to say that we do not consider them well founded, or that they, or any of them, ought to be sustained.

Upon the whole, we think that the decrees appealed from should be reversed, so far as they are considered erroneous in the foregoing opinion, and such decree rendered in lieu of the portions reversed as is required by the said opinion, and should be affirmed in all other respects, with damages according to the law and costs to the appellee, John W. Hedges, surviving executor of Alcinda C. Campbell, as the party substantially prevailing.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that there is no error in the decree appealed from to the prejudice of appellants, Thomas Campbell and Benjamin B. Campbell, either in their own right or as executors of James B. Campbell, or of their brothers, the appellees, John Campbell, Samuel C. Campbell, William M. Campbell, A. Hanson Campbell and Edgar Campbell. But the court is further of opinion, for reasons stated as

692 aforesaid, that *there are errors in said decree to the prejudice of the appellee, John W. Hedges, surviving executor of Alcinda C. Campbell, as follows, to wit:

1st. The said Circuit court erred in overruling instead of sustaining the appellee's first exception to Commissioner Myers' first report. "That on page 24 of said report he has credited the estate with \$330.12, instead of \$725.12, cash received of Wm. Skeen, receiver;" and

in overruling, instead of sustaining, the appellee's renewal of that exception to Commissioner Myers' second or amended report, such renewal being embraced in their first exception to said second report. It appears from a receipt of Thomas Campbell, one of the executors of James B. Campbell, to said Skeen, receiver, at pages 385-6 of the record, that \$725.12 was the true amount received.

2d. As to the appellee's second exception to Commissioner Myers' first report renewed in their first exception to his second report; "because the commissioner has failed to charge the executors with the new list of bonds filed with the late answer of Thomas Campbell since Commissioner Strickler's last report, and headed 'A list of J. B. Campbell & Co.'s bonds assigned to Thomas Campbell and believed to be insolvent or not collectible, amounting as added up at the foot to \$8,012.87.'" Although it was proper not to charge the executors with the whole amount of the bonds included in the "new list" referred to in the exception, yet, as since that list was filed in 1861, some of the said bonds may have been collected, or, as some of them may now be collectible, there ought to be an enquiry and account by a commissioner to ascertain the facts. The court, therefore, erred in overruling the said exception, and, instead of doing so, in not directing such an inquiry.

3d. As to the appellee's second exception to Commissioner Myers' second or amended report; that is, "to the allowance made by the commissioner in his said
693 *second report of credit to the executors, on the first page of said report, for each and every of the items numbered 1, 3, 4, 5, 6, 7, 8, 9 and 13, amounting in the aggregate to \$2,673.88 of principal and \$122.67 of interest." These items here numbered were items of charges to the executors in Commissioner Myers' first report; to which items the appellants excepted, and their exceptions to which were sustained by the court below.

The said items are designated by the same numbers in a statement on page 43 of Commissioner Myers' first report, copied on page 740 of the printed record. Commissioner Myers, having accordingly, in his second report, given credit to the executors for those items, the appellees, on their part, excepted to the amended report on that account. We will have to take up and dispose of the items as they are above numbered.

No. 1. Price of mule sold by S. M. Lightner and accounted for to executors. Credited to the estate of J. B. Campbell in 1853 in Commissioner Myers' first report, page 2.

The Circuit court erred in sustaining the appellants' exception to this item in Commissioner Myers' first report, and in overruling the appellee's exception to the same item in the said commissioner's second report. The item is a proper credit to the estate.

No. 3. Bond of John Ginger, due 29th January 1841, and interest.

No. 4. Amount of two bonds on John Malcomb.

No. 5. Amount of two bonds of Thomas Bird, to be credited on John Lamb's bond.

Instead of sustaining the appellants' and overruling the appellees' exceptions in regard to these three items (Nos. 3, 4 and 5), the Circuit court ought to have referred the subjects of them to a commissioner for further enquiry and account, and erred in not doing so.

No. 6. Balance due from D. G. Kinhead, 20th June 1850, as per statement of J. 694 B. C., \$185.53, and interest *to January 10, 1860, when renewed by W. M. C., \$108.21.

This debt is included in William M. Campbell's list of bonds, and is not included in his list of insolvents which he returned under oath February 7, 1860. The presumption, therefore, is that it has been collected, or is a good debt. It was renewed March 10, 1860, for \$274.09, which seems to be less than the amount of debt and interest due on that day, the difference, no doubt, having been paid when or before the new bond was given.

The Circuit court erred in sustaining the appellants' exception to this item in Commissioner Myers' first report and in overruling the appellees' exception to the corresponding item in Commissioner Myers' second report. The item is a proper credit to the estate.

No. 7. Bond of Marshall and Cunningham, due 1st March 1851, and interest.

The appellants' exception to this item was sustained as to all over \$227. The appellees insist that it ought to have been overruled altogether. Instead of sustaining the appellants' and overruling the appellees' exception as to the excess of said bond over the said sum of \$227, the Circuit court ought to have referred the matter of such excess to a commissioner for further enquiry and account, and erred in not doing so.

No. 8. Bond of J. J. Cooper, due August 1st, 1844, and interest.

No. 9. Bond of H. Michael and interest.

These two items (Nos. 8 and 9) are proper credits to the estate, and the Circuit court erred in sustaining the appellants, and overruling the appellees' exceptions in regard to the said two items.

No. 13. Value of shares in the estate of Wm. Dinwiddie, deceased, on the 19th day of June 1861, \$4,342.39.

The appellants' exception to this item was sustained as to all over \$2,500. The
695 appellees insist that it ought *to have been overruled altogether. There is nothing in the record which shows that the executors are chargeable with more than \$2,500, which they actually received on account of said interest. Instead of sustaining the appellants' and overruling the appellees' exceptions as to the excess of the value of said shares over the said sum of \$2,500, the Circuit court ought to have referred the matter of such excess to a commissioner for further enquiry and account, and erred in

not doing so. Therefore it is decreed and ordered that so much of the said decree appealed from as is inconsistent with the foregoing opinion and decree, be reversed and annulled, and the residue thereof affirmed, including in such affirmation that portion of the said decree of the 29th day of September 1867, which adjudged, ordered and decreed that the said Thomas Campbell and Benjamin B. Campbell, the executors of J. B. Campbell, do, out of their own estates, pay to the said John W. Hedges, as surviving executor of Alcinda C. Campbell, deceased, the sum of thirty-three thousand eight hundred and sixty-two dollars and twenty-nine cents, with interest on twenty-five thousand and twenty-three dollars and thirty-nine cents, part thereof, from the 20th day of January 1861 till paid; the amount due by said Thomas Campbell and Benjamin B. Campbell to the said John W. Hedges as surviving executor of Alcinda C. Campbell as aforesaid, being increased by this decree, and being therefore greater than the said sum of money and interest decreed to be paid by the said decree of the 29th day of September 1867, as aforesaid. The payment of which sum of thirty-three thousand eight hundred and sixty-two dollars and twenty-nine cents (\$33,862.29), with interest on twenty-five thousand and thirty-three dollars and thirty-nine cents (\$25,033.39), part thereof, from the 20th day of January 1861 till paid, together with the costs and damages hereby decreed in his favor, the said John W. Hedges, as surviving executor of Alcinda C. Campbell, deceased, is to be at liberty to enforce forthwith, without waiting for the making of the enquiries and taking of the accounts hereby directed to be made and taken.

And it is further decreed and ordered that the appellants, Thomas Campbell and Benjamin B. Campbell, executors of James B. Campbell, do, out of their own estates, pay to the appellee, John W. Hedges, surviving executor of Alcinda C. Campbell, deceased, damages according to law and his costs by him about his defence in this behalf expended. And the cause is remanded to the said Circuit court for further proceedings to be had therein in conformity with the foregoing opinion and decree. Which is ordered to be certified to the said Circuit court of Highland.

BILLS OF REVIEW.

I. Courts.

II. Parties.

III. Leave of Court.

IV. Form of Bill.

V. Essentials.

A. Final Decree.

B. Grounds of Reversal.

1. Error of Law Apparent on the Record.
2. Newly-Discovered Evidence.

VI. Statute of Limitations.

VII. Procedure.

I. COURTS.

A bill of review is a proceeding to correct a final decree in the *same* court in which that decree was rendered. *Laidley v. Merrifield*, 7 Leigh 346; *Vanmeter v. Vanmeters*, 3 Gratt. 148; *Hancock v. Hutcherson*, 76 Va. 609.

II. PARTIES.

A bill of review can only be filed by a person who was a party or privy to the former suit; and even persons having an interest in the cause, if not aggrieved by the particular errors assigned in the decree, cannot maintain a bill of review, however injuriously the decree may affect the rights of third parties. *Heermans v. Montague* (Va.), 20 S. E. Rep. 899; *Amis v. McGinnis*, 12 W. Va. 571; *Chancellor v. Spencer*, 40 W. Va. 337, 21 S. E. Rep. 1011; *Hall v. Lowther*, 22 W. Va. 570; *Gibson v. Green*, 89 Va. 594, 16 S. E. Rep. 661; *Armstead v. Bailey*, 83 Va. 243, 2 S. E. Rep. 38.

To maintain a bill of review, the party filing the same must show by the allegations thereof that he is interested in the matter disposed of by the decree sought to be reviewed, what those interests are, and that he will be benefited by a reversal or modification of said decree. *Riggs v. Huffman*, 33 W. Va. 436, 10 S. E. Rep. 795; *Hall v. Lowther*, 22 W. Va. 570; *Kanawha Valley Bank v. Wilson*, 35 W. Va. 38, 13 S. E. Rep. 58; *Laidley v. Kline*, 35 W. Va. 308; *Miller v. Rose*, 21 W. Va. 291; *Shrewsbury v. Miller*, 10 W. Va. 115.

III. LEAVE OF COURT.

A bill of review whether for error apparent on the record or on the ground of after-discovered new matter can only be filed by leave of court. This rule is to prevent clamorous litigants who have no just cause of complaint from reopening a final decree on frivolous grounds. Especially is such leave of court necessary since an appeal lies to the refusal of the court to allow a bill of review in a proper case. *Diamond, etc., Co. v. Rarig*, 93 Va. 595, 25 S. E. Rep. 894; *Legrand v. Francisco*, 3 Munf. 83; *Heermans v. Montague* (Va.), 20 S. E. Rep. 899; *Davis Sewing-Machine Co. v. Dunbar*, 32 W. Va. 335, 9 S. E. Rep. 237; *Hatcher v. Hatcher*, 77 Va. 600; *Hill v. Bowyer*, 18 Gratt. 364; *Amis v. McGinnis*, 12 W. Va. 570; *Bowyer v. Lewis*, 1 H. & M. 554; *Williamson v. Ledbetter*, 2 Munf. 521; *Lee v. Braxton*, 5 Call 459; *Roberts v. Stanton*, 2 Munf. 133; *Connolly v. Connolly*, 32 Gratt. 660; *Ambrose v. Keller*, 22 Gratt. 769; *Whitten v. Saunders*, 75 Va. 563.

West Virginia Rule.—There need be no leave of court to file a bill of review based on error of law, but such leave is necessary when the bill of review is based on newly-discovered facts. *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. Rep. 102; *Nichols v. Nichols*, 8 W. Va. 174; *Davis Sewing-Machine Co. v. Dunbar*, 32 W. Va. 335, 9 S. E. Rep. 237.

IV. FORM OF BILL.

It is the settled practice, to treat a bill of review which is filed to an interlocutory decree as if it was in name a petition for rehearing; and a petition for rehearing, which is filed to a final decree, as if it was a bill of review, provided it conforms to the ordinary requirements of such a bill. *Ambrose v. Keller*, 22 Gratt. 769; *Kendrick v. Whitney*, 36 Gratt. 646-654; *Summers v. Darne*, 31 Gratt. 791, 808; *Rawlings v. Rawlings*, 75 Va. 91; *Dillard v. Thornton*, 29 Gratt. 392; *Hill v. Bowyer*, 18 Gratt. 364; *Martin v. Smith*, 25 W. Va. 583; *Sturm v. Fleming*, 23 W. Va. 418; *Heermans v. Montague* (Va.), 20 S. E. Rep. 899;

West v. Shaw, 23 W. Va. 195, 9 S. E. Rep. 81; Diamond, etc., Co. v. Rarig, 98 Va. 595, 25 S. E. Rep. 894; Sands v. Lynham, 27 Gratt. 391; Mettert v. Hagan, 18 Gratt. 231.

Where the decree is interlocutory the so-called bill of review may be regarded as a supplemental bill in the nature of a bill of review. Laidley v. Merrifield, 7 Leigh 363; Claytor v. Anthony, 15 Gratt. 586; Ellzey v. Lane, 2 H. & M. 589.

New Issues.—It is not allowable in a bill of review to allege matters by way of amendment or supplement to the original bill which will have a tendency to create new issues. Such a course would be foreign to the object of a bill of review. Snyder v. Botkin, 37 W. Va. 365, 16 S. E. Rep. 591.

Former Bill and Proceedings Stated.—A bill of review should state the former bill, and the proceedings thereon, the decree, and the point in which the party exhibiting the bill of review conceives himself aggrieved by it; for it is laid down, that no objection, but what has been assigned for error, shall be allowed to be made, and if it is not any ground of law, then the new matter discovered, upon which the plaintiff seeks to impeach it, must be stated. Amies v. McGinnis, 12 W. Va. 399; Quarrier v. Carter, 4 H. & M. 342; Keran v. Trice, 78 Va. 690; Hatcher v. Hatcher, 77 Va. 600.

What Errors Considered.—When the bill of review is for errors apparent on the face of the decrees, orders and proceedings in the cause, the error must arise on the facts admitted by the pleadings or stated as facts in the decrees. Core v. Strickler, 24 W. Va. 697; Shepherd v. Chapman (Va.), 21 S. E. Rep. 498; State Bank v. Blanchard, 90 Va. 22, 17 S. E. Rep. 748; Rawlings v. Rawlings, 78 Va. 76; Beatty v. Barley, 97 Va. 11, 23 S. E. Rep. 794; Lorentz v. Lorentz, 23 W. Va. 556, 9 S. E. Rep. 886; Thomson v. Brooke, 76 Va. 160; Hancock v. Hutcherson, 76 Va. 606.

V. ESSENTIALS.

A. Final Decree.—A bill of review lies only to a final decree. The decree being final, the bill of review is not regarded as a part of the cause in which the decree was rendered, but as a new suit having for its object the correction of the decree in the former suit. Diamond, etc., Co. v. Rarig, 98 Va. 595, 25 S. E. Rep. 894; Hodges v. Davis, 4 H. & M. 400; Roanoke Bank v. Farmers' Bank, 84 Va. 610, 5 S. E. Rep. 683; Parker v. Logan, 82 Va. 376; Diffendal v. R. Co., 86 Va. 465, 10 S. E. Rep. 586; Trevelyan v. Loft, 83 Va. 141, 1 S. E. Rep. 901; Epes v. Williams, 69 Va. 794, 17 S. E. Rep. 226; Nelson v. Kownalar, 79 Va. 469-487; Heermans v. Montague (Va.), 20 S. E. Rep. 899; Hyman v. Smith, 10 W. Va. 298; Bowyer v. Lewis, 1 H. & M. 584; Laidley v. Merrifield, 7 Leigh 363; Claytor v. Anthony, 15 Gratt. 586; Ellzey v. Lane, 2 H. & M. 589; Royall v. Johnson, 1 Rand. 427; Ellzey v. Lane, 4 Munf. 66; McCoy v. Allen, 16 W. Va. 734; Custer v. Custer, 17 W. Va. 123; Nichols v. Nichols, 8 W. Va. 174; Dingess v. Marcum, 41 W. Va. 757, 24 S. E. Rep. 684; Ruhl v. Ruhl, 24 W. Va. 279; Carper v. Hawkins, 8 W. Va. 291; Battaille v. Hospital, 76 Va. 68; Dellinger v. Foltz, 98 Va. 729, 25 S. E. Rep. 998; Lehman v. Hinton, 44 W. Va. 1, 29 S. E. Rep. 964; Mackey v. Bell, 2 Munf. 522; Banks v. Anderson, 3 H. & M. 30; Graves v. Graves, 2 H. & M. 23.

When Decree Final.—A decree which disposes of the whole subject and gives all the relief that was contemplated, so that nothing remains to be done in the cause, is a final decree. Battaille v. Hospital, 76 Va. 68; Sheppard v. Starke, 3 Munf. 29; Parker v. Logan, 82 Va. 376; Thomson v. Brooke, 76 Va. 160; Nelson v.

Jennings, 3 Pat. & H. 369; Vanmeter v. Vanmeter, 3 Gratt. 148; Cocke v. Gilpin, 1 Rob. 30; Rawlings v. Rawlings, 78 Va. 76; Harvey v. Branson, 1 Leigh 108; Pace v. Ficklin, 76 Va. 292; Johnson v. Anderson, 78 Va. 771; Norfolk, etc., Co. v. Foster, 78 Va. 413; Jones v. Turner, 81 Va. 709; Yates v. Wilson, 86 Va. 626, 10 S. E. Rep. 976; Royall v. Johnson, 1 Rand. 421; Alexander v. Coleman, 6 Munf. 335; Core v. Strickler, 24 W. Va. 696; Morgan v. Ohio Riv. R. Co., 39 W. Va. 17, 19 S. E. Rep. 588; Tennent v. Patton, 6 Leigh 196.

A decree made upon the hearing on the merits, which settles and adjudicates all the matters in controversy between the parties, is such a final decree that a bill of review will lie to it, although much may remain to be done before it can be completely carried into execution. Fowler v. Lewis, 86 W. Va. 130, 131, 14 S. E. Rep. 447; Gallatin Land, Coal & Oil Co. v. Davis, 44 W. Va. 109, 26 S. E. Rep. 748; Core v. Strickler, 24 W. Va. 696.

Voidable Decree.—When the circuit court, having jurisdiction of the parties and the subject-matter of the suit renders a decree in a cause, that decree, though erroneous is binding until reversed; and the remedy would usually be by a bill of review and not by an action of ejectment. Peirce v. Graham, 85 Va. 237, 7 S. E. Rep. 189.

Affirmation by Court of Appeals—When Conclusive.—When the court of appeals affirms a decree, whether interlocutory or final, and sends the cause back for further proceedings, there cannot be a bill of review to correct any errors apparent on the record up to the time when such decree was rendered in the lower court. The maxim, "*Interest rei publicae res judicatae non rescindi*" applies in such case. Dunn v. Renick, 40 W. Va. 349, 22 S. E. Rep. 66; Mason v. Bridge Co., 20 W. Va. 223; Kent v. Dickinson, 26 Gratt. 817, 821; Shepherd v. Chapman (Va.), 21 S. E. Rep. 498; Davis Sewing-Mach. Co. v. Dunbar, 23 W. Va. 336, 9 S. E. Rep. 237; Campbell v. Price, 3 Munf. 237; McCall v. Graham, 1 H. & M. 13; Randolph v. Randolph, 1 H. & M. 181; Findlay v. Trigg, 83 Va. 543, 3 S. E. Rep. 143; W. O., etc., R. Co. v. Casenove, 83 Va. 751, 3 S. E. Rep. 432. See *foot-note*, appended to Campbell v. Campbell, 23 Gratt. 649; Henry v. Davis, 18 W. Va. 266; White v. Atkinson, 3 Call 376; Ambler v. Macon, 4 Call 605.

Affirmation by Court of Appeals—When Not Conclusive.—But in such case a bill of review may be had on the ground of after-discovered evidence if such evidence is material, has been discovered since the decree was affirmed, could not have been discovered before by reasonable diligence and is of such character as would probably change the decision of the court. Connolly v. Connolly, 22 Gratt. 661, and *note*; Reynolds v. Reynolds, 88 Va. 152, 18 S. E. Rep. 598; Davis Machine Co. v. Dunbar, 23 W. Va. 335, 9 S. E. Rep. 237; Diamond, etc., Co. v. Rarig, 98 Va. 601, 25 S. E. Rep. 894; Shepherd v. Chapman (Va.), 21 S. E. Rep. 498; Curry v. Burns, 3 Call 183; Winston v. Johnson, 3 Munf. 305; McCall v. Graham, 1 H. & M. 12.

Final Decree—Several Parties.—Where a decree is made as to one of several defendants, whose interests are not at all connected with each other, with a direction for the payment of costs as to that defendant, such decree is final as to him, although the cause may still be pending in court as to the rest. Thorntons v. Fitzhugh, 4 Leigh 219; Noel v. Noel, 86 Va. 113, 9 S. E. Rep. 584; Ryan v. McLeod, 22 Gratt. 367, and *note*.

Decree by Default.—A final decree by default, may often be set aside at a subsequent term, for good cause shown in a case where relief cannot be given

by bill of review. *Erwin v. Vint*, 6 Munf. 267; *Callaway v. Alexander*, 8 Leigh 114; *Anderson v. Woodford*, 8 Leigh 316; *Hill v. Bowyer*, 18 Gratt. 375; *Craufurd v. Smith*, 98 Va. 623, 23 S. E. Rep. 235; *Legrand v. Francisco*, 3 Munf. 83.

Interlocutory Decrees.—When the further action of the court in the cause is necessary to give completely the relief contemplated by the court, then the decree is to be regarded not as final but interlocutory. *Templeman v. Steptoe*, 1 Munf. 339; *Camden v. Haymond*, 9 W. Va. 680; *Dunbar v. Woodcock*, 10 Leigh 623; *Suckley v. Rotchford*, 12 Gratt. 70; *Richardson v. Duble*, 33 Gratt. 730; *Sims v. Sims*, 94 Va. 580, 27 S. E. Rep. 436; *Wayland v. Crank*, 79 Va. 602; *Wright v. Strother*, 76 Va. 357; *Elder v. Harris*, 75 Va. 68; *Manns v. Flinn*, 10 Leigh 98; *Brengle v. Richardson*, 78 Va. 412; *Johnson v. Wagner*, 76 Va. 587; *Ewart v. Saunders*, 25 Gratt. 209; *Ambrouse v. Keller*, 22 Gratt. 769; *Burch v. Hardwicke*, 23 Gratt. 56; *Smith v. Blackwell*, 31 Gratt. 300; *Summers v. Darne*, 31 Gratt. 308; *Ryan v. McLeod*, 32 Gratt. 377; *Jameson v. Jameson*, 86 Va. 54, 9 S. E. Rep. 480; *Young v. Skipwith*, 2 Wash. 300; *Grymes v. Pendleton*, 1 Call 54; *McCall v. Peachy*, 1 Call 56; *Bowyer v. Lewis*, 1 H. & M. 558; *Aldridge v. Giles*, 3 H. & M. 136; *Mackey v. Bell*, 2 Munf. 523; *Goodwin v. Miller*, 2 Munf. 42; *Hill v. Fox*, 10 Leigh 587; *Fairfax v. Muse*, 2 H. & M. 557; *Ellzey v. Lane*, 2 H. & M. 589; *Allen v. Belches*, 2 H. & M. 595; *Barker v. Jenkins*, 84 Va. 899, 6 S. E. Rep. 459; *Miller v. Cook*, 77 Va. 817; *Noel v. Noel*, 86 Va. 109, 9 S. E. Rep. 584.

Decree by Consent.—A decree or order made by consent cannot be set aside either by rehearing or appeal or by bill of review, unless by clerical error something has been inserted in the order as by consent, to which the party had not consented, in which case a bill of review might lie. *Stewart v. Stewart*, 40 W. Va. 65, 20 S. E. Rep. 862.

B. Grounds of Reversal.—A bill of review only lies on one or both of the grounds of error apparent on the face of the decree, or after-discovered new matter and in general all the parties to the original suit must be made parties to the bill of review. *Heermans v. Montague* (Va.), 20 S. E. Rep. 899; *Mosby v. Mosby*, 9 Gratt. 584; *Braxton v. Lee*, 4 H. & M. 376; *Nelson v. Suddarth*, 1 H. & M. 360; *Kern v. Wyatt*, 89 Va. 885, 17 S. E. Rep. 549; *Diamond, etc., Co. v. Rarig*, 93 Va. 595, 25 S. E. Rep. 894; *Thomson v. Brooke*, 76 Va. 160; *Amis v. McGinnis*, 12 W. Va. 371; *Triplett v. Wilson*, 6 Call 47; *Niday v. Harvey*, 9 Gratt. 454; *Dingess v. Marcum*, 41 W. Va. 757, 24 S. E. Rep. 624.

A bill of review, strictly speaking, is a proceeding to correct a final decree, in the same court, for error apparent on the face of the decree, or on account of new evidence discovered since the final decree. *Hancock v. Hutcherson*, 76 Va. 609; *McCall v. Graham*, 1 H. & M. 13; *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. Rep. 102; *Hill v. Maury*, 21 W. Va. 162; *Quarrier v. Carter*, 4 H. & M. 242; *Legrand v. Francisco*, 3 Munf. 83; *Dalingerfield v. Smith*, 83 Va. 81, 1 S. E. Rep. 599; *Pracht v. Lange*, 81 Va. 711; *Parker v. Dillard*, 75 Va. 418; *Wroten v. Armat*, 31 Gratt. 260; *Carter v. Allan*, 21 Gratt. 241; *Laidley v. Merrifield*, 7 Leigh 353; *Thompson v. Edwards*, 3 W. Va. 659; *West v. Shaw*, 32 Va. 195, 9 S. E. Rep. 81; *Middleton v. Selby*, 19 W. Va. 167; *Custer v. Custer*, 17 W. Va. 123; *Nichols v. Nichols*, 8 W. Va. 174; *Dingess v. Marcum*, 41 W. Va. 757, 24 S. E. Rep. 624; *Shen. Val. Bank v. Shirley*, 26 W. Va. 563; *Goolsby v. St. John*, 25 Gratt. 163; *Parker v. Logan*, 82 Va. 376; *Sands v. Lynham*, 27 Gratt. 303.

1. Error of Law Apparent on the Record.—A party to a suit who has a lien against land which is sought to be subjected, who has had notice of the time and place of ascertaining the liens against the same and the amounts and priorities thereof, who fails to attend before said commissioner at the time of settling said account, or to except to the same after it is stated, after the report of the commissioner has been confirmed and a sale decreed, reported, and confirmed, and the proceeds directed to be distributed in accordance with the priorities so ascertained, will not be allowed to have the order of said priorities changed on petition in the nature of a bill of review, unless the error complained of in ascertaining said priorities appears on the face of the decree, or he sufficiently accounts for his laches. *Keck v. Allender*, 37 W. Va. 201, 16 S. E. Rep. 530.

Determination of Error of Law.—In determining what is error of law apparent on the face of the decree the court cannot look into the evidence in order to see if the decree sought to be reviewed is erroneous, as that is the proper office of the court upon appeal. It can only examine errors apparent on the record. *Middleton v. Selby*, 19 W. Va. 172; *Thompson v. Edwards*, 3 W. Va. 659; *Nichols v. Nichols*, 8 W. Va. 174; *Rawlings v. Rawlings*, 75 Va. 88; *Thomson v. Brooke*, 76 Va. 160; *Hancock v. Hutcherson*, 76 Va. 609; *Core v. Strickler*, 24 W. Va. 607; *Dunn v. Renick*, 40 W. Va. 349, 22 S. E. Rep. 66; *Mason v. Bridge Co.*, 20 W. Va. 223; *Lorentz v. Lorentz*, 33 W. Va. 556, 9 S. E. Rep. 886; *Shepherd v. Chapman* (Va.), 21 S. E. Rep. 468; *State Bank v. Blanchard*, 90 Va. 27, 17 S. E. Rep. 742; *Davis v. Morris*, 76 Va. 21.

It is immaterial in what manner it is brought to the attention of this court that the decree complained of was rendered in the absence of proper parties; the cause will be reversed and remanded, in order that proper parties may be made. *Gallatin Land, Coal & Oil Co. v. Davis*, 44 W. Va. 109, 23 S. E. Rep. 747; *Hill v. Maury*, 21 W. Va. 162; *Sheppard v. Starke*, 3 Munf. 29.

Error of Law—Several Parties.—To a final decree for S against T the latter files a bill of review for errors in law in the proceedings and decree; S, cannot, in an answer to the bill of review, allege any new matters of fact. *Thornton v. Stewart*, 7 Leigh 128.

Errors of Judgment.—When the errors sought to be corrected by a bill of review are not errors of law but errors of judgment in the determination of facts the bill should be denied. The only remedy in such case is by appeal. *Rawlings v. Rawlings*, 75 Va. 76; *Wethered v. Elliott*, 45 W. Va. 436, 22 S. E. Rep. 209; *Kern v. Wyatt*, 89 Va. 885, 17 S. E. Rep. 549; *Hancock v. Hutcherson*, 76 Va. 609.

2. Newly-Discovered Evidence.

Nature of New Evidence.—In *Corey v. Moore*, 86 Va. 730, 11 S. E. Rep. 114, the court says: "The well established rule is, that whether the proceeding be by bill of review to a final decree or by a petition to rehear an interlocutory decree, if it be founded on after-discovered evidence, the bill or petition, as the case may be, must not only allege that the new matter was discovered after the rendition of the decree sought to be reviewed or reheard, but should be supported by an affidavit that the newly-discovered evidence could not have been procured with the use of due diligence, in time to have been used when the decree was rendered; and the affidavit must also state the substance of the evidence, which must be relevant, and not merely cumulative.

and such as, if true, ought to produce a different result on another hearing. *Lewis, P.*, in *Trevelyan v. Lofft*, 83 Va. 141, 1 S. E. Rep. 901, citing *Kendrick v. Whitney*, 28 Gratt. 646; *Connolly v. Connolly*, 32 Gratt. 657; *Whitten v. Saunders*, 75 Va. 563; *Douglas v. Stephenson*, 75 Va. 747; 1 Bart. Ch. Pr. 126." *Carter v. Allen*, 31 Gratt. 245; *Wethered v. Elliott*, 45 W. Va. 496, 82 S. E. Rep. 309; *Com. v. Pauly*, 5 Call 331; *Hatcher v. Hatcher*, 77 Va. 600; *Kern v. Wyatt*, 89 Va. 885, 17 S. E. Rep. 549; *Alexander v. Morris*, 3 Call 89; *Norfolk Trust Co. v. Foster*, 78 Va. 413; *Nuckols v. Jones*, 8 Gratt. 267; *Diamond, etc., Co. v. Rarig*, 93 Va. 566, 25 S. E. Rep. 894; *Randolph v. Randolph*, 1 H. & M. 181; *Sayre v. King*, 17 W. Va. 562; *Barnett v. Smith*, 5 Call 98; *Tate v. Tate*, 85 Va. 216, 7 S. E. Rep. 352; *Parker v. Logan*, 83 Va. 376; *Harman v. McMullin*, 85 Va. 191, 7 S. E. Rep. 349; *Armstead v. Bailey*, 85 Va. 245, 2 S. E. Rep. 38; *Nichols v. Nichols*, 8 W. Va. 174; *Bloss v. Hull*, 27 W. Va. 503.

A bill of review for newly-discovered evidence will not lie where the evidence is simply confirmatory or cumulative. It must be decisive in its character; such as ought, if true, upon rehearing, to produce a different decree, and of which the party was ignorant at the time of the decree, and could not have learned by the exercise of reasonable diligence. *Davis Sewing-Machine Co. v. Dunbar*, 32 W. Va. 336, 9 S. E. Rep. 337; *Kern v. Wyatt*, 89 Va. 885, 17 S. E. Rep. 549; *Harman v. M'Mullin*, 85 Va. 191, 7 S. E. Rep. 349; *Whitten v. Saunders*, 75 Va. 573; *Hatcher v. Hatcher*, 77 Va. 600; *Akers v. Akers*, 83 Va. 633, 8 S. E. Rep. 390; *Sanders v. Burk (Va.)*, 22 S. E. Rep. 516; *Winston v. Johnson*, 3 Munf. 305.

New Evidence—Immaterial—Demurrer.—Where a bill of review is filed to review and reverse a decree on the ground of newly-discovered evidence, and the bill on its face shows that the facts stated as relied upon are immaterial and irrelevant, the bill should be dismissed on demurrer. *Lorentz v. Lorentz*, 32 W. Va. 556, 9 S. E. Rep. 886; *Nichols v. Nichols*, 8 W. Va. 174; *Shepherd v. Larue*, 6 Munf. 529.

New Evidence—Affidavit of Party.—The application to file a bill of review on the ground of newly-discovered evidence must be supported by affidavit of the party, making such application, and this affidavit should set forth and satisfactorily prove, that the evidence is not only new, but such as the party, by the use of reasonable diligence, could not formerly have discovered. *Kern v. Wyatt*, 89 Va. 885, 17 S. E. Rep. 549; *Diamond, etc., Co. v. Rarig*, 93 Va. 566, 25 S. E. Rep. 894; *Whitehurst v. Com.*, 79 Va. 561; *Trevelyan v. Lofft*, 83 Va. 141, 1 S. E. Rep. 901; *Hatcher v. Hatcher*, 77 Va. 600; *Norfolk Trust Co. v. Foster*, 78 Va. 421; *Nichols v. Nichols*, 8 W. Va. 174; *Armstead v. Bailey*, 85 Va. 242, 2 S. E. Rep. 38.

New Evidence—Affidavit Witness.—It is not sufficient that the party expects to prove certain facts. He must file the affidavits of witnesses in support of his averments. *Whitten v. Saunders*, 75 Va. 573; *Kern v. Wyatt*, 89 Va. 885, 17 S. E. Rep. 549; *Hatcher v. Hatcher*, 77 Va. 600; *Harman v. M'Mullin*, 85 Va. 191, 7 S. E. Rep. 349; *Nuckols v. Jones*, 8 Gratt. 267; *Brown v. Speyers*, 20 Gratt. 296; *Hale v. Pack*, 10 W. Va. 146.

Evidence Omitted—Advice of Counsel.—It is no ground for a bill of review, that the party was prevented from proving certain important facts, by wrong advice of one of his counsel. *Franklin v. Wilkinson*, 3 Munf. 112; *Jones v. Pilcher*, 6 Munf. 426.

VI. STATUTE OF LIMITATIONS.

Before the eleventh of February, 1814, a bill of

review could not be received after five years had elapsed from the date of the decree. *Shepherd v. Larue*, 6 Munf. 529.

Virginia Code 1860.—"No bill of review shall be allowed to a final decree, unless it be exhibited within three years next after such decree; except that an infant, married woman or insane person may exhibit the same within three years after the removal of his or her disability." Va. Code 1860, ch. 179, § 5.

Old Rule in Virginia and West Virginia.—No bill of review is allowed to a final decree, unless it be exhibited within three years, next after such decree, except that of an infant, married woman, etc., may exhibit such bill within three years after disability removed. Va. Code 1860, ch. 179, § 5; W. Va. Code 1868, ch. 133, § 5; *Arnold v. Casner*, 23 W. Va. 455; *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. Rep. 102; *Hatcher v. Hatcher*, 77 Va. 600; *Hancock v. Hutcherson*, 76 Va. 609; *Nelson v. Jennings*, 2 Pat. & H. 369; *Amias v. McGinnis*, 13 W. Va. 371-394; *Thorntons v. Fitzhugh*, 4 Leigh 209.

West Virginia Code 1899.—A court or judge allowing a bill of review, may award an injunction to the decree to be reviewed. But no bill of review shall be allowed to a final decree, unless it be exhibited within three years next after such decree, except that an infant, or insane person, or a married woman in a case not relating to her separate property, may exhibit the same within three years after the removal of his or her disability. W. Va. Code 1899, ch. 133, p. 890.

Virginia Code 1887.—No bill of review shall be allowed to a final decree unless it be exhibited within one year next after such decree, except that an infant, married woman, or insane person, may exhibit the same within one year after the removal of his or her disability. Va. Code, 1887, ch. 108, § 2435.

Virginia Code 1887, § 3455.—The obvious prescription and policy of §§ 3 and 17 of ch. 18, Acts 1884 (Code '87, § 2455) is to limit the period allowed for *appeals* and *superadeas* in cases of bills of review, to *six months*, whether the decree of *refusal* be to the filing of the bill of review or to the prayer of the bill. *Jordan v. Cunningham*, 85 Va. 420, 7 S. E. Rep. 540.

Under Code 1887, § 2455, providing that, "If the final decree from which an appeal is asked is a decree refusing a bill of review to a decree rendered more than six months prior thereto, no appeal from or *superadeas* to such decree so refusing a bill of review shall be allowed, unless the petition be presented within six months from the date of such decree" the statute of limitations begins to run and is to be computed from the actual date of the decree, and not from the beginning or the end of the term at which it was rendered. *Buford v. Land Co.*, 94 Va. 616, 27 S. E. Rep. 509; *Mason v. Mason*, 97 Va. 108, 33 S. E. Rep. 1015.

Bill of Review and Appeal.—The pendency of a bill of review on the *sole ground* of after-discovered evidence will not prevent an appellant from prosecuting his appeal in this court from the decree sought to be reviewed, as the question presented to the two tribunals by the separate proceedings are entirely distinct, and no confusion can arise from their separate determination. *Gillespie v. Allen*, 37 W. Va. 675, 17 S. E. Rep. 184.

When a bill of review is predicated on the sole ground of after-discovered evidence, and during the pendency of said bill of review more than two years elapse after the date of the decree sought to be

reviewed, and said bill of review is then dismissed. an appeal from the decree sought to be reviewed will be barred. *Wethered v. Elliott*, 45 W. Va. 426, 22 S. E. Rep. 210.

No Plea of Statute of Limitations Necessary.—It is not necessary to plead the statute of limitations against a bill of review; for it ought to appear in the bill itself, that it is exhibited within the time prescribed by law; or that the complainant is protected by some of the savings of the act; otherwise it ought not to be received. *Shepherd v. Larue*, 6 Munf. 529; *Amliss v. McGinnis*, 12 W. Va. 397; *James Riv., etc., Co. v. Littlejohn*, 18 Gratt. 71.

VII. PROCEDURE.

A person who comes for the first time into a pending cause by petition, and is a proper person to file such petition, may have prior erroneous orders in the cause reheard and corrected, upon prayer for that purpose in his petition, whether the case be proper for a petition for rehearing or bill of review in the case of a party to the cause. *Crumlish v. Shenandoah Val. R. Co.*, 40 W. Va. 637, 23 S. E. Rep. 90.

On a bill of review, the court will not only correct errors of law apparent in the decrees in the cause, but will look into all "the pleadings and proceedings," and correct whatever error of law there may be in the record. *Goolsby v. St. John*, 25 Gratt. 146; *Wroten v. Armat*, 31 Gratt. 200; *Pracht v. Lange*, 31 Va. 731; *Hancock v. Hutcherson*, 76 Va. 609; *Daingerfield v. Smith*, 33 Va. 81, 1 S. E. Rep. 590.

See in general, Code Va. 1867, § 3485; *Pollard's Supp.* 1900, § 3492.

697 **Calbreath v. Va. Porcelain & Earthenware Co.*

August Term, 1872, Staunton.

1. **Bond**—*Parol Evidence*—Kind of Currency.—V executes to C a bond, for the purchase of property, dated March 30th, 1864, to be paid, with interest, three years from the date, "in the currency used in the common business of the country at the date of the maturity." Parol evidence is admissible to show what was the true understanding of the parties in respect to the kind of currency in which the same was to be performed, or with reference to which, as a standard of value, it was made and entered into.

2. **Scaling**.—The court below, to whom the case was submitted for trial, having scaled the debt as of the value of the property at the time of the contract, and this appearing to be according to the justice of the case, the appellate court will not disturb the verdict.

This is an action of assumpsit in the County court of Augusta, brought in July 1870, by Thomas Calbreath against The Virginia Porcelain and Earthenware Company. The suit was founded on a note in the following terms: \$3,600. Three years after date, The Virginia Porcelain & Earthenware Co. promise to pay to Thomas Calbreath, his heirs or assigns, the sum of three thousand six hundred dollars, for a

*See *Wrightsmen v. Bowyer*, 34 Gratt. 436, where the principal case is cited as authority. See also, *foot-note* to *Hilb v. Peyton*, 23 Gratt. 550, where the authorities are collected as to the admissibility of parol evidence to show the kind of currency intended by the contract.

steam engine, saw mill shingle machine and chopping mill, with all the fixtures and appurtenances, which sum is to be paid in the currency used in the common business of the country at the date of the maturity, bearing interest from the date of written contract, which bears date the 30th of March 1864.

William Withrow, Jr.,
President Virginia Porcelain & Earthenware Co.

The defendant appeared and pleaded non assumpsit, on which issues was joined; 698 and the parties waived a jury and submitted the whole matter of law and fact to the court; which after hearing the evidence rendered a judgment for the plaintiff for fourteen hundred dollars, with interest thereon from the 3rd day of March 1864, until paid. The plaintiff thereupon took an exception to the opinion of the court, and spread the evidence upon the record, of which the following is the substance:

The plaintiff introduced the note above set out, and proved that at the date of its maturity the currency used in the common business of the country was legal tender and national bank notes. The defendants then introduced two witnesses, John G. Bell and T. W. Shelton, who were the agents of the company in the purchase of the property, and made the contract with Calbreath. Their evidence is substantially the same. They both say that they were the agents who purchased the property from Calbreath; they had several interviews with him before they made the purchase; that finally a contract was made and reduced to writing, and that the terms set forth in the paper in suit are the same terms that were set forth in the contract. They both say that as they understood it, the price of the property purchased was fixed in reference to Confederate currency, there being no other currency in the country; that no other currency was spoken of at the time, nor was any other thought of by them; that they would not have brought for or contracted to pay any other, nor had they authority to buy for any other currency. That nothing was said by them to the plaintiff, nor by the plaintiff to them, in reference to the kind of money to be paid in discharge of the debt. They had confidence in the success of the Confederate cause. Bell said that they would have paid the plaintiff the price agreed upon, in Confederate money, when they made the purchase, and did offer it to him, but the plaintiff declined to receive it, stating that he preferred the terms as they were agreed

on, the witness supposing that he preferred an interest-bearing obligation to the money itself. Shelton said that he expected the obligation to be discharged in the money that was the currency of the country at the time of the maturity of the obligation, and expected that money to be Confederate money; that he thought of no other money. That the paper sued upon expressed the true understanding and agreement of the parties, as he understood it and had explained. Both witnesses es-

timated the property purchased at the time of the purchase to be worth, in good money, from \$800 to \$1,000. At that time Confederate money rated at about \$20 for one of gold.

The plaintiff, in his evidence, said that the obligation sued upon evidenced the true intent and understanding of the parties; that he understood the contract to be purely a contract of risk or hazard; that he expected the currency of the country to be better at the maturity of the obligation than it was at the time the contract was made; that judging from the way affairs had been progressing, he thought there would be a change of the currency—in fact, that the Confederacy would be a failure; that if, at the maturity of the obligation, the currency of the country had not been worth ten cents, good money, for a thousand dollars, he would have felt himself bound to receive it, dollar for dollar, in discharge of the obligation; that he had no idea what would be the currency of the country at the time of the maturity of the obligation, but chose to run the risk, come weal or woe. He stated that in 1862, he and two others named, had purchased the property for \$1,600, and considered they had gotten a good bargain. He regarded the articles mentioned in the obligation as worth \$2,000 in good money at the time they were sold to the defendant. That he never told Bell and Shelton what kind of money he expected to receive on said obligation, nor did they tell him what kind they expected to pay; that they offered him Confederate money, but he refused to take it; and that the paper in suit is the true contract of the parties.

Another witness for the plaintiff stated that the articles, exclusive of the chopping mill, had cost \$1,600, and that had cost \$250. He regarded the property at the time it was sold to the defendants as worth \$2,000 or \$2,500 in good money.

The plaintiff obtained a supersedeas to the judgment from the judge of the Circuit court of the county; but when the cause came on to be heard in that court, the judgment was affirmed; and the plaintiff applied for and obtained a supersedeas to this court.

Fultz, for the appellant.

Stuart, for the appellees.

ANDERSON, J. The written contract sought to be enforced by this suit, is in these words: "\$3,600.—Three years after date the Virginia Porcelain and Earthenware Company, promise to pay to Thomas Calbreath, his heirs or assigns, the sum of three thousand six hundred dollars, for a steam engine, saw mill, shingle machine and chopping mill, with all the fixtures and appurtenances, which sum is to be paid in the currency used in the common business of the country, at the date of maturity, bearing interest from the date of written contract, which bears date the 3d day of March 1864."

"If this case is to be considered with our

eyes closed to the condition of the country at the date of the contract, and to the surrounding circumstances, and without reference to the act of Assembly for the adjustment of Confederate contracts, and to the parol evidence in the record; if our view is to be narrowed down to the face of the paper, and to consider it, as we would, if it had been executed in a time of profound peace, before the war or since the war, it is unquestionably with the plaintiff. Payment would be due in United States currency; *that being the currency used in the common business of the country at the maturity of the contract.

But we are not restricted, nor are we at liberty to restrict ourselves, to that narrow view. We are bound to ascertain, as far as we can, by the act aforesaid, which we have declared to be valid law, what was the true understanding and agreement of the parties as to the kind of currency with which the contract was solvable; or with reference to which as a standard of value it was entered into. And to this end, we are not restricted to the evidence of the writing; but it is our duty to consider all other relevant evidence, parol or written, direct or circumstantial, express or presumptive; to weigh the whole together, and thence to draw our conclusions. The statute gives no direction, as to the weight to be given to each kind of evidence, except only it implies, that written evidence, or evidence in writing under seal, is not conclusive. The court must consider all, and give to each just such weight as, in its opinion, it is entitled to; and decide, according to its belief, what was the true understanding and agreement of the parties. If they believe, from a consideration of the whole case, that the real intention of the parties was different from what the writing imports on its face, they are bound to give effect to it, and not to the contract as evidenced by the writing. But I do not hesitate to say, that where the contract is in writing, and plainly and expressly discloses the intention of the parties, and there is no evidence of fraud or mistake, it would require very strong evidence to satisfy my mind, that the intention was contrary to that which the writing clearly expresses.

The contract in this case expresses, that payment was to be made three years after date, "in the currency used in the common business of the country at the date of maturity." But it does not express that United States currency was meant. It contains not a word or syllable repugnant to the natural presumption, that they meant *the currency of their own government; and did not mean the currency of an alien enemy—a circulation which was inhibited by penal statute. The writing then in this case does not plainly and expressly disclose an intention of the parties, that in any event, payment should be made in United States currency.

In *Hilb v. Peyton*, not yet reported, the contract, as construed by a majority of the court, is substantially the same as this.

As construed, it was to pay two years after date, in such funds as the banks received and paid out at maturity. It is true that, in my opinion, it was susceptible of a construction, on its face, which required payment to be made in such funds as they received and paid out at the date of the bond. But a majority of the court construed it to mean at its maturity. Taking that to be the import of the bond, the majority of the whole court held that the contract was solvable in Confederate currency, although the banks were receiving and paying out at its maturity, United States currency. Both the contract in this case and in that, are in effect solvable in the currency used in the common business of the country at their maturity respectively.

I hold it to be a sound principle, that where parties under the government of Virginia, made a contract during the war, especially if made after the 20th of October 1863, with reference to Confederate money, as the standard of value, payable at a future fixed period, in such currency as was the medium of exchange in the transactions of the country at the maturity of the contract, the presumption is, in the absence of evidence to the contrary, that they intended payment in Confederate currency. Indeed, by the act of 14th of October 1863, fairly construed, all contracts made on or after the 20th of October of that year, were presumed to be made with reference to Confederate currency as a standard of value, and solvable in the same kind of currency, unless a contrary intentment was expressed. It was a conclusive *presumption of law. But now since the adjustment act of March 3d, 1866, as expounded by this court in Walker's per. rep. v. Pierce, 21 Gratt. 722, the presumption is not conclusive, but only *prima facie*.

Again, I hold it to be equally clear, that the war resulting before the maturity of the contract in the extinction of Confederate currency, and in the introduction of the currency of the country which at the date of the contract was an alien enemy, cannot change that presumption as to the intention of the parties in their contract.

This principle is not in conflict with *Boulware v. Newton*. It was there held that parties during the war, had a right to contract with reference to the contingency that the war might result in the overthrow of the Confederacy, and in that event payment to be made in United States currency. The principle now asserted, does not deny the right to make such a contract. It only declares that in a certain state of facts it shall not be presumed. But on the contrary, that the presumption is, in such case, that payment shall be made in Confederate currency; and that the war terminating before the contract matured, and destroying that currency, could not change the contract of the parties. This it seems to me is sound in law and reason.

Now let us apply it to the case in hand. This contract was made in March 1864, during the war; at a time when every true man

within our borders felt that although we were engaged in a death struggle for liberty and independence, and for the life of the Confederacy, it would be nothing short of moral treason, to think of surrendering our Confederation, and restoring the old government. It was a contract for the sale and purchase of property, price, \$3,600, payable at a fixed time in the future, three years after date, in "the currency used in the common business of the country at the date of maturity." According to the principle enunciated, if *this contract was made with reference to Confederate currency as the standard of value, and it is not expressed in the writing, or proved by other evidence, that there was a different intention, the presumption is, that it was the intention to be paid in Confederate currency. And the war having terminated disastrously before it was solvable, extinguishing the Confederate currency and introducing in its place and stead, a currency which was foreign to the parties at the date of the contract, and which was the currency of the alien enemy, it could not change the contract of the parties, and subject the debtor to pay in the substituted currency (United States) more than the value of the Confederate currency with reference to which the price was fixed in the contract.

The question now arises, was this contract, made the 3d day of March 1864, entered into with reference to Confederate money as the standard of value? Such was the presumption of law at the date of the contract, by force of the act of Assembly of October 14, 1863, unless a different intentment is expressed; though now by the act of March 3, 1866, either party may offer evidence to repeal that presumption, and to show what was the true understanding. It is now only a *prima facie* presumption.

There is nothing in the writing to repeal this *prima facie* presumption. It throws no light upon this inquiry. It describes the property sold "a steam engine, saw mill, shingle machine and chopping mill, with all the fixtures and appurtenances." It states the price \$3,600, payable three years after date, with interest from date, and gives the date March 3d, 1864. Is there anything in the surrounding circumstances, or in the parol evidence, to repel this *prima facie* presumption, which is raised by the statute with regard to all contracts made on or after the 20th of October 1863?

It is in proof that at the date of the contract Confederate money constituted the only currency, a fact which *is judicially known. That fact is not in opposition to, but in support of, the *prima facie* presumption under the statute, and doubtless was inducement to the passage of the act.

There is also proof as to the value of the property. It is conflicting and contradictory. According to repeated decisions of this court, the appellate tribunal in such case will presume that the judgment of the court of trial, who had the witnesses before it and heard their testimony, as to

the weight of evidence, is correct. And according to the judgment of the County court, which is affirmed by the Circuit court, the value of the property at the date of the contract was \$1,400. I could not say, from the evidence certified, that it was undervalued. On the contrary, the evidence, I think, sustains the judgment of the County court as to the value of the property.

But the plaintiff and defendant in their contract valued it at \$3,600. What sort of dollars did they mean? Certainly not gold dollars. It is equally evident that they did not fix the price in greenbacks. There was no such currency in Virginia outside of the enemy's lines, and its circulation was prohibited by penal statute. The only currency that was in circulation was Confederate. And it being evident that the price was not fixed in gold dollars, or in greenback dollars, as the standard of value, the price must have been fixed with reference to Confederate currency as the standard of value.

This conclusion cannot be avoided by the fact that the gold value of \$3,600 at the time was greatly below the value of the property. It is a fact of general notoriety, that in contracts of sale, &c., Confederate money had a much higher value than the brokers' tables indicate. Hence it is, that the adjustment act was amended and the property value was allowed in contracts of sale, renting and hiring. As was pertinently said by Moncure, P., in

706 *Hale v. Wilkinson*, 21 Gratt. 75, *88, "Confederate money had a purchasing power in regard to land and other property, which made it worth much more than its market value in gold with the brokers." And he cites with approbation what was said arguendo in *Thorington v. Smith*, "while it was 20, 30 or 40 to 1, those treasury notes had an exchangeable power of 2, 3 or 4 to 1 in the different species of property." The fact, therefore, that the gold value of price to be paid for the property was greatly below its value does not avoid the conclusion to which we had come, that the price was fixed with reference to Confederate currency as a standard, nor repel the prima facie presumption to that effect raised by the statute.

Is there anything in the parol evidence to repel the presumption, fortified as it is by the facts which we have been considering? The witnesses, John J. Bell and T. W. Shelton, who were the agents of the company in making the contract, both testify that they contracted with reference to Confederate money as the standard. That they never thought of any other, and had no authority to contract for any other, and supposed that plaintiff had reference to Confederate money. Their testimony is in exact harmony with the presumption raised by the statute, and the conclusion drawn from the facts which we have been considering. The plaintiff's testimony on this point is not contradictory. It is true he says that he considered the contract purely one of risk and hazard, and that he expected the currency to be better at the

maturity of the contract than it was at its date, &c.; which we will after a while consider; but he nowhere says that the contract was not made, or the price fixed, with reference to Confederate money as the standard. There is no evidence in the record in conflict with the testimony of Bell and Shelton on this point. I am, therefore, brought irresistibly to the conclusion that this contract was made with reference to Confederate money as the standard of value.

707 *This fact now being established according to the first postulate, it was intended to be paid in Confederate currency, unless a different intention is shown by the writing or by other evidence.

We have already shown that there is nothing in the writing which expresses an intention that payment should in any event be made in United States currency. We will now inquire whether there is anything in the nature of the contract, or its phraseology, which repels the natural presumption that a contract for the sale and purchase of property, in which the price of the property was fixed with reference to Confederate currency, was intended to be solvable in the same kind of currency, and not in a foreign currency which, at the time of the contract, was the currency of an alien enemy, and which was prohibited by the laws of the State to which the contracting parties belonged. It is contended that the phraseology employed in the writing, "to be paid in the currency used in the common business of the country at the date of maturity," implies that it might be a different currency from that then in use. And so it may. But it does not imply that the parties meant United States currency. If it was shown by the paper, or the other evidence in the record, that it was a contract of hazard, contingent upon the termination of the war before its maturity, and the overthrow of the Confederacy with its currency, such evidence would be sufficient to repel the presumption, as natural and strong as it is, as well as the now prima facie presumption of the statute, that the parties intended payment to be made in the same kind of currency, with reference to which as the standard of value the contract was made. I cannot now conceive of any mere presumptive evidence which could repel that presumption. Nothing less than an express agreement shown by the writing, or implied in terms which would give it the force of an express agreement, or prove by the clearest and

708 most unquestionable testimony,* would be sufficient to repel the presumption of the statute and of the facts in the case.

An act of the Confederate Congress had just passed providing for calling in the circulation, and for the issue of a new currency for two-thirds of its nominal value in its stead. And the parties would probably expect that other and more radical changes might be made by the Confederate government in the currency before their contract matured, and therefore say, that

it shall be paid in the currency then (at maturity) used in the common business of the country. It does not imply that it shall be the currency of the enemy with whom their State was then at war, against the presumption that, in fixing the price of the property in their contract with reference to the Confederate currency, they intended it to be paid in the same kind of currency, and also against the presumption of the statute which was in force at the date of their contract, and which was then conclusive. But the effect of the act of March 3, 1866, is to allow either party to show by other evidence that the fact was not as the law then presumed. But if that is shown, I apprehend the presumption raised by the statute is as conclusive as it was before the subsequent act was passed.

The phraseology employed was also proper if the parties intended to repel the common law presumption, that it was a contract for specie. This was unnecessary under the act of Assembly, *supra*. But still they may have deemed it safest to express it in their written contract. There is nothing on the face of this paper which, in my opinion, removes the strong presumption from the law and the surrounding facts, that the parties intended payment to be made in Confederate currency.

Such, therefore, was the contract, unless the parol evidence shows otherwise. The parol evidence consists, on behalf of the defendant, of two witnesses; and on the plaintiff's behalf, of his own testimony. The notion, or opinion of his witness,

Z. F. Calbreath, that it was a
709 *contract of hazard, nothing having been said on the subject in his hearing, is not entitled to consideration. The defendant's witnesses are entirely consistent; and as they understood the contract, it was made with reference to Confederate money, as the standard of value, and was to be performed and fulfilled in Confederate currency. Their testimony is in perfect harmony with, and fully sustains, the presumptions relied on. There is nothing in the record to throw a doubt upon their capacity, or credibility; and it does not appear, that they have any interest in the subject of controversy. They were the agents of the company in making the contract; and both of them testify, that they would not have purchased the property to be paid for in any other currency than Confederate. They say that the price of the property was fixed with reference to Confederate money, and was to be paid for in Confederate money, as they understood it. That they thought of no other; that none other was mentioned; that they would have contracted for no other, and had no authority to contract for any other. That nothing was expressly said to them by the plaintiff, or by them to the plaintiff, with reference to the kind of money to be paid in discharge of the obligation. One of them says, the question was not discussed between them, but he supposed that plaintiff had reference to Confederate money, as none

other was talked about, and he himself thought of no other, and that the paper sued on expressed the true understanding and agreement of the parties, as it was understood by him. It is true, that one of them says, he offered to pay the plaintiff at once, and that he refused, saying he preferred the terms of the contract; for what reason he does not appear to have stated. He does not say that he was unwilling to receive Confederate money; or that he expected to get paid in a better currency than Confederate. It may be implied, that he expected to get a better Confederate currency, at the maturity of the
710 *bond, than that which was then circulating, as an act had recently passed the Confederate Congress, and which was soon to go into operation, which would subject the holders of Confederate treasury notes to a loss of one-third of their nominal amount. This fact itself furnishes sufficient and adequate motive for his refusing to receive payment down; and in addition, he may then have had no use for the money, and preferred to have it at interest. Whatever may have been his motive, it is not shown that he was unwilling to receive Confederate money, or that he expected to receive payment in greenbacks. He did not intimate it at the time, nor does he expressly say now, in his deposition, that he did. Doubtless he expected to be paid in a better currency than that which was then offered him, which he knew would be reduced in a short time, to two-thirds of its face value; and in this aspect of the case he had good reason to say, that he preferred the terms of his contract.

It seems to me, that if the plaintiff intended to bind the defendant to pay in a different currency than that in reference to which the price of the property was fixed, and which was then the only currency of the country; if he intended to bind him to pay in United States currency, in any event, it should have been so expressed in the bond; or at least he should have disclosed in some way, such intention and purpose. As I said in *Linsday v. Stover's ex'or*, "I am unwilling to hold parties bound to pay in United States currency, dollar for dollar, for property purchased during the war, at Confederate prices, and when Confederate money was the only currency of the country, unless the evidence clearly shows, that it was in the contemplation of the parties when they made the contract, and was their intention that in some contingency, payment should be made in United States currency." That I hold to be a just, and sound principle. And it finds support in the case of *Thorington v.*

Smith, 8 Wall. U. S. R. p. 1, 12 and
711 13. In that *case it was held the Supreme Court of the United States, Chief Justice Chase delivering the opinion of the court, that where a contract was made in any other country, whose circulation denominated dollars, was of inferior value to the coins or notes authorized in the United States, in a suit brought upon

that contract here, the creditor could only recover the equivalent value in lawful money of the United States; so where the contract was made between the inhabitants of the Confederate States, when Confederate treasury notes were the exclusive currency of the country, and when, what he calls, the "insurgent belligerent power was actually established as the government of the country," such a contract "must be interpreted and enforced with reference to the condition of things created by the acts of the governing power." Again, the chief justice says: "In the light of those facts it seems hardly less than absurd to say, that these dollars (nominated in a Confederate contract), must be regarded as identical in kind and value, with the dollars which constitute the money of the United States."

Contracts made under such circumstances, and with reference to Confederate money, as the standard, are prima facie contracts solvable in Confederate money. In this case, the agents of the company had the right so to regard it, as a contrary intention had not been expressed by the plaintiff in the negotiation, or in the written agreement. And the plaintiff ought to have understood it in the same way, without any declaration on the part of the agents that they so understood it. It was not incumbent on the agents to have expressed what would have been universally understood at the time and under the circumstances; and they say that they never thought of any other currency.

The plaintiff testifies that he understood it to be purely a contract of hazard or risk; and that the writing expresses the true understanding and agreement. But we *have seen that the paper writing does not purport to be a contract of hazard, contingent upon the termination of the war and its results. He does not say that he even expected it to be paid, in any event, in United States currency. But says "he had no idea what would be the currency of the country at the time of the maturity of the obligation, but chose to run the risk, &c. But if such were his thoughts and expectations they were not manifest to the agents of the defendant, by the writing, or in any other way.

The plaintiff has, therefore, failed to prove, by parol or other relevant evidence, any thing which can repel the presumption arising upon the face of the written contract, read in the light of the surrounding circumstances, that it was a contract made in reference to and solvable in a Confederate currency. The parol evidence, so far from repelling, strengthens and confirms that presumption.

It is very hard for us to give up long established habits of thought. We are slow to admit innovations. And as we advance in years, we are apt to become more fixed in our habits of thought, as well as other habits, which become hallowed by time; and we become more and more adverse to change and innovation. We have been so

long accustomed to the rules of law, distinguishing between the different grades of evidence, and attaching such verity and sanctity to some descriptions, as absolutely excluding any explanation or contradiction by other evidence, that it is hard to turn our minds into a different channel. Now the acts of adjustment, supra, are innovations. They overturn some important rules of evidence in relation to contracts for the payment of money made between the 1st day of January 1862 and the 10th day of April 1865. In *Hilb v. Peyton* a majority of the court held that under this act parol or other relevant evidence was admissible, in relation to all contracts made between those periods, whether in writing

*under seal or not under seal, as the means of understanding what was the true understanding and agreement of the parties as to the kind of currency in which they were solvable, or with reference to which as a standard of value they were made. That decision, I take it, settles the construction of the statute; and it is no longer an open question. And as thus judicially construed, the law requires us to consider this writing, in connection with the other evidence of the contract. The error, I think, arises from regarding the writing as the contract, when it is only evidence of it; and the parol is really as legal evidence of it as the writing. We are obliged to consider the whole together. To do so, if we believe *Shelton* and *Bell*, it is not possible to believe that the defendant ever made such a contract as the plaintiff claims. And their testimony is not in conflict with the writing. Take both together, can there be a doubt that the defendant did not make a contract to pay in other currency than Confederate? I care not what were the thoughts or expectations of the plaintiff, confined to his own breast, it is not a contract binding on the defendant, without his assent to it. Regarding this evidence of the defendant's agents, did they ever assent to a contract for their principal except for Confederate money? They both testify that they never did. Then, as there can be no contract without the assent of both parties to it, the plaintiff has failed to establish the contract under which his counsel contend he has a right to recover. And if such contract were specially alleged in his declaration, he could not recover at all, except upon the quantum valebat count.

The plaintiff ought to get the value of his property. He ought not to desire more. At least the defendant should not be held to a contract of hazard and speculation, which, it is evident, he never made, nor intended to make. I think the judgment of the County court, affirmed by the judgment of the Circuit court for Augusta

*county, conforms to the substantial justice of the case and the law. If we were not satisfied that the judgment is correct, we should not reverse except for a plain deviation from the law or evidence. Much respect is due to the judgment of the court of trial. Upon the whole, I am of

opinion to affirm the judgment of the Circuit court.

CHRISTIAN, J. I cannot concur in the opinion of the majority of my brethren. With the greatest respect for their judgment, I cannot bring my mind to assent to the proposition that the agreement of the parties in this case, as evidenced by the writing sued upon, can possibly be brought within the operation of the "Adjustment Act," and subject to be scaled as a Confederate contract.

The obligation sued upon is in these words:

"\$3,600. Three years after date, The Virginia Porcelain & Earthenware Company promise to pay to Thomas Calbreath (said plaintiff), his heirs and assigns, the sum of three thousand six hundred dollars, for a steam engine, saw mill, shingle machine and chopping mill, with all the fixtures and appurtenances, which sum is to be paid in the currency used in the common business of the country at the date of maturity, bearing interest from date of the written contract, which bears date the 3d day of March 1864." (Signed by the President of the Company.)

How such a contract as this can be construed to be a contract to be discharged in "Confederate currency" is beyond my comprehension. If it was conceded that the parties had met together, the one to sell, and the other to purchase this property, and that it was by common agreement not to be paid for in "Confederate currency," but that both parties were stipulating for a different currency, I cannot conceive of any words or forms of expression which the parties could have employed more clearly to express such intention than those used in the writing before us.

715 *To characterize this writing as an obligation to be discharged in Confederate currency, is to say that every contract, no matter what may be its express terms, is a contract to be discharged in "Confederate currency," provided it was entered into between the 1st of January 1862, and the 10th of April 1865, even where it is plain that the parties were stipulating in express terms for a different currency.

If parol evidence can be admitted to explain, vary or contradict such an obligation as this, where there is not the slightest ambiguity, either latent or patent, then it may be done in every case; for as I shall show presently, this is not one of those cases provided for by the adjustment act, and must be decided upon principles outside of that act. If, I repeat, we can look to the parol proof in this case, in a contract where there is not the slightest ambiguity even suggested, and where upon its face it is not to be discharged in Confederate treasury notes, but, by express terms, in another currency—and consequently is not within the purview of the statute—then we are establishing, in my humble opinion, a most dangerous precedent. We strike a deadly blow at those principles of the common law which, under the jurisprudence of

this country, have ever been held sacred, and which form the basis to uphold and the shield to protect the inviolability of contracts.

If I can show (as I think it is easy to show) that the contract under consideration was not, according to the true agreement of the parties, to be fulfilled or performed in Confederate treasury notes, and was not entered into with reference to said notes as a standard of value, then we have, by the decision of the majority, a case which overrules every decision of this court from the time of its first constitution, which has uniformly declared that no parol evidence shall be admitted to vary, alter or contradict the plain written terms of the 716 contract. And *it is against that decision that I most earnestly protest and record my dissent.

How can it possibly be maintained that this contract was to be performed or fulfilled in Confederate treasury notes, when it is expressly stipulated that it is not to be so fulfilled and performed, but is "to be paid in the currency used in the common business of the country at the date of maturity," to wit: on the 3d day of March 1867? How can it be said that it "was entered into with reference to such currency as a standard of value," when a different currency is expressly referred to and agreed to be paid, as the value deliberately fixed by all parties, when such a conclusion is expressly excluded by the terms of the bond?

This case cannot be brought within the operation of the statute known as the adjustment act, except upon the theory that the statute covers every case which was entered into between the 1st of January 1862, and the 10th of April 1865, even if (as was admitted by the counsel for the appellee) it stipulated for the payment of gold. The contract in this case is just as definite and fixed as to the currency in which it is to be discharged as if it was payable in gold. If this is the true construction—if the statute means this—then all I have to say is, that it is unconstitutional and void, because it impairs the obligation of contracts.

But the statute, properly construed, is not unconstitutional, but is one eminently wise and proper, and which the exigencies of the country and the abnormal condition of affairs imperatively demanded.

But what is the character of those contracts, which, under the statute, may be scaled, either by reducing the nominal amount to the gold value or to the value of the property the subject of the consideration? In such contracts, and such only, can the scale of adjustment be applied, as where "it shall appear that according 717 to the *true understanding and agreement of the parties (of both parties not of one), the contract was to be fulfilled or performed in Confederate treasury notes, or which were entered into with reference to said notes as a standard of value."

Can it be possible that where both parties have solemnly stipulated in writing the

kind of currency in which the contract is to be fulfilled or performed, and have indicated in writing the currency, with respect to which, as a standard of value, it was entered into, and that currency is not Confederate currency, can it be possible that such a contract is to be declared a Confederate contract, and subject to be scaled?

In this case it appears, by the express terms of the contract, that it was not to be fulfilled and performed in Confederate States treasury notes, and was not entered into with reference to such notes as a standard of value. It was, therefore, not a case to which the statute applies, and not a case in which, in my opinion, parol evidence could be heard at all.

But does the parol evidence, conceding that it can be admitted, make it appear that the true understanding and agreement of the parties was different from that expressed in the written agreement.

The obligation is signed by William Withrow, president Virginia Porcelain and Earthenware company. He gives no account of his understanding of the agreement, except as shown by the solemn act of signing his official name as the president of the company, and acknowledging himself as bound by the terms of the written contract. He is presumed to have read a paper by which he bound the company to pay \$3,600, and to have understood the terms of that contract; when and in what currency it was paid. He, the president of the company, was not examined as a witness, who was, in fact, the party to the contract, and whose official signature could alone bind the company. What the

718 true understanding and agreement of the company was is shown by the signature of the president to a paper under seal declaring it plainly and unequivocally without the slightest ambiguity on its face.

What we want to get at under the statute is, what was the true understanding and agreement of the parties? Who are the parties? Thomas Calbreath on the one hand and the Virginia Porcelain and Earthenware company on the other. Thomas Calbreath produces the written agreement upon which he demands the fulfillment of his contract, as his true understanding and agreement, and the Porcelain company acknowledged it as their agreement by the signature of their president, the only officer authorized to bind them. What boots it then, that Messrs. Bell and Shelton, the agents who negotiated the purchase of this property, should give in their views of what they thought (in their several interviews with the plaintiff), about Confederate money being the currency of the country three years after the 3d of March 1864; about their unwavering confidence in the success of the Confederate cause? The question is not what these agents thought, or hoped or expressed, but what was the true understanding and agreement of the parties to this contract—of both parties to this contract—of Thomas Calbreath and of

the Porcelain company. Neither the hopes nor the expectations nor the patriotism of these agents can interpret the contract of the parties. But in point of fact these agents do not pretend to prove (if their evidence is to be looked to at all), a different agreement from that set out in the written contract; but on the contrary, they both confirm and establish it as the true agreement of the parties.

Bell says that he and Shelton purchased the property as agents of the company; that they had several interviews with the plaintiff before they made the purchase; that finally a contract was made and reduced to writing, and that the terms set forth

719 in the obligation sued upon are "the same terms set forth in the contract. And while, he says, he (Bell) thought of no other money but Confederate money, yet that nothing was said by him to the plaintiff, or by the plaintiff to him, about what kind of money was to be paid. And he expressly states that he offered Confederate money to the plaintiff and he refused to receive it, stating he preferred the terms as they were agreed on.

Shelton says, they had several interviews with the plaintiff; and finally made a contract with him which was reduced to writing; that the terms set forth in the paper in the suit, are the exact terms agreed upon. He also proves that nothing was said about the kind of currency in which the obligation was to be discharged; that he expected that it would be discharged in the money that was the currency of the country at the time of its maturity; but he expected that would be Confederate currency. He also distinctly proved that they offered the plaintiff Confederate money, and he refused to receive it.

These are the only two witnesses introduced by the defendant. Neither of them pretend to prove either that Calbreath, the plaintiff, or the president of the company, who executed the contract, made any other agreement than the one sued upon. Giving the utmost weight to the statements of these witnesses, the most that can be said is, that they thought that the same currency would be in existence in 1867, which was then the currency, and, therefore, the contract was to be discharged in that currency; and it appears they did not even communicate these thoughts and hopes to the plaintiff; and yet it is gravely asked, why did not Calbreath disclose to the agents that he was not contracting with reference to Confederate money? Disclose it to them? How could he have more plainly disclosed it than he did? Was not his refusal to receive Confederate money a disclosure of his purpose? Did he not disclose his

720 purpose, "when he deliberately put in writing that this "sum is to be paid in the currency used in the common business of the country at the date of the maturity" of this obligation?

But it is said that, plain as this contract is written, there is some sort of a presumption, that the parties did not mean what they said,

because they lived under the government of the Confederate States, and must be presumed to have contracted with reference to the currency of that government, and not of another; and that, therefore, when they stipulated for such currency as may be used in the common business of the country" in the year 1867, we must construe their contract, by adding the words, "provided, that currency shall remain as it is, Confederate treasury notes," and thereby they are made to contract for the very thing they are seeking to avoid.

Surely everybody must admit, that a man had a right to sell his property in March '64, for a better currency than the worthless trash then current. When he parted with his property there was, surely, nothing illegal, or immoral, or even disloyal, in his seeking to secure for it a sound currency. Why should there be any legal presumption against such contract? Upon what principle of law or reason can such a presumption be raised? Especially, how can it be raised in this case, against a man who positively refuses to receive Confederate money, and expressly stipulates that he is to receive another currency? This violent and illegal presumption is to be raised in the face of the written contract, in the face of the fact, that he has refused to sell his property for Confederate money, in the face of the fact that he thought (as many did), in 1864, that the Confederacy would be a failure; because, forsooth, he was a citizen of Virginia, and Virginia was one of the Confederate States, and it must therefore, be presumed he was not contracting for the currency of the

721 United States, then at war with the Confederate States. There might be some reason in raising such presumptions against the citizen of a government which had established its independence, and whose separate nationality had been recognized by the other nations of the world. But surely no such presumption can be raised against the citizen of a government which never had one day of peaceful existence, but whose every day's existence, from the stormy cradle of its birth to its bloody and untimely grave, was a struggle for life.

But certainly and beyond all question, no legal presumption can be raised against the plain written terms of the contract. And I insist that it was not only lawful, but it was eminently proper in every prudent man who was about to part with his property as late as the year 1864, to stipulate for a currency other than Confederate currency, when it was then depreciated twenty for one, and steadily and rapidly going down every day.

But I understand that the principle now settled by this court is this (I state the very words of the proposition): that where parties enter into a contract during the war with reference to Confederate money as a standard of value, payable at a future fixed period, in such currency as may be current at the maturity of the contract, the presumption is, in the absence of evidence

to the contrary, that the parties intended to pay in Confederate currency.

Now this is begging the question in this case. It is assumed that this contract was entered into with reference to Confederate currency as a standard of value, when, in fact, another and different currency is pointed to as the standard of value fixed by the parties by the express terms of their agreement; and when the very witnesses who swear that they understood the value to be ascertained with reference to Confederate currency, prove distinctly that \$3,600 was worth only \$140, and at the same time that the property sold was worth 722 \$1,000; and when it is shown, too, that the property sold was worth from \$1,000 to \$2,500 in gold, and when the court fixes the value at at least \$1,400. I say it is begging the question to say that property thus valued on all hands was valued with reference to Confederate currency, in the face of the written contract, and in face of the fact that the value of the Confederate currency was worth only \$140, when the value of the property sold was worth from \$1,000 to \$2,500.

I think it is plain that in this case both the written contract and the parol evidence show conclusively that it is not shown that (in the language of the statute) the true understanding and agreement of the parties the contract "was to be fulfilled or performed in Confederate States treasury notes, or was entered into with reference to said notes as a standard of value, but that by the express terms of the contract, it was to be discharged in another currency, and was entered into with reference to another and different currency as a standard of value; and it was, therefore, error in the court below to scale the debt as a Confederate contract.

It is the province and the duty of this court to execute the contract of the parties; and when the contract has been fairly entered into, where no fraud is charged or proved, the court ought not to be deterred from executing the contract because a high price has been agreed to be paid upon a long credit.

But it must be conceded that where the parties have deliberately entered into a written contract, and especially where there is no proof that the understanding and agreement was different from the written contract, that written contract ought not to be ignored and set aside, because (as in this case) the agents of one of the parties had certain hopes and expectations and confidence in the success of the Confederacy and the continuance of the same currency.

The law is, that where the true un- 723 derstanding and *agreement of the parties—of both parties, not of one—was that the contract should be fulfilled and performed in Confederate States treasury notes, or was entered into with reference to said notes as a standard of value, then, and only then, is the contract to be scaled. And yet we are to set aside the solemn written agreement of the parties,

because one of them (and in this case his agent) may choose to say that he was looking to a payment in Confederate currency, because he had confidence in the success of the Confederate cause. We are thus substituting the hopes and expectations of one of the parties for the solemn agreement of both of the parties, as evidence in writing. I can never assent to such a proposition. I am for executing the contract of the parties which they have deliberately made for themselves. I am for reversing the judgment.

STAPLES, J. The questions of law and fact arising in this case were, by consent of parties, referred to the judge of the court for adjudication. Where this is done, the same weight and effect will be given to the decision in an appellate court, that are given to the verdict of a jury. In this case the judgment is in accordance with justice and is not plainly in conflict with the evidence; and I am not disposed to disturb it. Upon all the points involved, I refer to my opinion in *Hilb v. Peyton*, as containing all I desire to say.

MONCURE, P., concurred in the opinion of Christian, J.; **Bouldin, J.**, concurred in the opinion of Anderson, J.

Judgment affirmed.

724 *Poague v. Greenlee's Adm'r & als.

August Term, 1872, Staunton.

Case at Bar—Sale of Land—Confederate Money.—On the 15th of April 1863, a decree is made, appointing commissioners to sell land on the terms of cash for costs of suit and expenses of sale, and balance on a credit of six, twelve and eighteen months. On the day of sale, it is proposed to the commissioners to sell for Confederate money; but they decline to do it, and say they sell according to the decree. Four of the heirs, representing six shares out of twelve, enter into a written declaration that they will take Confederate money for their shares, and this is read to the assembly by the crier, who at the same time expresses the opinion that all the heirs will take the money. The land, worth then \$15,000 in good money, sells for \$50,301. The cash is paid in Confederate money, the bonds given and the sale is reported to the court and confirmed; and S, receiver of the court, is directed to withdraw the bonds, and collect the money as it falls due. S receives Confederate money in payment of the first bond, upon the purchaser, P, undertaking to take it back if the persons entitled will not receive it. When the second bond comes due P offers to S to give him a check on the bank of R, for the amount, which S declines to receive; and so when the third bond fell due. Says he declined to receive it because he knew it would be paid in Confederate money. He did not doubt that P had the money in bank, though there was no evidence of that fact, but P's statement to S. **HOLD:**

1. **Same—Same—Same.**—The sale was a sale with reference to Confederate treasury notes as the standard of value.

*See principal case cited in *Staples v. Staples*, 24 Gratt. 234, and *Crockett v. Sexton*, 29 Gratt. 57.

2. **Same—Same—Tender of Payment.**—The offer of P to give S a check for the money, was not a good and valid tender: First, Because there was no evidence that P had the money in the bank at the time; and, Second, Because a good and valid tender could not be made to the receiver of the court.

3. **Same—Same—Measure of Liability.**—P allowed his option to take the land at its value in good money, to be credited with the true value of the money he had paid; or to surrender the land and account for the rents and profits, and be credited for the value of the money he paid.

725 *This case was decided by the court at the November term 1871, and the opinion was delivered by Christian, J., affirming the decree of the court below. Upon the petition of the appellant, a rehearing was allowed; and it was argued at Staunton during the present year, by Brockenbrough and Tucker, for the appellant, and Cochran and Baldwin, for the appellees. The opinion contains a sufficient statement of the case.

CHRISTIAN, J., delivered the opinion of the court.

This is an appeal from a decree of the Circuit court of Rockbridge county.

The record discloses the following facts:

David Greenlee died in April 1850, leaving a large estate, real and personal. His widow, Hannah J. Greenlee, was appointed the executrix of his will and trustee of his children. The testator was indebted to numerous creditors, and charged his whole estate first with the payment of his debts.

In August 1860 the original bill was filed by James C. Walton and Virginia C., his wife, who was Virginia Greenlee, in which they ask for an account of the administration of the executrix on the estate of her husband, and also an account of the debts partly chargeable on the estate; "and further praying that, if in the opinion of the court, the interest of all parties will be promoted by a sale of the estate, both real and personal, that such sale may be decreed," &c.

In this suit various orders were made and accounts taken, about which no questions arise in the case now presented to this court, and which it is not necessary here specially to refer to. But it is sufficient to remark that such regular and proper proceedings were taken in the cause, that on the 15th day of April 1863 the said Circuit court "being satisfied that the interest of all the heirs, as well infants as adults, will be promoted by a sale of the tract of land in the bill mentioned," entered

726 *its decree directing two commissioners therein named, to sell, after due advertisement, the said tract of land for so

***Measure of Liability—Confederate Money.**—Sexton v. Windell, 23 Gratt. 539, cites the principal case as laying down the true rule for "fixing the measure of the debtor's liability where a portion of the purchase money has been paid," i. e., when the sale was with reference to confederate securities as the standard of value.

much cash in hand as will pay the expenses of sale and costs of suit; and as to the residue of the purchase money, on a credit of six, twelve and eighteen months, in equal instalments, taking bonds with good personal security for the deferred payments.

This decree was executed according to its terms by the commissioners on the 16th of July 1863; and the appellant, Wm. F. Poague, became the purchaser of the land known as the Home tract at the sum of fifty thousand three hundred and one dollars. He paid in cash the sum required by the decree for expenses of sale and costs of suit, to wit: the sum of one thousand two hundred dollars, and executed three bonds for the deferred payments, with security, payable at six, twelve and eighteen months, for the sum of sixteen thousand three hundred dollars each.

The commissioners of sale returned their report, and with it the bonds of the appellant. No exception was taken to this report; and the said Circuit court, at its September term, confirmed and ratified the sale; and directed a receiver of the court to withdraw the bonds and collect them when they became due, and to convey the land to the purchaser or his assigns by deed with special warranty as soon as the whole of the purchase money should be paid. No further proceedings were taken in the cause until the April term 1866 of said Circuit court, when the appellant, Wm. F. Poague, filed his cross bill against all the parties to the record, as well as the receiver, Joseph G. Steele. After setting forth the sale of the land, and his purchase of the same at public auction, and his compliance with the terms of the sale, by making the cash payment of \$1,200, and the execution of his bonds, with security, for the deferred payment in three equal instalments, he charges

727 that he paid to the receiver the first instalment, to wit: the sum of \$16,300, when the same became due. That when the remaining bonds became due he tendered in Confederate money the amounts, principal and interest, and demanded a deed of the receiver in accordance with the decree of the court. That said receiver refused to receive the money tendered, upon the ground that it had become greatly depreciated, and refused to execute and deliver the deed, as directed by the decree of the 15th September 1863; and prays that the said Joseph Steele, receiver, &c., may be required to convey the said land so purchased to him, according to the terms of the before recited decree of the 15th September 1863.

The defendants who answered this cross bill (it being taken for confessed as to the receiver, Steele, and other defendants) denied that the sale was made for Confederate money, and affirmed that the commissioners announced on the day of sale that they were not authorized to receive Confederate money in payment of said tract of land; and they insisted that the balance of said purchase money should be paid in the present currency.

The depositions of numerous witnesses

were taken, and the cause coming on to be heard upon the cross bill and answers and the depositions of witnesses, the said Circuit court was of opinion that the said "William F. Poague should, at his option, be deemed to have paid towards said tract of land, a certain proportion of the true value of the whole, hereafter to be fixed, and to be entitled to hold the land and pay the balance according to such true value, or to give up the land, have the contract rescinded, have the true value of the Confederate currency paid in by him, refunded to him, and to account for the rents and profits according to the principles of equity."

To carry out this opinion of the court, the following decree was entered: "It is therefore adjudged, ordered and decreed, that, unless within sixty days from the rising of this court, the plaintiff in the

728 cross bill, William F. Poague, shall, in a writing to be filed in the papers in this cause, elect to retain, hold and pay for the tract of land in the bill and proceedings mentioned, in accordance with this decree; that is to say, that the said Poague shall settle and pay up for the land upon the basis of fifteen thousand dollars, as the true value of the land as of the 16th of July 1863; which sum the court, upon the evidence now in the cause, fixes as the true value of the tract of land as of the 16th of July 1863; or if said Poague elects to have a revaluation of the land as of that date, then that he shall pay for the land upon the basis of the valuation hereafter to be fixed by a master and confirmed by the court; and in either case, supposing the whole valuation sum to be divided into five hundred and one parts, the said Poague will be deemed to have paid one hundred and seventy-five parts, and to stand debtor for three hundred and twenty-six parts, and to account for the interest thereon from July 16th, 1863, till paid; and unless within the period aforesaid, said William F. Poague shall designate in writing as aforesaid, to be filed as aforesaid, upon which basis he will settle; that is to say, whether he will retain, hold and pay for the said tract of land, at the valuation of the whole as aforesaid of \$15,000, on the one hand; or as the alternative proposition, whether he will have said tract of land revalued, and settle and pay for the same, as aforesaid, according to the valuation to be fixed by the court upon a report from a master; then that the contract between said William F. Poague and the court, and the sale of the said tract of land shall be deemed to be vacated and annulled, as an act of this day."

It is from this decree that an appeal has been allowed to this court.

The case upon the evidence presents a very singular and almost irreconcilable state of facts. It requires a very careful consideration of the testimony to de-

729 termine, "whether in point of fact, the sale of the real estate in the bill and proceedings mentioned was, according to the true understanding and agreement of the parties, a sale for Confederate currency.

The appellant insists, and not without reason, that it was. He confidently points to the fact, that the sale was decreed in the year 1863; when it must have been known, both to the distinguished and learned judge who entered the decree, as well as to all the parties, that Confederate States treasury notes at that time constituted the entire currency in circulation. He points too to the enormous sum which he agreed to pay for the land to wit: the sum of fifty thousand three hundred dollars, when it is proved to be worth only fifteen thousand dollars in gold, as conclusive evidence that the land must have been purchased by him with reference to Confederate money as a standard of value.

On the other hand, it is proved by the intelligent commissioners who sold the land, that they never authorized, by any declaration of theirs, the purchaser or any one else at the sale, to believe that they would sell the land for Confederate treasury notes or other depreciated currency. One of these commissioners, S. McDowell Moore, says in his deposition: "Before the sale took place a number of persons spoke to me to know if we would agree to sell for Confederate money, and stated that if we would do so the property would bring a much higher price. I promptly replied, that we could not and would not do so. That we would sell on the terms set forth in the decree, and no other. * * * I stated that we could not make any change from the decree; but if the heirs would take Confederate money they could do so. I was told that there were a number of the heirs present, and that they were willing that the sale should be for Confederate money. It was then suggested by me or some one else, that those who were present and willing to take Confederate money should
730 *give a writing binding themselves to do so. I went to the house and drew up a paper which was filed with the report of sale. * * * * The paper was signed and was then read out to the persons in attendance, probably by W. G. Moore, the crier. He then commenced crying the sale, and expressed the opinion that the heirs who were not present would take Confederate money. He did not say they would do so, or I would have at once said that he was not authorized to say that they would do so."

The paper referred to in this deposition, is in the following words: "We the undersigned, heirs and distributees of the estate of David Greenlee, deceased, do hereby bind ourselves to receive our respective portions of the proceeds of the Home tract, in current funds, if the court under which the decree for the sale was made, shall sanction a sale for such money at its next term." This paper, signed by four of the heirs who were present, was read out publicly by the crier, who, according to the evidence, expressed the opinion, that the heirs who were not present would also be willing to receive the same currency. Under these circumstances, the bidding commenced, and

the land went up to the sum of fifty thousand three hundred and one dollars, and was knocked down to William F. Poague, the appellant, he becoming the purchaser at that price.

The commissioners returned a report of this sale to the Circuit court of Rockbridge at its September term 1863, and returned with said report the paper above referred to, signed by the heirs and distributees who were present at the sale as aforesaid. There was no exception to this report, and on the 15th September 1863, the said Circuit court confirmed the sale, and "further ordered that Joseph G. Steele, the receiver of this court, do withdraw the bonds filed with the report of sale and collect them as they become due, and pay over the proceeds to the distributees, who shall be ascertained
731 by the report of a commissioner, to whom the case is referred, to be entitled to receive them."

The purchaser, William F. Poague, paid to the commissioner the cash payment of \$1,200, required by the decree, in Confederate treasury notes, which were received without objection by the commissioners, and executed his three several bonds with security for the sum of \$16,300 each, one payable six months after date, one payable twelve months after date, and the other payable eighteen months after date, all bearing date on the 16th of July 1863. These bonds were returned with the report of the commissioners. The first bond was paid to the receiver at its maturity, and was paid in Confederate States treasury notes. The receiver seemed to have some doubt as to his authority to receive this currency, and consented to receive it only upon condition that the purchaser, Poague, would take back from the receiver the same amount in currency in the event that the heirs refused to receive it. No demand was ever made upon Poague to take back the money, inasmuch as it was disposed of by the receiver to the heirs and distributees.

When the other two bonds became due, the receiver says "he (Poague) offered to pay each of them on the day of its maturity, by offering to give me a check on the Bank of Rockbridge for the amount, which I declined to receive, because I knew the check would be paid in Confederate money." In point of fact only one of the three purchase money bonds was paid, and the other two remained in the hands of the receiver unpaid.

Thus matters stood until after the close of the war, when the purchaser, Poague, filed his cross bill as before recited, claiming that he was entitled to have a conveyance made to him of the tract of land so purchased, upon the ground that he had paid, or tendered to pay, the whole of the purchase money.

We are constrained to say that upon the whole evidence in the cause, conflict-
732 ing and contradictory as it may appear, it is manifest that the sale was made for the currency which at the time of the sale was the only currency known as a

irculating medium in this state, to wit : Confederate treasury notes.

It is impossible to conceive that the learned and distinguished judge (Judge Thompson), who entered the decree in this cause in the Circuit court of Rockbridge, on the 15th of April 1863, directing commissioners to sell at public auction the tract of land in the proceedings mentioned, intended that the sale should be made for gold. No one knew better than he did that gold and silver had been driven entirely from the channels of circulation as money, and that the only currency in existence at that time (April 1863) was the treasury notes of the Confederate States. Under the terms of the decree cash was required for so much as was necessary to pay the costs of suit and expenses of sale. This amounted to the sum of \$1,200. It is doubtful whether that sum in gold could have been found in the whole county of Rockbridge. Certain it is that no bidder could have been found in that county, or any where else in the state, for a tract of land for which he was required to pay \$1,200 down in gold, and to execute his bonds, in three instalments, of six, twelve and eighteen months, for gold or its equivalent. A decree requiring such terms could not at that time have possibly been executed.

Again, the price which the land brought at public auction demonstrates beyond question, that the understanding of the bidders was, that the land was sold for the currency of the country then in circulation. It is true, that the commissioners, out of abundant caution, stated at the sale, that they could only sell in accordance with the terms of the decree; and it seemed to desire to throw upon the heirs the responsibility of receiving Confederate money. They no doubt did this, because the decree did not, in terms, direct a sale for that currency.

But it would be a very narrow view of 733 the case *to say, that because the decree (though entered at a time when it was well known to the court and the counsel, as well as to the parties, that there was no other circulating medium, except Confederate treasury notes), required payment in gold, because it did not specifically declare that the sale should be made for Confederate money. We would rather say, that as a general rule, all decrees for the sale of property entered during as late a period of the war as the year 1863, must be taken, unless the contrary plainly appears, to be decrees for sales for Confederate currency.

But though we are of opinion, for reasons stated above, that the sale in this case, was a sale for Confederate currency, yet, it by no means follows, that the appellant is entitled to the relief which he is now claiming at the hands of a court of equity. He comes before the court claiming a specific execution of his contract; claiming that having paid the cash payment and the first instalment due; and having tendered to the receiver of the court the balance of the purchaser money, he is entitled to have the land conveyed to him.

In the first place, it cannot be said upon the evidence in this cause, that he made a tender of the balance of the purchase money due to the receiver.

It is true, that the receiver states in his deposition, that at the maturity of the bonds remaining unpaid, the appellant offered to give him a check or draft on the bank of Rockbridge, for the amount of said bonds; but it is not proved anywhere in the record, that the appellant had a dollar to his credit in that bank.

The receiver, it is true, states that his refusal to receive the checks was based entirely upon his knowledge that they would be paid in Confederate money. He also states, that he was fully satisfied that the appellant had the money to his credit in the bank, not from any personal knowledge that he had of the matter, but only from the appellant's statement.

734 *But suppose, instead of offering to give a check upon a bank, without proof that he had a dollar in that bank, he had actually produced the whole amount in Confederate treasury notes and offered them to the receiver, and they had been refused; could he even then maintain that he was entitled to receive a deed for the land? His contract was not with the receiver; the receiver was but the hand of the court to take the money when it became due. It is not like the case of two contracting parties, where one is held bound when the other has performed his part of the contract according to its terms, or has offered to perform it, but has been prevented by the act of the other, and by no fault of his own.

The principles upon which courts of equity decree a specific performance of a contract in ordinary cases cannot be applied to a case like the one before us. The appellant was the purchaser at a judicial sale. He could acquire no title to the property until he had complied with the terms of the decree of the court directing that sale. One of the specific terms of that decree was, that a deed should be made only when the whole of the purchase money was paid. It was not sufficient that the purchaser should tender to the receiver the balance due. He had no contract with the receiver. The latter was only the hand of the court to collect the money when due. It was the plain duty of the appellant, when the receiver of the court refused to receive Confederate money under his conviction that he was not authorized to do so by the express terms of the decree, to have applied to the court for its construction of its own decree. When he made the first payment he had notice from the receiver of his unwillingness to take Confederate currency unless the heirs would receive it from him. Instead of then making application at the very first term of the court for its instructions to the receiver, he chose to give his personal obligation to that officer, by which

735 he agreed to take back the currency paid him if *he could not dispose of it to the heirs. When the other two

bonds became due (the one six months and the other twelve months after the first payment), he contents himself with offering his check to the receiver, instead of reporting to the court the refusal of its officer to receive the purchase money. If he had brought the matter to the attention of the court, and asked the court for its construction of its own decree, and had brought the Confederate money into court, that court would have either disposed of the fund in such a way as to relieve him of all further responsibility, or would have set aside the sale and ordered a re-sale, with specific directions as to the kind of currency in which the purchase money should be required. But he failed to take this plain course which ordinary prudence would dictate. He chose, as to the first payment, to give his personal obligation to the receiver to take back the Confederate currency, in the event the heirs refused to receive it. As to the other two payments, when they became due, he contented himself with offering to the receiver his checks. Offering no proof that he had the money in bank—or if he had, that it remained in bank, and was not afterward appropriated to his own use—he passively waits till after the war has ended, and now claims that he is entitled to a deed for valuable real estate, for which he has paid only one-third in Confederate currency.

Upon this state of facts, how shall the liability of the appellant be adjusted according to the principles of equity? We cannot hold, according to the theory of the appellees, that the sale of the real estate was a sale for specie. The time at which the decree was entered (April 1863), when there was no other currency than Confederate treasury notes, and the large amount (\$50,301) which the land brought, while the evidence shows it was worth only \$15,000, forces us to the conclusion that the sale must be regarded as a sale for Confederate currency. But regarding the sale as a sale for Confederate currency, we are of opinion that the appellant, William F. Poague, is not entitled to have a deed for the land. By his own default, in passively waiting till after the close of the war, when the Confederate currency has perished, before taking steps, which he might and ought to have done, to enable the court below to adjust the matter upon equitable principles between him and the heirs and creditors of David Greenlee, he has forfeited all claim to have the title to the land confirmed in him. He has paid only \$16,300 in Confederate money for a tract of land worth, according to the evidence, at least \$15,000 in gold.

Upon the whole, we are constrained to conclude that there is no other mode of adjustment, upon equitable principles, of this, in many respects, peculiar case, than that adopted by the court below, to wit: that the appellant shall now be put to his election, either to have the sale vacated and annulled, and to receive back the value of the Confederate money which he has paid; or

if he elects to do so, to have the title to the land confirmed in him, upon his paying the actual value of the land at the day of sale in the present currency, having credit for the proportion which the amount he had paid bears to the whole amount of the purchase money agreed to be paid—that is to say, if the value of the land is taken to be (as the evidence fixes it) at \$15,000, and he has paid one-third of the amount he agreed to pay in Confederate money, then he must be regarded as having paid one-third of the purchase money, and as still being bound for the other two-thirds, to wit: the sum of \$10,000, more or less, according to the proposition which the amount he has paid bears to the amount he agreed to pay. This is the principle upon which the decree appealed from is based. We think it is the correct principle. It is entirely in conformity with the statute passed March 3d,

1866, providing for "the adjustment *of liabilities arising under contracts made between the 1st day of January 1862, and the 10th day of April 1865," and the amendments to that act passed February 28th, 1867, as construed by this court in the case of "Pharis v. Dice," 21 Gratt. 303. In that case this court, by its unanimous opinion, approved and sustained the validity of that provision of the statute which declares that "where the cause of action grows out of a sale, or renting or hiring of property, real or personal, if the court (or where it is a jury case), the jury think that under all the circumstances the fair value of the property sold, or the fair rent or hire of it, would be the most just measure of recovery in the action, either of these principles may be adopted as the measure of recovery, instead of the express terms of the contract." This court declared, in the case of Pharis v. Dice, that "where the consideration of the contract is the borrowing and lending of Confederate money, then, of course, the only mode of ascertaining its value is the reduction according to the scale of depreciation of the nominal value to its real value in gold. But generally where the consideration of the contract is property sold and delivered, rented or hired, then the best mode of adjustment, and the best mode of ascertaining the value of the Confederate currency agreed to be paid, is the fair value of the property which that amount of Confederate currency purchased, rented or hired at the time the contract was entered into."

The court below, in conformity with the provisions of the statute, and in accordance with the principles declared in Pharis v. Dice, has adopted the value of the land as the measure of recovery, in decreeing the terms upon which the appellant may have the title of the land confirmed in him. He is in possession of valuable real estate, for which he has paid only one-third of the purchase money he agreed to pay. The court below has put upon him fair and equitable terms. He may, if he *chooses to do so, give up the land, and have the value of the Confederate money which he paid refunded to him; or if he refuses

to do this, then he must be regarded as a purchaser who has paid one-third of the purchase money, and as still standing indebted for the balance. We are of opinion that, under all the circumstances of the case, the mode of adjustment adopted by the court below is in accordance with sound principles of equity, and best secures the rights of the parties.

We are, therefore, of opinion that the decree of the Circuit court of Rockbridge county ought to be affirmed.

ANDERSON, J., dissented.

Decree affirmed.

739 *Purcell v. Allemong & Son.

October Term, 1872, Winchester.

1. **Check—Presentment in Reasonable Time.**—A check upon a bank must be presented for payment in a reasonable time, in order to charge the drawer.
2. **Same—Discharge of Drawer.**—If a check is presented for payment, and payment refused, and notice is given to the holder at any time before the bank fails, the drawer is not discharged, if it be shown that he is not prejudiced by the delay; and if prejudiced he is only discharged *pro tanto*.
3. **Same—Same.**—If the holder of a check fails to present it for payment, when he might do it, until after the bank fails, the drawer is not responsible, if he had funds in the bank for its payment.
4. **Same—Same.**—If the holder of a check is not able to present the check by reason of the removal of the bank and the condition of the country, he should give notice of the fact to the drawer, and offer to return it. And if he fails to do so the drawer is not liable.
5. **Same—Excuse for Non-Presentment.**—Though the holder of a check is disabled, so that he cannot go in person to present the check for payment, yet if he might have sent it by mail, he will not be excused for not presenting it.

This was an action of assumpsit in the Circuit court of Frederick county, brought in 1865, by Edgar R. Purcell against John Allemong & Son, partners, to recover the amount of a check drawn by the defendants upon the Farmers Bank of Virginia at Winchester for \$911.87, payable to Purcell or order, and dated February 11th, 1862. The defendants pleaded "non assumpsit," on which issue was joined; and the parties waiving a jury, submitted the whole matter of law and fact to the decision of the court.

740 *It appears that the plaintiff, Purcell, lived about twenty-six miles from Win-

*In *Cox v. Boone*, 8 W. Va. 510, the first three paragraphs of the syllabus of the principal case are quoted as authority upon this point.

In *Compton v. Gilman*, 19 W. Va. 316, the court citing, among others, the principal case, says: "The fact that the check is presumed to be drawn against deposited funds, makes it of great importance, that a check should be presented, and that the drawer should be notified of non-payment, in order that he may speedily enquire into the causes of refusal and be placed in a position to secure his funds, which are deposited in the bank."

chester, on the stage road leading thence to Leesburg, in Loudoun county, and Allemong & Son lived at Newtown, about seven miles south of Winchester. In December 1861 Purcell had money in Baltimore which he wished to withdraw from thence; and Allemong & Son owed some debts in that city, which they wished to pay. At this time G. R. Coffroth, a merchant of Baltimore, was at Purcell's, and undertook to collect the money due him in Baltimore, and remit it to him. On the same trip Coffroth was in Newtown, when Allemong & Son requested him to receive from them Virginia money and use it in paying their debts in Baltimore, so far as their creditors would receive it. He then informed them that he was to collect money for Purcell, and would use it in paying their debts; and they could pay Purcell. To this arrangement they assented. Coffroth collected the money of Purcell, and out of it paid the debts of Allemong & Son to the amount of \$916.87; and on the 11th of February 1862, seeing one of the defendants in Winchester, he informed him of the amount he had paid for them, and the check for the amount was on the same day drawn and sent by mail to Purcell, who acknowledged the receipt of it by a note to Allemong & Son, dated the 17th of February 1862.

Purcell, who gave his testimony in the cause, states that at the time he received the check he was confined to his bed by a broken limb. That in a few days after its receipt he sent it to the Valley Bank at Leesburg to get it cashed, but that bank declined to cash it; and in a few days thereafter, as he thought about a week after he received it, he transferred it to a friend, simply to present it at the bank in Winchester, upon which it was drawn; and that in a few days thereafter his friend returned to him the check, without presenting it for payment. It appears 741 that the bank was removed from Winchester on the 7th of March 1862, and was sent to Farmville, up to which time it did a large business; and that the mail stage ran regularly from Purcellville, where the plaintiff lived, to Winchester, until the sixth or seventh of March; and that in February and up to the 1st of March checks to a large amount were sent by mail from the branch at Leesburg to Winchester.

It appeared further that Allemong & Son were merchants doing a large business; that their deposits in the bank were sometimes as much as \$20,000, and they were profitable customers to the bank. That when the check was drawn, and until the bank was removed, they had ample funds in the bank to pay; and this continued until July 1862, when their deposit in bank was reduced for a time to \$608.80, but if the check had been presented then it would have been paid. When the bank failed at the end of the war the defendants had to their credit in the bank upwards of \$1,200.

The plaintiff held the check without giving notice to the defendants that it had not been paid, though the defendants knew in the summer of 1862 it had not then been paid. After the return of the bank to Winchester,

after the surrender of General Lee in 1865, the plaintiff presented it to the bank for payment, but the bank had then failed.

It appears further that the Confederate troops fell back from Loudoun and the lower valley in March 1862; and though there were some instances of checks being sent from Winchester to Farmville, there were obstacles in the way arising out of the war.

The Circuit court rendered a judgment for the plaintiff for the amount of the check, \$911.87, with interest from the 7th of March 1862, till paid. From this judgment Allemond & Son obtained a supersedeas to the district Court of Appeals at Winchester; and

when the case came on to be heard, that 742 court reversed the judgment. *And thereupon Purcell applied to this court for a supersedeas, which was awarded.

Conrad & Son, for the appellant.

Barton & Boyd, for the appellee.

ANDERSON, J., delivered the opinion of the court.

A check is an inland bill of exchange drawn on a bank, or other house of deposit. The drawer undertakes that the bank will pay to the payee or holder the sum named in the check; and the payee having received the check the drawer is not liable to pay it, if he drew it in good faith, until the holder has demanded and failed to obtain payment from the bank upon which it was drawn. If the bank refuses to pay, the holder, as a general rule, has no right of action against it, but must look to the drawer for payment. But the drawer may have his action against the bank, for refusing to honor his check; but not until the same has been presented and payment refused.

It is consequently well settled, as a general rule, that the holder of a check has no recourse upon the drawer until the check has been presented to the bank and payment refused. *Murray v. Judah*, 6 Cow. R. 484; 3 Kent Com. p. 75, 4th ed. It is held that a check unless dishonored is payment. *Byles on Bills*, marg. p. 23, top 100. And that demand and refusal before suit is brought, is an essential preliminary to an action against the drawer. *Murray v. Judah*, 6 Cow. R. 484; *Harker v. Anderson*, 21 Wend. R. 372; *Sherman v. Comstock*, 2 McLean R. 19; *Daniels v. Kyle*, 5 Georgia R. 245; *Case v. Morris*, 7 Casey R. 100. And it is held that the same rules which are established in relation to bills of exchange, as to presentment and notice, in general apply to checks. *Byles on Bills*, top p. 85, marg. 13, 14, note 1, 743 and top p. 92 and n. 1. The *same diligence is required as to presentment and

notice. Mr. Parsons says, a check must be presented within reasonable time in order to charge the drawer or indorser, in case of failure of the drawee. The fact that it is presumed to be drawn against deposited funds, makes it of even greater importance than in the case of a bill, that a check should be presented, and that the drawer should be notified of the non-payment, and that he and any in-

dorser should be discharged by neglect of notice. 2 Pars. on bills p. 71.

In *Gough v. Staats*, 13 Wend. R. 549, it was held that greater diligence is necessary, in presenting checks for payment, than is required in relation to bills of exchange. But the better opinion is, that there is no good reason for the distinction. The fact that one instrument is drawn upon a bank, and the other upon an individual, can make no difference in principle, concerning the duty of the holder. What will be due diligence in the one case will be due diligence in the other. *Byles on Bills*, marg. p. 19, note 1.

But they differ in respect to the legal consequences of negligence and delay in presentment and notice. In the case of a bill of exchange, it is an absolute and unqualified discharge of the drawer. In the case of a check, if presentment is made and payment refused, and notice given any time before the failure of the bank, the drawer is not discharged if it be shown that he is not prejudiced by the delay; and if prejudiced he is discharged only pro tanto. *Bell v. Alexander*, 21 Gratt. 1. But presentment and refusal before suit brought, are, as a general rule, pre-requisite to the right of action by the holder to charge the drawer.

Mr. Smith, in his valuable work on Mercantile Law, says, It has been held that if the drawer has no assets in the drawee's hands, nor any reason to expect that the bill will be paid, a presentment is, for the purpose of charging him, unnecessary. But nothing short of this *will do; not even a declaration by a drawee, that he will not pay it. *Smith's Mercantile Law*, p. 312, and cases cited. And again, on p. 332, he says, if the drawer has any reasonable ground to expect that the bill will be paid, he is entitled to notice.

In this case the drawer had more than double the amount of the check to his credit in the bank when it was drawn. He had reduced his credit on the 7th of March, when the bank was removed to Farmville; but had still to his credit more than was required to pay the check, if it had been presented. But on the 1st of July his credits had been further reduced, so that they would have fallen short of paying the check, if it had then been presented, something over \$300. And it is contended for the plaintiff, that he was thereby excused for failing to present the check, and give notice to the drawer.

In *Hammond v. Dufrene*, and *Thackay v. Blackett*, 3 Campb. R. 145 and 163, Lord Eldon held the drawer entitled to strict notice. Mr. J. Story, in commenting on these cases in the matter of Brown, says, "it was upon the ground that there was an open account between the parties, and therefore the drawer could not necessarily have been aware beforehand, that either of the bills would not be discharged; so that the case was put upon the clear ground that the drawer had a right to draw, and a right to believe that his bills would be honored. Indeed, in the case of a fluctuating balance between the parties, this may well constitute a ground upon which, without knowing the exact state of the bal-

ance, the drawer may reasonably draw. And this, he says, was the very ground upon which the doctrine was put in the case of *Orr v. Maginnis*, 7 East's R. 359, where the court thought in the case of a shifting balance, notice was necessary; because the drawer could not or might not know, that he was drawing without any right to draw. The same doctrine, he says, was upheld in 745 **Legge v. Thorpe*, 12 East R. 171, and was there expounded upon the principles which I have stated."

Now to apply these principles. The drawers in this case had an open account with the bank. They were large dealers and esteemed good customers. Their deposits from January to March 1862, amounted to \$20,000, some in bank notes and some in Confederate money. And what was the extent of their deposits afterwards does not appear. But it does appear that in October 1862, they made a deposit of \$1,200. They had an open account with the bank and the balance was fluctuating. And the drawers could not, or might not, know that they were overchecking. The cashier testifies that it often occurred through the inadvertence of dealers, and that if this check had been presented it would no doubt have been paid upon the credit of the drawers. We conclude, therefore, that upon this ground the holder of the check was not excused for its non-presentment.

But it is further contended for the plaintiff, that he was excused on account of his inability, by reason of a broken limb, to go to Winchester to present the check for payment. There was no necessity for him to have gone in person. He might have sent it by post, as he did the letter acknowledging its receipt.

Another ground relied on was the state of the country, being occupied by the public enemy. There appears to have been nothing in the condition of the country to have prevented the presentment to the bank at Winchester before its removal. And due diligence required that it should have been presented before the removal of the bank. The check was sent by mail to the plaintiff on the 11th of February 1862, and he acknowledged the receipt of it "by due course of mail," by letter dated February 17th. He probably received it on the 12th or 13th of February. And the bank was not removed until the 7th of March. And it is proved that the 746 mail *stage ran regularly between Winchester and the plaintiff's residence (which was about twenty-six miles from Winchester on the stage road), until the 6th or 7th of March. The same mail which carried his letter acknowledging the receipt of the check through Winchester to the defendants, might have safely carried the check to Winchester to be presented to the bank for payment. And if it had been, it would have been undoubtedly paid. And no presentment being afterwards made until the bank had become insolvent, it would seem that nothing more is necessary to negative the plaintiff's right of action to charge the drawers. The presentment after

the bank had failed was a vain and nugatory act, and was of no value for any purpose.

There is no evidence that the plaintiff made any effort to draw the money from the bank after its removal to Farmville. Communication, for most of the time, probably was interrupted by hostile armies. But sometimes it was open and uninterrupted. And whilst the bank was at Farmville checks from Winchester were paid at its counter. He says he did not know where the bank had removed. He surely could have ascertained by very little inquiry. Mr. J. Story thus lays down the rule: "If the acceptor has changed his place of domicile or business, presentment must be made at the new domicile or place of business, if by reasonable diligence and inquiries it can be found, and it is within the same State." Story on Bills, § 346, p. 441. But whether, in the then abnormal condition of the country, it was the duty of the payee to follow the bank to Farmville, the court deems it unnecessary in this case to decide. It is of opinion that if he did not intend to follow the bank to Farmville, he ought, at least, to have promptly returned the check to the drawers. He evidently did not desire to collect the money, but preferred to let it lie in bank. And having allowed it to lie in the bank for more than three years, without an 747 effort to collect *it, and without notice to the drawers that he had not collected, and did not intend to look to the bank for its payment, but looked to them, without an offer to return the check to them and request that they would pay it, the court is of opinion that he must be deemed to have made the check his own, and to have relied upon the bank for ultimate security, and that the drawers were thereby discharged. 4 Kent's Com. p. 549, 4th ed. The court is, therefore, of opinion to affirm the judgment of the district court.

Judgment of the District court of Appeals affirmed.

748 **Kendrick & al. v. Forney.*

October Term, 1872, Winchester.

Bond—Confederate Money*—Surety, as Purchaser.—

In March 1862 K sold personal property at auction, on nine months' credit, amounting to about \$2,000. F purchased some of it, and gave his bond for \$501.57, with R as his surety. On the tenth of April 1863 K sold all the bonds to R, including that of F for Confederate money. After the bond of F fell due, he tendered payment in this money. **Held:** R can only recover of F the value of the Confederate money he paid K for the bond, with interest from the date of the purchase.

***Subrogation of Surety.**—In *Cromer v. Cromer*, 30 Gratt. 280, citing the principal case and *Powell v. White*, 11 Leigh 309, 324, the court said: "Among his [the surety's] equitable remedies is that of subrogation to the securities of the creditor, to whom he has paid the debt. These, though extinguished at law by the payment made by the surety, are generally revived in equity for the surety, and may there, by him, be enforced for his indemnity. But it is not

This was a suit in equity in the Circuit court of Warren county, by James W. Kendrick and James R. Richards against Abraham Forney, as an absent defendant, to attach the land of Forney lying in that county, for the payment of a bond for \$501.57, dated March 10th, 1862, payable, with interest, at nine months from its date, executed by said Forney as principal, and James R. Richards as his surety. Forney answered the bill, and insisted that the bond was to be paid in Confederate treasury notes; that Richards had paid off the bond to Kendrick in April 1863, in that currency, and that respondent had tendered the money to both Kendrick and Richards, and they had refused to receive it. The facts seem to be as follows:

Kendrick, who had boarded with his family at Richards', in the county of Warren, wishing to leave that county, sold his personal property at auction, on a credit of nine months, and Forney made purchases at the sale to the amount of \$501.57, for which he executed the bond in question, with Richards as his surety. The whole amount of the sale seems to have been about \$2,000, for which bonds were taken. Kendrick, whose

749 *deposition was taken, says the sale was not for Confederate money, and that the property sold for less than the prices before the war or since. In April 1863, Kendrick sold all those bonds, including Forney's, to Richards, receiving Confederate money therefor at par, except that what he owed Richards for the board of himself and family was taken in part for the price of the bonds. This account was for three months' board, at the rate of \$375 a year, his family consisting of himself, his wife, and two children and a nurse.

every security which may be thus revived and enforced. A bond on which principal and surety are both bound, once paid by the surety in the lifetime of the principal without assignment by the creditor, or agreement to assign, is forever dead as a security as well in equity as at law. There can be no subrogation in such a case."

In *Southall v. Farish*, 85 Va. 406, 7 S. E. Rep. 584, the court, citing the principal case, said: "The rule is certainly too well settled to be controverted, nor is it disputed that the contract between the principal and the surety is for indemnity only, and therefore if the surety discharges an obligation for a less sum than its full amount, he can only claim against the principal the sum so paid."

As to the implied contract between the parties which obliges the principal to reimburse the surety when he, the surety, pays the debt, see *Southall v. Farish*, 85 Va. 409, 7 S. E. Rep. 584; *Feamster v. Withrow*, 9 W. Va. 316 *et seq.*; *Conrad v. Buck*, 21 W. Va. 410, all citing the principal case as authority.

Butler v. Butler, 8 W. Va. 676, citing the principal case as authority, said: "Therefore, if the surety pays the debt of his principal in depreciated currency, or depreciated notes of banks or other institutions, the general rule is, that he can recover only the value thereof at the time he paid the debt for his principal; and the criterion is the market value." See also, in accord, *Feamster v. Withrow*, 12 W. Va. 686; and *Matthews v. Hall*, 21 W. Va. 514, both citing the principal case as authority for the proposition above set out.

As to the tender, both Kendrick and Richards denied that Forney had tendered them the money. A witness, Hite, deposed that Forney placed in his hands near \$600, with direction to pay it to Richards and get the bond, and that he did offer it to Richards, who refused to receive it.

The cause came on to be heard on the 26th of August 1868, when the court held that Richards, who was the surety of Forney in the bond to Kendrick, was only entitled to recover of Forney the value of the Confederate treasury notes paid by him to Kendrick for the bond, with interest thereon. And it appearing that the amount of Confederate States treasury notes so paid by Richards was \$534.17, which at the gold value at the date of payment, viz: April 10th, 1863, was \$97.12, it was decreed that Richards should recover of Forney the said sum of \$97.12, with interest from the 10th of April 1863, until paid. And unless, &c. From this decree Kendrick and Richards applied to this court for an appeal, which was allowed.

Conrad, for the appellants.

Cook, for the appellee.

ANDERSON, J., delivered the opinion of the court.

A surety who pays the debt of his principal, upon the plainest principles of natural reason and justice, has a *right to be reimbursed by him. And this principle is recognized by both courts of law and equity. There is an implied contract of indemnity between the principal and his surety, which obliges the former to reimburse the latter who has paid his debt; and the courts of equity will substitute him to the remedies and securities of the creditor for his indemnity; and this not upon the ground of contract, but upon a principle of natural equity and justice. In a court of law the surety in a joint bond with his principal, who has paid the debt of the principal to the creditor, can proceed against the principal upon the implied contract of indemnity, to be reimbursed the amount he has paid. He can proceed against him only upon the implied contract, and not as assignee of the bond; for by the payment of the bond to the creditor it is extinguished. And in *Copis v. Middleton*, 1 Tur. and Russ. R. 224, Lord Eldon held that in such a case, the doctrine of courts of equity, that a surety who has paid the debt of the principal may be subrogated to the remedies and securities of the creditor against the principal does not apply. He says the rule must be qualified by considering it to apply to such securities as are not extinguished, but which continue to exist, and do not go back upon payment, to the person of the principal debtor. As where there was a mortgage in addition to the bond, the surety paying the bond, which is thereby extinguished, would have an equity to be subrogated to the benefit of the mortgage which is still a subsisting security.

This decision is not in accord with the decisions of our courts, as to payments made by the surety, after the death of the prin-

principal debtor. It has been repeatedly held by this court, that where the bond has been paid by the surety, after the death of the principal, he will be subrogated to the rights of the creditor, and will be regarded as a specialty creditor of the decedent in the administration of assets, and as binding the real estate *of the principal debtor, if the heirs are bound. That the bond although extinguished at law by the payment, will be resuscitated by courts of equity for the indemnity of the surety. But if payment had been made by the surety, in the lifetime of the principal debtor, he is considered here, as in *Copis v. Middleton* and *Jones v. Davids*, 4 Russ. R. 277, as only a simple contract creditor. Judge Tucker, in the very able opinion he delivered in *Powell's ex'ors v. White & al.*, 11 Leigh, 309, 324, says: "We do not in our courts, place the surety in the shoes of the bond creditor where he has paid off the bond in his principal's lifetime. We still consider him as a creditor by simple contract. There is, at that time, no superior dignity in one debt over the other. There is no right, no privilege of the creditor to which the surety can be subrogated. For though the bond should bind the heirs, yet during the debtor's life it cannot affect the realty; and as to his personality as well as realty, all creditors have, during his life, the same privileges. Substitution or assignment is, therefore, useless." "We apply the principle only where the payment is after the principal's death." This equitable practice of subrogation, which is a creature of equity, is applied to sureties, as we have seen, not upon the ground of contract; for where I become the surety of another by jointly with him executing a bond to his creditor, the implied assumption of the principal debtor to reimburse me if I pay the debt, is not an undertaking under his hand and seal. It is only an implied assumption on his part; and the surety having an equity to be subrogated to the rights and securities of the creditor, as for instance to the benefit of the mortgage, when the creditor held such security, or to be regarded as a specialty creditor of the debtor, as placed in the shoes of the creditor, when he has made payment after the death of the principal debtor, is not upon the ground of contract, because there *was no contract by mortgage, or by bond between the principal debtor and the surety. But it is upon the ground that the surety having become bound to the creditor upon an implied contract of indemnity with his debtor, has, in the place of the debtor, satisfied the claim of the creditor, done what the debtor ought to have done; upon principles of natural justice and equity he should be entitled to the benefit of the creditor's securities for his indemnity. But only for his indemnity. He has no equity to be subrogated to the rights and securities of the creditor against the debtor for what he has not paid for him; but only for what he has paid for him. So that upon the principle of subrogation, as upon the implied contract of indemnity, the surety is not entitled to recover from the principal a greater amount

than he has paid for him. He has an equity to be subrogated only for his indemnity in cases where the doctrine of subrogation will apply. But in this case the payment having been made by the surety in the lifetime of his principal, it has no where been held, in this country or England, that the principle of subrogation is applicable. He must stand alone upon his implied contract of indemnity. As was said by the Lord Chancellor Cottenham in *Reed v. Norris*, 14 Cond. E. C. R. 362, 375, the contract between him and his principal is, that the principal shall indemnify him from whatever loss he may sustain by reason of incurring an obligation together with the principal. It is on a contract for indemnity that the surety becomes liable for the debt. It is by virtue of that situation, and because he is under an obligation as between himself and the creditor of his principal, that he is enabled to make the arrangement with that creditor. It is his duty to make the best terms he can for the person in whose behalf he is acting. His contract with the principal is indemnity." He then asks the question, "can the surety, then, settle with the obligee, and instead of treating that settlement as payment *of the debt, treat it as an assignment of the whole debt to himself, and claim the benefit of it as such to the full amount, thus relieving himself from the situation in which he stands with his principal, and keeping alive the whole debt? This question he answers in the negative, and says he is prepared to make a precedent. But this was unnecessary, as Lord Eldon in *Rushforth ex parte*, 10 Ves. R. 409, 420, and *Butcher v. Churchill*, 14 Ves. R. 567, had laid down the rule "that where a surety gets rid of and discharges an obligation at a less sum than its full amount; he cannot, as against his principal, make himself a creditor for the whole amount; but can only claim as against his principal what he has actually paid in discharge." The same doctrine is asserted by eminent text writers and in various decisions, both in England and America; 1 Stor. Eq. Jur. s. 499 b., and 499 c.; Pittman on Principal and Surety, Law Libr. vol. 40, top p. 98, marg. 134, and cases cited. And it is expressly held by this court in *Blow v. Maynard*, 2 Leigh, 29.

The court is therefore of opinion that Richards, having paid the debt of Forney to Kendrick, for which he was bound in a joint and several obligation as surety for Forney, in the lifetime of his principal, the said obligation was thereby discharged, and the said surety could not take an assignment of it. But that he has a claim on Forney, his principal, for indemnity; that is, for the amount he paid the obligee, and for that only.

The court is further of opinion that upon the facts of the record Richards must be deemed to have paid the debt in April 1863, to Kendrick, the obligee, in Confederate money. The evidence shows that he paid him about \$2,000 in Confederate money, including a small account he had against him for three months' board, in consideration of an assignment to him of bonds to the same amount,

including the bond in which he was surety for Forney. The account seems to have been received, *in payment of the bonds, for its face amount, just as the Confederate money was received. There appears to have been no discrimination made by the parties in the transaction between the account and the Confederate money; but it seems to have been received in payment as Confederate money. Nor does it appear that Richards had a right to demand specie or other currency than Confederate in payment of it. And it being a contract made in the latter part of 1862 or 1863, for board, it may fairly be inferred that it was solvable in Confederate currency, there having been no stipulation that it was to be paid in specie. Nor does it appear that this account in the transaction was specially applied to the payment of Forney's bond. Inasmuch, therefore, as Richards, the surety, must be deemed to have paid the debt of his principal in Confederate money, he was bound to have received from his principal reimbursement in the same sort of funds. And it satisfactorily appearing from the preponderance of testimony in the cause, that the same was tendered by the appellee to Richards soon after he had paid the bond to the obligee, and that he refused to receive it, the court is further of opinion that the Circuit court did not err in decreeing in his favor only the value of the Confederate money paid by him to Kendrick for his principal. And it not appearing that the amount allowed by the decree is less than the value thereof, the court is of opinion, for the foregoing reasons, to affirm the decree.

Decree affirmed.

755 *Sangston, Cor. Sec., &c., v. Gordon & Riely.

October Term, 1872. Winchester.

1. **Voluntary Associations—De Facto Officer.**—Bonds are given to S, secretary &c., of a voluntary association, and a deed of trust executed to secure them. And S is directed by the association to proceed to collect all the debts belonging to them. Though by the by-laws the secretary was to be elected annually, yet as S continued to act as such, and was so recognized by the association, it was competent for him to direct the enforcement of the deed of trust.
2. **Same—Same—Presumption.**—It is not competent for the grantors in the deed of trust to question the authority of S to take the deed as a security for the bond; that will be presumed until his principals disavow his act.
3. **Bonds and Deeds of Trust—Parol Evidence.***—Parol evidence is not admissible to prove that the bonds and deed of trust were not to be paid and executed according to their terms, but were only to be paid out of the profits of the property for the price of which they were given.

This is a bill in the Circuit court of Frederick county, filed in April 1869, by George

*See principal case cited in *Peyton v. Stuart*, 88 Va. 78, 16 S. E. Rep. 160.

M. Gordon and J. Chap. Riely, against Lawrence Sangston, secretary of the Baltimore Agricultural Aid Society, and James H. Williams and John J. Williams, trustees, to enjoin the sale of a steam saw mill conveyed by them, with other property, in trust to secure the payment of two bonds given by the plaintiffs to Sangston, secretary, &c., for the price of said mill. The bill, after stating that the plaintiffs had received the mill from the said society, and that the object of the society, as set out by them, was to aid the people of the South in their destitute condition, by furnishing them with machines and implements for the cultivation of their lands, says that before entering into any engagement with the society, they had endeavored to inform themselves as to the terms upon

756 which the *society was furnishing the machines and implements to the people of the South; and they were furnished for that purpose with a copy of the preamble and by-laws of the society; which they exhibit. That though said society was benevolent in its intention, they expected to be amply repaid for what they furnished by the increased supplies which would be raised in the country and sent to the Baltimore market; for the preamble expressly confines the distribution of the benefits to that "portion of the South which has heretofore been commercially connected with this city." Plaintiffs received the mill, and on the 15th of October 1865; executed their notes for the purchase money. They aver that in the execution of these notes, as well as in the execution of the deed of trust, they were induced by the representations made to them, not only by the society's agent at the time, but also by the express and explicit language of the preamble and by-laws of the society, that "the obligation of the purchasers are to be taken, to be repaid out of the proceeds of the first crop, or as soon thereafter as possible." Which provision was, in substance, stated to them by the agent of the society as forming the terms of their contract at the time of the execution of the notes; and but for this statement of the agent and language of the preamble, the plaintiffs aver they would not have embarked in the undertaking.

The bill further states that one of the persons connected with them withdrew, and as they had given no security on the notes, it was suggested by the agent of the society, and assented to by them, that the deed of trust should be given, which was accordingly done; plaintiffs thinking it but fair the society should have a right to the mill against their other creditors. They aver that they have made no profits by the mill, though they have given to it their constant care; and they state the difficulties they have had to contend with. They insist that Sangston, under article 7 of the by-laws of

757 *the society, had no power, of his own motion, to direct the enforcement of their claim against the plaintiffs without the order of the executive and finance committee; which order they believe has never been given; and they call for proof of it. They charge that the beneficiaries of this trust are

individuals scattered all over the State of Maryland, who contributed sums of various amounts to purchase the articles distributed by the society, with no intention of ever claiming the repayment of the amounts advanced. And they insist that having been unable, out of the receipts of the mill, to make any payments upon it, and it having been impossible otherwise for them to pay for the same, in whole or in part, up to this time, the society has no right, according to the published exposition of its views and objects, to enforce the collection by sale under the trust, or by suit at law upon the notes of the amounts so secured. They say they are willing, and have proposed to the society, to return the mill to them, together with the appurtenances which the plaintiffs have supplied at a cost of from three to four hundred dollars, if the society would return their notes and have their real estate released; but the proposition has not been accepted. They pray that the sale of the mill may be enjoined, and for general relief.

Sangston answered the bill. He says, he was, upon the organization of the Baltimore Agricultural Aid Society, elected the corresponding secretary, and has ever since continued to act as such; and was, during its active operations, the active, managing agent, and is entirely familiar with the organization and purposes of the society. That it never was the object of the society to dispense charities or bounties; but to render aid to needy, honest persons, engaged in agriculture; expecting that the obligations taken by the society would be paid as soon as the persons so aided would be able; which it was contemplated would be out of the first

758 *crop. The society was careful not to place the persons aided in the attitude of paupers receiving charity, but to furnish at cost such articles as were required, and take a bond for payment out of the next crop, or as soon as possible. And the subscribers to the fund were assured that there would be paid back at least eighty per cent. of their subscriptions.

He further says, that upon the organization of the society it was not contemplated to furnish large sums of money or costly implements or machinery, or anything not directly needed and used in agricultural pursuits, and did not even embrace threshing machines, as no one farmer had need or exclusive use for one for his own crop. That furnishing steam saw mills was not within the scope of the purposes and objects of the society at the time of its organization, or adoption of the preamble and by-laws. That upon the first application of the plaintiffs for mills, the society refused to furnish any, because they were too expensive, and not within its plans and purposes; and that afterwards, upon the personal importunities of one or both of the complainants, the executive board of said society decided to furnish two steam mills for the valley; one for the lower, the other for the upper valley; but then and there determined, that inasmuch as these machines were only indirectly connected with agricultural pursuits, and were sought

by complainants and others for purposes of speculation and gain, and were to be operated for purposes of making money, good security should be required for the payment of the purchase money of the same. That no other obligation, either for loans or purchases, except for threshing machines and the two mills aforesaid, were required to be secured. And he denies that plaintiffs ever understood from him, or any one else, so far as he can learn, that they were to have said mill to be paid for out of the profits of the operation. He says that no one acting for

said society, so far as he can learn and 759 believes, *ever had any authority to enter into or make any such agreement or arrangement; and he believes none such was ever made. That neither the terms of the deed of trust, made some months after complainants were operating the mill, nor the obligations given by them, contain any such provision. That whatever may have been the previous understanding or misunderstanding of the parties, the whole matter was merged in the written contract; and he denies that the only object was to protect the society against creditors, and avers that the security was given only to provide for the debt contracted in the purchase of the mill, and to effect this, other property was embraced in the deed of trust.

He further says, he has full authority to enforce the payment of this claim, and any and all other claims due the society; that as early as July 5th, 1866, the bonds of the said society were placed in the hands of respondent for collection, by direction of the executive committee of said society. That in pursuance of said authority he has placed the bonds of said society in the hands of agents and attorneys, and has been distributing the proceeds so collected among the subscribers.

The preamble to the by-laws of the society says: "This society has been organized for the purpose of supplying such persons in the South, in that portion of it which has heretofore been commercially connected with this city, and within easy reach of it, who, from the ravages of war, have been deprived of the necessary agricultural and farming implements, tools, seed and stock, to enable them to cultivate their land, and are without the means of purchasing them. It proposes to supply such as may be in that condition, and on enquiry may be deemed worthy of assistance, with such necessary articles, at or near the cost thereof, taking the obligations of the parties, to be repaid out of the proceeds of the first crop, or as soon thereafter as possible."

760 *The by-laws provide for the annual election of officers and directors of the society; that the directors should, at their first meeting, appoint an executive and finance committee, which should exercise a general control and supervision over the fund of the society; and the corresponding secretary, among other things, should receive the notes and obligations for the goods sold, and hold them subject to the orders of the executive and finance committee, and report

his action at each monthly meeting of the directors.

It appears from the evidence that the primary object of the society was to furnish articles which would enable the farmers to cultivate their land, such as farming implements, seeds and horses. When the application to them to furnish a steam saw mill was made, the society seemed disinclined to do it; but on being pressed to do it, they determined to furnish two, one for the lower and the other for the upper part of the valley. But the money, about \$59,000, which had been subscribed for the uses of the society, being nearly exhausted, some four or five of the persons who had interested themselves in the matter, borrowed from the bank in Baltimore, on their own notes, some \$17,000 to enable the society to furnish the mills and other implements, with the understanding that this sum was to be a prior claim on the assets of the society; and it was by means of this fund that the mill in question was purchased and paid for.

There being a number of applicants for the mill intended for the lower valley, these applications were referred to the agent of the society at Winchester and two other gentlemen, to determine which of these applicants should have it. Among these applicants were Gordon, Price & Riely; and whilst the applications were pending before this committee, Gordon, Price & Riely handed to the committee the names of four men who would become their securities for the price of

761 the *mill; and the committee awarded the mill to them. After this had been done, Price withdrew from the concern, and the persons whose names had been given declined to become their securities. And then Gordon & Riely proposed in writing to J. H. Burgess, the agent of the society at Winchester, to secure the money which was the price of the mill by giving a deed of trust upon the mill, and upon the undivided interest of each of them in the estate of their father-in-law, James P. Riely, deceased. This proposition was accepted, and the deed hereinbefore referred to was executed by them. This deed bears date the 27th of January 1866, and reciting that Riely and Gordon are indebted to Sangston, secretary of the Baltimore Agricultural Aid Society, in the sum of \$2,000, payable the 17th of October 1866, with interest from 17th October 1865, and in the further sum of \$1,993.62, payable on the 17th of October 1867, with interest, &c., being the price of a steam saw mill and fixtures, they convey to Philip Williams the said saw mill and fixtures and their undivided interest in the estate of James P. Riely, deceased, real and personal, being two-tenths thereof; and the deed sets out the real estate, which embraces a house and lot in Winchester, a tract of land in Frederick county, and numerous tracts in Iowa, Illinois and Missouri; upon trust that if the notes were not paid as they became due, the trustee should, upon request, proceed to sell at auction first the mill and fixtures; and if that was not sufficient to pay the notes, then to sell the

two undivided tenth parts of the land in Frederick county; and then, if necessary, the lands in Iowa, &c., or with the consent of Gordon & Riely, he might sell these western lands at private sale; and lastly, the interest in the house and lot in Winchester. And out of the proceeds of sales pay, &c. And in conclusion, it was agreed that if the heirs of James P. Riely shall choose to make sale of the western lands privately, the trustee may unite in the *sale, and the proceeds of the said two-tenths to be applied to the payment of the debts secured by the deed.

There is a great deal of testimony in the record which it is impossible to state; the plaintiffs and others who were examined say that they were induced by publications they saw in the papers and the preamble of the society to believe that the articles furnished were only expected to be paid for out of the profits made in the use of them, and indeed, that it was a charitable society veiled under the form of sales, but the payments were to be optional.

On the other hand, the testimony of Sangston and other members of the society was, that whilst their purpose was to render a service to the persons to whom they sold articles, they expected to be paid generally, and the estimate when the subscriptions were made was that they would get back probably eighty dollars in the hundred. And they were decided in their testimony that the mills were not embraced in their original object, and that they were sold with the understanding that the purchasers should give security for the purchase money.

It appears also that Sangston, the secretary, was authorized by the directors to collect the debts due.

The cause came on to be heard on the 2d of July 1869, when the court perpetuated the injunction. And thereupon Sangston applied to this court for an appeal; which was allowed.

Williams & Williams, for the appellants.

R. Y. Conrad & Son, for the appellees.

STAPLES, J. This is an appeal from a decree of the Circuit court of Frederick county in a suit wherein the appellees were complainants and the appellant, Sangston, was defendant. The history of the transactions in which this controversy originated, very briefly stated, is as follows:

763 *In the month of October 1865, the appellees purchased from the Baltimore Agricultural Aid Society a steam saw-mill, with its fixtures and appurtenances, at the price, in round numbers, of four thousand dollars, for which they executed their bonds payable to L. Sangston, "Secretary of the Baltimore Agricultural Aid Society." To secure the payment of these bonds, the appellees, in January 1866, conveyed in trust the said saw-mill, with all its fixtures and appurtenances, and also certain real and personal estate. Default being made in the payment of the debt, the trustee was instructed by Sangston to make sale of the

mill. The appellees applied for and obtained an injunction to this sale, which was afterwards perpetuated by a decree of the said Circuit court. It is from this decree an appeal was taken to this court.

Various grounds have been urged by the appellee against the deed of trust and the proposed sale under it, which will be briefly considered.

It is objected, first, that as Sangston was elected corresponding secretary for one year only, and as his term of office had expired when the sale was directed, he was not then authorized to enforce the collection of this debt. Sangston, both in his answer and in his deposition, states that he was elected secretary at the organization of the society; and that he has ever since held the office without interruption. There is nothing in the record contradicting or tending to contradict this statement; and we must therefore regard it as true. By a resolution of the board of directors of the 1st July 1866, he, Sangston, was authorized to collect the debts due the society. Under that resolution he took possession of its bonds and notes, and has been ever since engaged in collecting the same, without objection from the society or any of its members. As before stated, the bonds are payable to "L. Sangston, secretary of Baltimore Agricultural Aid Society"; the deed recites that the appellees are indebted to him the amount of these

764 *bonds, and that the property is conveyed to secure their payment to him. This form of security was no doubt adopted to enable him to sue for and collect the debts due the society, without the expense and inconvenience of his bringing before the courts the numerous parties interested in the proceeds of sale. It is clear that the legal interest in these bonds is vested in Sangston alone. Upon well settled principles the descriptive words used in the instruments may be rejected, and suits at law or in equity may be maintained thereon in his name, without the addition of other parties. *Porter v. Nekervis*, 4 Rand. 359; *Clarksons v. Doddridge & al.*, 14 Gratt. 42; *Sangston v. Coffman*, 21 Gratt. 263.

It is next objected that Sangston, in taking the deed of trust, acted without instructions or authority from the society. The doctrine of ultra vires relied on in support of this proposition, has no application to the case. That doctrine only applies when the principal is sought to be charged with the unauthorized act of an agent, and not where a debtor has given a security to the agent for the benefit of the principal. The appellees had the right to secure the payment of the debt they had contracted. The society, though not expressly authorizing the act in the first instance, might at any time ratify it, and claim the benefit of the security thus given. It will be presumed to have done so until some distinct disavowal is made to appear. Nothing of the kind is shown in this case. And it could never be endured that in a controversy between appellees and the agent alone, the principal should be deprived of this only security for his debt,

without evidence of his dissent, and without even an opportunity of being heard.

Having disposed of these preliminary objections, I come now to consider very briefly, the main question in the case. It is insisted, that a sale of the property conveyed in trust,

would be a fraud upon the appellees; 765 *that they purchased the steam saw mill with the express understanding that it was only to be paid for out of the profits, if any, realized from the mill itself; that the deed was given at the suggestion of Sangston, because of the persons associated with the appellees—a man of large experience and influence in the county—had withdrawn from the adventure; and the real and indeed sole object of the deed was to furnish the secretary, Sangston, some security against the claims of other creditors and purchasers. This is substantially the ground upon which it is sought to arrest the sale by the trustee. If successful, the effect will be to vacate the bonds and deed for all practical purposes. The bonds on their face are payable absolutely. It is proposed to show, by parol evidence, they were only to be paid out of the profits of the mill, if any were realized. The deed provides, that if the bonds are not paid at maturity, the property therein conveyed shall be sold. It is proposed to show, by parol, that the property was not to be sold under any circumstances. And thus it is to be made to appear, that an instrument of writing which on its face was intended as a valid security is, in fact, no security at all. No argument is necessary to show that this is an attempt to contradict or vary the express terms of a written agreement by proof of a prior or contemporaneous parol agreement. The admission of such evidence as a foundation of relief in any court, violates the best established principles of the common law. When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, it is conclusively presumed that their whole engagement, the extent and manner of their undertaking, are embodied in the instrument. The cases of *Towner v. Lucas*, 13 Gratt. 705; *Woodward, Baldwin & Co. v. Foster*, 18 Gratt. 200; affirm these principles, and are decisive against the pretensions of the appellees.

This is the aspect of the case when 766 considered with *reference to the conclusive effect of the written contracts. If, however, we go farther, and give due weight to all the evidence adduced by the appellees, I do not perceive the result would be different. It will be observed, that the appellees do not pretend there was any special contract or understanding between them and the society, or its agents, by which the steam saw mill was not to be paid for, unless out of the profits realized. They aver that such was their understanding, derived from various newspaper publications and the pamphlets of the society, one of which is filed with the bill. What these newspaper publications were, does not appear; as they are no part of the record. The pamphlets filed with the bill show that the main purpose of the society

was the distribution of agricultural and farming implements, tools, seed and stock; to be paid for out of the first crops, or as soon thereafter as possible.

It is clear, that the general scope and design of the society did not extend to the sale or donation of steam saw mills and articles of like character. This could not have been done without seriously diminishing the resources of the society and impairing its capacity for good. In this case, the mill, with its fixtures, was purchased by certain members of the society, at a cost of near four thousand dollars, and paid for with means borrowed from bank upon their individual credit and responsibility. It can be well understood, therefore, how it was, and why it was, the committee to award the mills was instructed to make known to all applicants, that in no case would the mill be awarded except to parties giving good and satisfactory security. The appellees understood these terms, and attempted to comply with them by a proposition in writing, to give a bond with satisfactory securities. Upon the faith of this undertaking, the mill was awarded to them; and actually placed in their possession. Some of the parties, however, offered as sureties or endorsers, declined to

767 *assume the liability; and this part of the arrangement was defeated. Appellees then proposed in writing, to execute the trust deed, and that proposition was accepted, in lieu of the personal security.

This latter arrangement was a matter of favor to them, as they had not complied with the terms of the sale, and were liable at any time to surrender the possession of the mill. The deed was accordingly executed. It conveys the mill, with all its fixtures and appurtenances, a house and lot in Winchester, and more than a dozen tracts of land, containing not less than three thousand acres, situated in a half dozen different States. It directs with great minuteness, the order in which the property shall be sold, if default is made in the payment of the debts. And at the conclusion, this provision is added, "It is agreed that if the heirs of the said James P. Riely shall choose to make sale of the western lands privately, that they may do so; and the trustee shall unite in the sale; and the proceeds of the said two-tenths to be applied to pay the debts hereby secured.

Now, it is inconceivable that such a deed, with such provisions, drawn with so much precision and accuracy; evincing the greatest care and foresight in regard to the property conveyed and the proceeds of sale, should have been deliberately executed and placed on record, with an understanding that it should never be enforced, or if enforced at all, only on certain contingences wholly omitted in the deed. The evidence does not warrant any such conclusion; on the contrary, I think it plainly shows that the bonds and the deed contain the true contract of the parties; and there is not in this case the slightest foundation for the charge of fraud against the appellant or the society he represents.

For these reasons, I think the decree of the

Circuit court should be reversed, the injunction dissolved and the bill dismissed.

The other judges concurred in the opinion of Staples, J.

768 *The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the said decree is erroneous. Therefore, it is ordered and decreed that the same be reversed and annulled, and that the appellees George M. Gordon and J. C. Riely, do pay unto the appellant his costs by him expended in the prosecution of his appeal aforesaid here.

And this court proceeding to pronounce such decree as the said Circuit court ought to have rendered, it is further decreed and ordered that the injunction awarded the plaintiffs, J. Chap. Riely and George M. Gordon, on the 30th day of April 1869, "restraining John J. and James H. Williams, trustees, from selling the steam saw mill in the proceedings mentioned until the further order of the court," be dissolved, the bill of the plaintiffs dismissed, and that they do pay unto the defendants their costs by them about their defence in the said Circuit court expended. Which is ordered to be certified to the said Circuit court of Frederick county.

Decree reversed.

769 *Ambrouse's Heirs v. Keller.

November Term, 1872, Richmond.

1. Decree—Further Relief—Not Final.*—Though a decree denies to the plaintiffs the specific execution of the contract they seek to enforce, yet if it authorizes them to amend their bill, if they shall so elect, and ask for other relief, and continues the cause to give them time to so amend their bill, it is not a final decree.

2. Bill of Review—Petition for Rehearing.†—If the plaintiffs present their bill of review verified by oath, and ask leave to file it, if the decree was interlocutory, the court should treat the bill as a petition for a rehearing of the cause, and if the decree was erroneous, should rehear and reverse it.

3. Same—Appeal—What Brought up.—An appeal from the decree of the court refusing to allow the bill of review to be filed, if the decree was final brings

*Decree Not Final.—The rule laid down in the principal case that, "when the further action of the court in the cause is necessary to give completely the relief contemplated by the court, then the decree is to be regarded not as final but interlocutory," has been approved by several subsequent cases citing the principal case as authority on the subject. See *Burch v. Hardwicke*, 23 Gratt. 56; *Smith v. Blackwell*, 31 Gratt. 300; *Summers v. Darne*, 31 Gratt. 306; *Ryan v. McLeod*, 32 Gratt. 377; *Jameson v. Jameson*, 86 Va. 54, 9 S. E. Rep. 480.

In *Burch v. Hardwicke*, 23 Gratt. 56, it is said that "the same principle applies to judgments."

†Petition for Rehearing.—In *Rawlings v. Rawlings*, 75 Va. 91, the court, citing the principal case as authority, said if the decree was interlocutory in its character, the bill could be treated as a petition for rehearing.

up for consideration the correctness of the first decree; and if the first decree was interlocutory, brings up the whole case.

4. **Contract for Sale of Land—Enforcement—Confederate Money.***—A contract for the sale and purchase of land made in January 1864, for Confederate money, both parties being *sui juris*, and the price being fair at the time, and then paid, and possession delivered, will be enforced at the suit of the heirs of the vendee.

5. **Petition—Statute of Limitations.**†—If the petition for an appeal is presented within the period for the limitation of appeals, it is sufficient.

In September 1867, the widow and heirs of William Ambrouse filed their bill in the Circuit court of Frederick county, against George W. Keller, to enforce the specific execution of a contract entered into between the said Keller and Ambrouse for the sale by Keller to Ambrouse of a tract of land lying in the county of Frederick.

On the 29th of January 1864, the parties entered into a contract under seal, by which Keller sold to Ambrouse a tract of land in the county of Frederick, containing one hundred and twenty-four acres, in consideration of the sum of four thousand dollars, 770 the price asked by *Keller, which was paid at the time; and Keller contracted to make a deed to Ambrouse as soon as possible, and possession was to be given on or before the 1st day of the next March. The sale was made for Confederate money, and possession was delivered, and continued from that time by said Ambrouse during his life, and since his death by his widow and heirs. There is proof that the parties met for the purpose of making the deed, and the writing of it was commenced; but it could not be concluded because of the absence of papers which were necessary to furnish a description of the land. There is also proof that after the war Keller spoke to a lawyer to write the deed, who prepared it; but Keller afterwards declined to execute it.

***Specific Execution of Contract—Inadequacy of Consideration.**—In *Stearns v. Beckham*, 31 Gratt. 390, the court lays down, as the rule of English chancery "that inadequacy of consideration, unconnected with any other circumstance, constitutes no valid objection to the specific execution of a contract through the medium of a court of equity unless the inadequacy be so great as in itself to be sufficient evidence of fraud." The court then says this English rule has been followed by Virginia in several cases and cites among others, the principal case to sustain the assertion.

†**Confederate Money.**—In *Mead v. Jones*, 24 Gratt. 359, the court, citing the principal case to sustain the point, said: "Whatever doubts and perplexities as to the character of Confederate States treasury notes and the validity of proper payments therein, may have attended the administration of justice at an early period after the close of the late war with the United States, there cannot, at this day, be a doubt that they constituted a valid consideration; and that transactions therein closed in good faith during the war by parties understanding them and competent to contract, will not be reopened by this court, because they were based on Confederate States treasury notes."

Keller, in his answer, objected to the execution of the contract, on the ground that the contract, being for Confederate treasury notes, was illegal and void; that the consideration was wholly inadequate, the Confederate money being at the time of the contract worth but \$200, and that Ambrouse had committed a fraud upon him by assuring him that the money was equal to gold; of which there was no proof. He said he was willing to return the value of the money he received with interest from January, 1864, upon being put in possession of his land; if the plaintiffs will account to him for the rents and profits of it for the same time.

The cause came on to be heard on the 23d of July 1868, when the court held that the contract ought not, upon the principles of a court of equity, to be specifically executed; and that the only relief to which the plaintiffs were entitled in this court is to have the value of the Confederate States treasury notes paid by Ambrouse to Keller for the lands, repaid to the personal representative of said Ambrouse, said value to be ascertained as of the day of payment, either with interest thereon from that time until repaid, deducting a reasonable rent for the land, or setting off said interest against said rent.

771 *It was therefore decreed that the plaintiffs, if they elect so to do, may amend their bill by making the personal representative of William Ambrouse, deceased, a party to the same, which being done the court will proceed to ascertain, through its commissioner, the value of the said treasury notes at their day of payment, &c. If on the other hand the plaintiffs elect to proceed at law, then the bill will be dismissed. And the cause is now continued to give the plaintiffs reasonable time to make the said election between this and the next term.

On the 28th of January 1869, the plaintiffs presented their petition to the court to be permitted to file a bill of review to the decree. The petition was accompanied by a bill sworn to by one of the plaintiffs. But the court denied the petition, and ordered that unless the plaintiffs should, within sixty days from the end of this term, amend their bill by making the personal representative of William Ambrouse, deceased, a party thereto, and elect to proceed in this court according to the principles set forth in said decree, their said bill shall be dismissed, &c., such dismissal to be without prejudice to any action at law, &c.

On the 12th of June 1869, the cause came on again, when the plaintiffs, not having amended their bill, and the time allowed them to do so having expired, it was decreed that the bill be dismissed upon the terms of each party paying their own costs; and without prejudice. From these decrees the plaintiffs applied to a judge of this court for an appeal, which was allowed. This appeal was allowed on the 26th of October 1871.

Conrad & Son, for the appellants.

Barton & Boyd, for the appellee.

BOULDIN, J. delivered the opinion of the court.

The decrees complained of in the petition for appeal were rendered, one of them 772 on the 23d day of July *1868, and the other on the 28th of January 1869. A subsequent decree finally disposing of the cause and dismissing the bill was rendered on the 12th day of June 1869. The appeal was not allowed until the 26th day of October 1871; but it is conceded by the parties, by counsel, as a fact in the cause to be considered by the court, that the petition was presented to one of the judges of this court at Staunton during the August term of the court, 1871, which commenced August 10th and closed September 20th 1871.

On this state of facts it has been earnestly and ably contended by the counsel for the appellee that the petition was not presented within the time prescribed by law, and that the appeal should, therefore, be dismissed as improvidently awarded.

Under the statutes existing when these decrees were rendered, and still in force, no appeal can be allowed from any final judgment or decree, unless the petition shall be presented within two years after the date of the decree or judgment; and it is obvious that more than that time elapsed between the date of the latest of the three decrees and the presentation of the petition for an appeal. It does not appear from the concession of the parties on what day of August term 1871, the petition was presented, but as it was presented at Staunton during that term, it could not have been earlier than the 10th day of August 1871, being the 1st day of the term. Assuming that to be the true date, it was two years and fifty-nine days after the last decree, two years six months and thirteen days after the decree of January 28th, 1869, and three years and eighteen days after the decree of July 23d, 1868.

But by the act of the 5th of November 1870, Session Acts 1869-70, chapter 399, pp. 553-4, passed within two years from the dates of the decrees of January and June 1869, and amending the law limiting appeals to two years, it is enacted "that the time from 773 the 26th day of *January eighteen hundred and seventy, to the passage of this act, shall be excluded from the computation of said period of two years." The time thus required to be deducted amounts to nine months and ten days, and when the deduction is made in this case, the time between the dates of the decrees of January and June 1869, and the presentation of the petition, will be less than two years; and the case would be the same were the last instead of the first day of Staunton term assumed as the day on which the petition was presented.

The appeal, then, from those decrees was taken in due time, notwithstanding the court should be of opinion that the decree of July 1868, is a final decree and no longer subject to appeal.

At the next term after that decree was rendered the appellants presented to the court their bill of review, duly supported by affidavit, seeking to have the decree reviewed and

reversed, and asked leave to file the same; but the court, by decree of January 28th, 1869, refused to allow the bill of review to be filed, decreed adversely thereto, and re-affirmed the decree of July 1868; and not only from the decree of July 1868, but from this decree of January 1869, the appeal to this court was allowed. This appeal from the last decree is, as we have seen, in time, and, of necessity, it presents for our consideration the propriety of the decree of July 1868, sought to be reviewed. If that decree was final and erroneous on its face, the bill of review should have been allowed and the decree reversed. If the decree was interlocutory merely, and erroneous, then the bill of review should have been treated by the court as a petition for a rehearing, and the decree should have been reheard and reversed; and in either event, the refusal of the court below to entertain the application was a proper subject of appeal to this court; and as we have already said, the appeal is in time.

See 2 Rob. old practice, p. 418, citing 774 the cases of *Lees v. Braxton*, 5 *Call, 459, and *Williamson v. Ledbetter*, 2 Munf. 521. But as the result of a reversal of the decree of January 1869, were that decree alone to be considered by this court, would probably be to send the case back to the Circuit court, with instructions either to allow the bill of review to be filed, or to rehear the cause, as the case may be, and would thus be attended with additional expense and delay; it is proper to consider and decide the question so ably and elaborately argued at the bar, viz: whether the decree of July 1868, is final or interlocutory. If that decree is not final, but interlocutory merely, then it is properly before us on the appeal in this case, notwithstanding more than two years have elapsed from its rendition.

The court is of opinion, that the decree of July 1868, was not a final decree, but was merely interlocutory.

The distinction between final and interlocutory decrees has been a subject of frequent discussion before this tribunal, and is now well established by the decisions of the court.

In *Cocke's adm'r v. Gilpin*, 1 Rob. R. 20, 46, Judge Cabell, adopting the language of Judge Carr in *Harvey & wife v. Branson*, 1 Leigh, 108, said: "When a decree makes an end of a case, and decides the whole matter in controversy, costs and all, leaving nothing further for the court to do, it is certainly a final decree." And in the same case, p. 27-8, Judge Baldwin said: "Where the further action of the court in the cause is necessary to give completely the relief contemplated by the court, then the decree is to be regarded not as final but as interlocutory."

Here we have very briefly and clearly presented the characteristic features of a final and an interlocutory decree; and the definitions thus given have been approved and adopted by this court in the subsequent case of *Fleming & als. v. Bolling & als.*, 8 Gratt. 292, Moncure, J. delivering the opinion of the court.

775 *Let us apply the test to the decree of July 1868.

The suit was for the specific performance of a contract in writing, signed and sealed by the parties, for the sale and purchase of land; and performance was resisted mainly on the ground of inadequacy and failure of consideration; the consideration being Confederate States treasury notes. The decree merely set forth, that in the opinion of the court, upon the principles of a court of equity, the contract ought not to be enforced; but it did not dismiss the bill. On the contrary, it goes on to declare, that the only relief to which the plaintiffs were entitled, was to have the value of the Confederate States treasury notes paid by their ancestor for the land, repaid to his personal representative; and that upon his being made a party the court would proceed to ascertain through one of its commissioners, the value of said notes at the date of payment, and would decree accordingly; but should the plaintiffs elect to proceed at law, the bill would be dismissed without costs to either party. And the cause was continued to the next term to give the plaintiffs a reasonable time to make their election. This is the substance of the decree; and it certainly cannot be said of it, that it "makes an end of the case, and decides the whole matter in controversy, costs and all, leaving nothing further for the court to do;" that no "further action of the court in the cause is necessary to give completely the relief contemplated by the court." On the contrary, the court after settling certain principles as applicable to the case, sedulously avoids rendering a decree in favor of either party, but indicates a form of relief to which the plaintiffs were entitled in the cause; and continues it with a pledge on the face of the decree, that the relief thus indicated would be ascertained by the court and granted, if elected by the plaintiffs.

Such a decree is plainly interlocutory; and the appeal allowed in the cause, brings properly before this court the entire record.

776 *This brings us to the merits of the case; about which, we think there can be no doubt.

Each party was *sui juris*, and no advantage was taken on either side. The land was sold for a sum in Confederate States treasury notes, demanded for it by the vendor, and deemed at the time by both parties its fair equivalent. The entire amount of the purchase money was paid in cash to the vendor, and received by him as a sufficient consideration—instructions were given to a person who was present for the purpose, to prepare a deed—officers were in attendance to take and certify the proper acknowledgments—the writing of the deed was commenced, and its completion was only prevented by the absence of certain papers, which were necessary to ascertain the boundaries of the land. The vendor seems to have caused a deed for the land to be prepared by his counsel; and always until, and in fact for sometime after, the fall of the Confederacy, expressed his willingness to execute it; but in some way its execution was delayed.

There was no evidence introduced in the cause showing, or even tending to show,

that the price paid for the land was not at the time of payment its full value in Confederate States treasury notes; nor was there any evidence showing that one dollar of the money received perished in the vendor's hands. On the contrary, the vendor said that he would be able to make a satisfactory use of the money.

The ground on which the Circuit court refused to enforce specific performance of the contract, evidently was not that the consideration was inadequate at the date of the contract, nor that there was fraud in the sale, nor undue advantage taken of the vendor; but, that in the state of the law when the cause was heard in the Circuit court, a court of equity could not regard Confederate States treasury notes as a valid consideration.

Whatever room there may have been for 777 discussion on that *subject at an early period after the close of the war, it is no longer a doubtful or open question. All doubt about it has been removed by repeated decisions as well of the United States Supreme court as of the courts of the several States. Among them will be found a recent decision of this court directly on the point, and in a case in all respects analogous. *Hale v. Wilkinson*, 21 Gratt. 75.

That was a suit for the specific performance of a contract made during the war for the sale of land for Confederate States treasury notes, and the contract was specifically enforced. Judge Moncure, speaking for the court, says, that in determining the question of the right to specific performance, "we must carry ourselves back to the date of the contract, and the time when the purchase money was paid. If at that time the consideration would have been deemed adequate; if the court would then have decreed a specific execution of the contract, had this suit been then brought, it follows, I think, necessarily, that the consideration must now be deemed adequate, and the court must now decree such execution." P. 87. We approve and re-affirm these principles; and applying them to the facts of this case, we adopt the following language of the same learned judge: "Can there be a doubt, that if this suit had been then brought (that is, when the contract was made, and the price demanded by the vendor for the land was fully paid in cash,) the consideration would have been then considered adequate, and the court would then have decreed specific execution? I think none whatever." *Ibid*, p. 87.

The reasoning and conclusions of the court, throughout the entire opinion, are referred to as strikingly applicable to the case before us; and the facts are in all material respects alike. If there be a difference in any respect, that difference is in favor of the enforcement of the contract in this case. In *Hale* 778 *v. Wilkerson*, there *was, as to a portion of the purchase money, both delay and depreciation before the payment thereof was completed; whereas, in this case, there was compliance with the contract by the vendee to the letter, by the payment in cash of the entire price demanded by the vendor for the land. The vendor thus received in hand at the date of the contract, the full consider-

ation demanded by him for the land, leaving nothing more to be done by the vendee, who was not for one moment in default.

Under such circumstances, there cannot be a doubt that the vendee was then, and that his heirs are now, entitled to a specific performance of the contract. The court is, therefore, of opinion, that the decree of July 1868, refusing to enforce the contract, and the subsequent decrees of January and June 1869, are erroneous, and should be reversed with costs to the appellants; and that a decree should be entered, requiring the appellee to convey the land in the contract mentioned to the appellants, with general warranty.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the appellants are entitled to a specific performance of the contract in their bill mentioned, and that the decrees of the 23d day of July 1868 and of the 28th of January and 12th of June 1869 are erroneous.

It is therefore ordered and decreed that said decrees be reversed and annulled, and that the appellee, George W. Keller, do pay to the appellants their costs by them expended about the prosecution of their appeal aforesaid here. And this court proceeding to render such decree as should have been rendered by the said Circuit court, doth order and decree that the said George W. Keller do convey to the plaintiffs, in said Circuit court, children and heirs at law of said William Ambrouse, deceased, the tract of land described in the contract of the 29th of 779 *January 1864, exhibited with the bill, with general warranty of title; and that said George W. Keller do pay to the plaintiffs their costs by them about the prosecution of their suit in said Circuit court expended. And should the said George W. Keller fail to make said deed within sixty days from this date, the court doth further order and decree that John J. Williams, who is hereby appointed a special commissioner for that purpose, shall in the name and on behalf of said George W. Keller convey the said tract of land to said heirs at law of William Ambrouse with general warranty of title on the part of said Keller and at his costs; and said commissioner shall then report his proceedings to the said Circuit court in order to a final decree. All which is ordered to be certified to the Circuit court of Frederick county.

Decree reversed.

780

*Myers v. Whitfield.

November Term, 1873, Richmond.

Absent, BOULDIN, J.*

1. *Confederate Money—Scaling.*—On the 5th of November 1862, W sold at auction to M lots in the city of Richmond, at \$143 per front foot, worth before the

*The case was argued before his election.

See principal case cited in *Stearns v. Mason*, 24 Gratt. 486; *Merewether v. Dowdy*, 26 Gratt. 230; *Berne v. Brown*, 10 W. Va. 761; *Gilkeson v. Smith*, 15 W. Va. 60.

war \$60 per foot, one-fourth cash, and the balance in one, two and three years. Nothing was said as to the kind of money to be received, though the impression seems to have been that currency would be taken. M paid the cash and the first and second notes in currency, and he tendered payment of the third on the day it fell due in Confederate money, which W refused to receive. After the war M sues in equity to enjoin the sale and set up his tender. HELD: It was a contract for currency; but M will not be discharged by having made the tender in Confederate money, but the debt will be scaled as of its date.

2. *Court of Conciliation—Decision Not Obligatory.*—The decision of the court of conciliation established by the military authorities after the war, is not obligatory upon a party who did not consent to its hearing the case.

On the 5th of February 1862, Richard and John F. Whitfield sold at auction three lots in the city of Richmond, fronting on Franklin street seventy-eight feet, when Solomon Myers became the purchaser at one hundred and forty-three dollars per front foot. The terms of sale were one-fourth cash, and the balance at one, two and three years. The cash payment was made in Confederate money; the notes of the purchaser were given for the credit payments, and the vendors conveyed the property to Myers, who conveyed it to the trustees to secure the purchase money. The notes were transferred by John F. to Richard Whitfield, who received payment of the first and second notes 781 as they fell due in Confederate money; but when the third note fell due he refused to receive payment in that currency. After the war, Myers, against the protest of Whitfield, as his executor alleges, brought the case before the court of conciliation, and that court scaled the debt at its gold value when it fell due; but Whitfield refused to receive the money, and directed the trustees to sell under the trust deed; and Myers thereupon filed his bill in the Circuit court of Richmond, to enjoin the sale and have the note scaled. The Circuit court scaled the debt as of its value at its date, amounting to two thousand seven hundred and eighty-eight dollars and fifty cents, with interest from its date. And thereupon Myers applied to this court for an appeal, which was allowed. And Whitfield's executor also obtained an appeal. The facts are stated in the opinion of Judge Anderson.

J. Alfred Jones and A. Austin Smith, for the appellant.

A. Johnston, for the appellee.

ANDERSON, J. This is an application of a debtor, to a court of equity, for relief on a contract made between the 1st of January 1862 and the 10th of April 1865. The bill alleges that plaintiff, who is appellant here, was the purchaser of three adjoining lots in the city of Richmond, having a front on Franklin street of twenty-six feet each, which were exposed to sale at public auction on the 5th day of February 1862, by their joint owners, Richard Whitfield and John F. Whitfield, at the

price of \$143 per front foot, aggregating \$11,154. That agreeably to the terms of the sale, he paid one-fourth of the purchase money down, in Confederate money, and gave his three several notes, in equal amounts, payable in one, two and three years, with interest, for the remaining three-fourths. That thereupon the vendors conveyed him the title, and he gave them a deed of trust upon the lots to secure the deferred payments. That he

782 *paid the two first notes, as they fell due, in Confederate currency, and tendered payment of the last note, at its maturity on the 5th of February 1865, in Confederate States treasury notes; which Richard Whitfield, the then holder and owner of the note, refused to receive.

The bill also alleges that plaintiff applied to the court of conciliation in the city of Richmond for the adjustment of the controversy. And that said court, on the 30th of October 1865, decided that plaintiff should pay to defendant \$85.37, in full discharge of said note, and of the interest which had accrued thereon, to the date of said judgment, in Federal currency: which sum plaintiff was ready and offered to pay; but the said Richard refused to receive it. He insists that the defendant is concluded from demanding any more than was awarded him by said court, because: 1st, It is a *res adjudicata*; and 2nd, Because the decision was just and right.

The answer takes issue upon these pretensions of the bill. The Circuit court held that it was a Confederate contract; but that the scale should be applied at the date of the contract, and decreed that the plaintiff should pay to the defendant \$2,308.40, with interest from the 5th day of February 1862, and his costs. From that decree an appeal was allowed the plaintiff to this court. And the defendant has filed a petition for a cross appeal, upon the ground that the decree is erroneous, in not allowing him the face of the note.

The first question that meets us is, is the defendant concluded by the judgment of the court of conciliation? That court seems to have been established by the military power, then dominant in this state, as a temporary expedient, to arbitrate and adjust disputes between citizens during the suspension of the civil authority. It was composed of gentlemen of learning and ability, one of whom is a distinguished member of this bar; and the other afterwards presided in one of the Circuit courts of this commonwealth.

783 This decision might be suggestive *of what was right, and entitled to a persuasive influence; but can only be advisory. It could not have the force of an award, although the gentlemen composing the court were authorized by the order to arbitrate, it not being shown that the appellant consented to the submission to their arbitrament. The answer denies that he consented, and alleges that he protested against the jurisdiction of the court. Can it have the force of a judgment? The military order does not seem to contemplate it, as it authorizes the appointees to "arbitrate"; and expressly provides that its decisions shall be no bar to legal

remedies, when the civil laws and civil courts are re-established. It seems to have been designed in its institution to enlighten the conscience of the military commander, who doubtless needed enlightenment; for it seems that its decisions could only be enforced at his pleasure. The decisions of such a tribunal cannot be binding upon the judicial tribunals of the state, and cannot conclude the appellant in this case.

Section 4, chap. 71, of the act passed March 3, 1866, acts of 1865-6, p. 185, called the adjustment act, provides that "in any case wherein it shall appear that on any contract made or liability incurred on or after the 1st day of January 1862 and before the 10th day of January 1865, the debtor on or after the maturity of the claim against him, and within the period above mentioned, made to the creditor a bona fide and actual tender of the amount due, in the said Confederate States treasury notes, or other equal or better currency, and that the creditor then refused to accept the same, a court of equity may grant relief to the debtor, unless it appear that the creditor was justified in refusing to accept the amount tendered, on account of a substantial and decided depreciation of said currency after the time at which payment ought to have been made, and before the time at which the tender was made." The debtor in this case,

784 having made the tender on the day of the maturity *of the note, his case does not fall within this exception. He is entitled to relief, "unless (as is further provided) it otherwise appear to be inequitable to grant such relief." This section invests a court of equity with plenary jurisdiction to inquire what was the contract; whether the currency tendered was in compliance with it, and whether the creditor was justified in refusing it, and to give the debtor such relief as, under all the circumstances of the case, would be equitable. It involves an inquiry into the whole transaction, with an express inhibition to grant the debtor any relief which would be "inequitable." This brings us to the inquiry, what was the contract between these parties?

The appellee, in his answer, assumes that the negotiable notes, the deed of conveyance and the deed of trust furnish the only legal evidence of the contract, and that they must be interpreted according to the principles of the common law and the statutes of Virginia, and the acts of Congress, which were in existence and in force at the time the contract was made. If that position is tenable, it is very clear that it must be construed to be a specie contract. But that position cannot be maintained. Section 1 of the act of Assembly *supra* provides that either party may rely upon parol, or other relevant evidence, to show what was the true understanding and agreement of the parties, expressed or to be implied, as to the kind of currency with which the contract was solvable, or with reference to which, as a standard of value, it was entered into. And the whole current of decisions by this court is to the effect that the design and operation of

the act being to ascertain and enforce what was really, and in truth, the contract between the parties, and not to impair the obligation of the contract, it is constitutional and valid. So that this is a res adjudicata, and no longer an open question.

Again, it is argued by the learned counsel for the appellant that, inasmuch as the
785 act of Assembly reversing "the common law presumption was not passed until subsequent to this transaction, and did not go into effect until the 20th of October 1863, the common law presumption that a contract to pay so many dollars is a contract to pay specie, prevailed at the date of this contract and must govern the case. It is true that the appellant cannot derive any benefit from the act of 1863, it being subsequent to the transaction, and only prospective in its operation. By force of that act all contracts made on the 20th of October 1863, and subsequently, for payment of money, shall be presumed to be for currency, unless there is an express intendment to the contrary. So that the effect of that act was to create a presumption of law just the reverse of the common law presumption.

But the appellant does not rely upon that statute; nor does he rely upon a presumption of law in support of his pretension. But he relies upon a presumption of fact, that the sale was not made to him for specie, but was made for the prevailing currency. This he is authorized to do, not by the act of 1863, but by the act of 1866, which, we have seen, changes the rules of evidence in relation to contracts made between the 1st of January 1862, and the 10th of April 1865, in order to ascertain and enforce the true understanding and agreement of the parties in respect to the kind of currency in which they were solvable. And there can be no question now as to its constitutionality. To say that it was not competent for either party to show by parol, or other relevant evidence, direct or by implication, that the understanding and intention of the parties were really, and in fact, the reverse of the common law presumption, would be to annul the law, for it would defeat its very end and scope.

The note in controversy, as we have seen, was given for the last instalment of the purchase money, and bears date February 5th, 1862. If it had been given a month
786 "and a few days earlier, it would not have fallen within the provisions of this act. It was given at a time when Confederate money was comparatively but little depreciated, and when it constituted, together with Virginia State treasury notes and Richmond City notes, all of a uniform value, the circulating medium of the city.

The vendors were not present at the sale. And the auctioneer and all the witnesses who testify on that subject, except one (Moses L. Straus, a witness for plaintiff), say that nothing was said by the auctioneer at the sale as to the kind of currency in which payment would be required. Straus says that the auctioneer said the cash payment would be received in Confederate money, but he agrees with all the rest, that nothing was

said as to the deferred payments. And the auctioneer says that he received no instructions from the vendors as to the kind of currency which would be required.

But that there was an impression on the minds of the bidders and bystanders at the sale that payment would not be required in specie, I think, is shown by all the testimony in the record on that subject, and also by the price bid for the property, and that they expected payment to be made in the prevailing currency. Though if Straus is not mistaken, it would have been implied that no assurance was intended to be given as to the deferred payments. But whilst the above impression prevailed, it is evident that neither the vendors nor the auctioneer said or did anything to create such an impression.

The appellee states, in his answer, that he and his joint vendor sold on time as to part of the purchase money, with the expectation that before the deferred payments were due the confederation would be established and a firm and permanent currency provided, in which they would receive payment. And that they would have been unwilling to have
787 sold entirely for cash. From this the inference is unavoidable that they "did not intend the sale to be for specie. And they must have known, from the price bid for the property, that the purchaser did not regard it as a sale for specie. And the confirmation of the sale, under these circumstances, by the vendors, forbids that they should afterwards be allowed to claim it to have been a specie contract.

Whilst it was well understood by both parties that the sale was not for specie, there was no clear or definite understanding as to the character of the currency in which the deferred payments should be made—at least, no such understanding as would amount to a binding contract on the part of the vendors to receive payment of the last note as its maturity in an almost worthless paper, though it might retain the impress of a Confederate currency. They had the right, if they chose, to receive payment in a depreciated currency. And they did receive the first and second deferred payments in a greatly depreciated currency, especially the latter. And having accepted it, the purchaser's obligations, to that extent, were discharged. By the proviso to section 2 of the act of adjustment, supra, he is entitled to have "full credit for the nominal amount so paid, and such payment shall not be reduced." And I apprehend it cannot be reduced by requiring him to pay a larger amount in discharge of the last payment, in consideration that the vendors had accepted the discharge of the antecedent instalments in a very depreciated currency.

The evidence does not show that it was the true understanding and agreement of the parties that payment should be made in any particular distinctive currency. But it does show, I think, that it was not made with reference to specie as the standard of value, but to the currency which prevailed, State and Confederate, which being of equal value, were indifferently the standard of value in

this contract. There is nothing in the record to show that it was the understanding 788 and agreement of *the parties, either express or by implication, or in effect, that the purchaser should have the right to pay, and the vendors should be bound to receive, in discharge of the deferred instalments, or either of them, Confederate currency, however worthless it might become.

I am, therefore, of opinion that Richard Whitfield was justified in refusing to accept the Confederate treasury notes which were tendered in discharge of the last note at its maturity, when forty dollars thereof were worth only one dollar in gold. And that it would be very inequitable to allow the appellant to discharge his obligation now and to relieve the property from the incumbrance by the payment of the gold value of the money so tendered.

But it would not comport with his contract to require him to pay the face of his note in specie, or in a currency nearly equal to specie. It seems to me that the most equitable and just solution is, to estimate the fair value of the lots at the date of the contract in gold, and to require the purchaser to pay one-fourth of that sum, with interest, according to the terms of the sale, the last note being for one-fourth of the purchase money, as it provided by the second section of the act of adjustment, as amended by the act of February 28, 1867. And a majority of the court being of opinion that the sum decreed to be paid by the court below, in the present currency, is about one-fourth of the value of the lots at the date of the sale, and is as much as the appellee is entitled to receive, his cross appeal must be dismissed with costs. And the decree of the Circuit court is affirmed.

MONCURE, P., concurred in the opinion of Anderson, J.

CHRISTIAN and STAPLES, Js., concurred in affirming the decree.

Decree affirmed.

789 *Lee, Sergeant, v. Murphy.

November Term, 1872, Richmond.

[12 Am. Rep. 568.]

Absent, CHRISTIAN, J.

1. **Conditional Pardon—Authority of Governor.**—The Governor of Virginia has authority under the constitution, to grant a conditional pardon to a prisoner convicted of a felony.
2. **Same—Kind of Condition.**—The condition annexed to a pardon must not be impossible, immoral or illegal, but it may with the consent of the prisoner be any punishment recognized by statute, or by the common law as enforced in this State.
3. **Same—Substitution of Lesser Punishment.**—Though the warrant of the Governor speaks as commuting the punishment, yet as it substitutes a less for a greater punishment, and is intended to be done, and is done, with the consent of the prisoner, it will be considered a pardon, and not a commutation of the punishment.

In April 1872, Lawrence Murphy was tried and convicted of a felony in the Hustings court of the city of Richmond, and was sentenced to be imprisoned in the penitentiary for three years. He thereupon applied to the Governor for relief; and Governor Walker issued the following warrant:

Virginia—to wit:

It appearing to the executive that Lawrence Murphy, now confined in the city jail of Richmond, awaiting removal to the penitentiary under sentence of the Hustings court of said city, for unlawful shooting, is a fit subject for commutation of sentence:

Therefore, I, Gilbert C. Walker, Governor of the Commonwealth of Virginia, have in pursuance of authority vested in the executive by law, thought proper to commute, and do hereby commute the punishment of the said Lawrence Murphy, from imprisonment 790 ment in the *penitentiary for the term of three years, into imprisonment in the city jail of Richmond for the term of twelve months from the date hereof.

Given under my hand as Governor, and under the lesser seal of the Commonwealth, this 18th day of May A. D. 1872.

By the Governor: G. C. Walker.

James McDonald,

Secretary of the Commonwealth.

On this paper was the following endorsement by Murphy:

I, Lawrence Murphy, hereby accept the within commutation of my sentence as therein expressed, with the condition set forth.

Lawrence Murphy.

May 18th, 1872.

On the 8th of June, Murphy presented his petition to the judge of the Hustings court of the city of Richmond, complaining that he was illegally detained in the city jail, in the custody of N. M. Lee, the city sergeant, and jailor; and praying for a writ of habeas corpus. The writ was issued; and N. M. Lee, the sergeant of the city, brought in the prisoner, and returned that he held him by virtue of the sentence aforesaid, and the direction of the judge of the court to await the application of the prisoner to the Governor for a pardon; and such application having failed, he was directed by the judge of said court, to convey the said Lawrence Murphy to the penitentiary.

The case was heard on the 14th of June 1872, when the prisoner introduced the warrant of the Governor, with the written acceptance of the prisoner endorsed thereon; and the Commonwealth introduced the judgment and sentence of the Hustings court; and thereupon the court discharged the prisoner from custody. To this opinion and judgment Lee, sergeant, excepted: and stating to the court that he intended to apply for a writ of error to the judgment, it 791 was ordered that *the same be suspended until the 25th of July; and on the application of the prisoner, he was admitted to bail. The writ of error was awarded by a judge of this court.

The Attorney-General, for the appellant. Cabell & Meredith, for the appellee.

STAPLES, J. The record in this case presents for our consideration two important and interesting questions. First, has the governor of the State the constitutional power to grant conditional pardons; and second, is the paper which emanated from the Executive Department on the 18th of May 1872, and is filed as an exhibit in this cause, to be considered a conditional pardon, or a mere commutation of punishment. It is laid down in *Blackstone Com.*, vol. 4, p. 401, that a pardon may be conditional—that is, the King may extend his mercy upon what terms he pleases, and may annex to his county a condition precedent or subsequent, on the performance whereof the validity of the pardon will depend: and this by the common law. All the writers on criminal law concur in this doctrine; and the English books are full of authorities in support of it. 1 Chitty's *Crim. Law*, 714; 2 Hawkins *P. C.*, Pardon; 1 Leach *Crim. Law*, 223, 393; In the matter of *Parker & als.*, 5 Mees. & Welsh. R. 32.

This power has been exercised by the King of England from time immemorial, not as a part of his royal prerogative, but as an incident to the general pardoning power. The King may annex a condition to his bounty, not because he is king and clothed with royal attributes, but because being invested with the general power of pardoning, he has the right to prescribe the terms and limitations under which he will exercise it. To "grant conditional pardons," then, simply implies a contract between the sovereign power and the criminal, that the
792 *former will release the criminal upon certain conditions imposed by the sovereign and accepted by the criminal. It is not an inference from the general power of pardon, but appertains to it and is a part of it.

These are the doctrines and maxims of the common law. They were familiar to the jurists and statesmen of Virginia at the time of the adoption of our first constitution. In the language of Chief Justice Marshall, "As the power has been exercised from time immemorial by the executive of that nation, whose language is our language, and to whose judicial institutions ours bears a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look to their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it. *United States v. Nelson*, 7 Peters U. S. R. 150.

The constitution of 1776 declares that the Governor shall, with the advice of the council of State, have the power of granting reprieves or pardons, except where the prosecution shall have been carried on by the House of delegates, or the law shall otherwise particularly direct. And this power is conferred in language almost identical in all the amended constitutions, except that it can now only be exercised after conviction. The same terms are used substantially in the constitutions of nearly all the States, and in the constitution of the United States.

For example, the constitution of Pennsylvania, both of 1790 and 1838, provides that the Governor shall have power to remit fines and forfeitures, and grant reprieves and pardons. Under this provision, it was unanimously decided by the Supreme court of that State, that "the Governor may annex to a pardon any condition, whether precedent or subsequent, not forbidden by law; and it lies on the grantee to perform it: and if the condition is not performed, the original sentence remains in full force, and may be carried into effect."

793 *The Supreme court of Massachusetts, in construing a similar clause in the constitution of that State, used this language: "The power of pardoning offences is conferred on the executive by the eighth article of the second chapter of the constitution. It is general and extends to all cases, except convictions by the Senate on impeachment. This exception proves the comprehensive nature of the power. The only limitation to its exercise is that pardon shall not be granted before conviction. The general power necessarily contains in it the lesser power of remission and commutation. If the whole offence may be pardoned, a fortiori, a part of the punishment may be remitted, or the sentence commuted. If an absolute pardon may be granted, of course a conditional one may be." *Perkins v. Stephens*, 24 Pick. R. 278.

In the *People v. Potter*, 1 Parker's *Crim. Rep.* 47, 53, Judge Edmonds of the Supreme court of New York, in commenting upon the words "shall have power to grant reprieves and pardons," declares, "The decisions of the courts in our State, in several of the States of the Union, in the courts of the United States and in the courts of the British Empire, have all regarded these words as conveying the right to attach conditions to the grant of a pardon." The courts of South Carolina, of Arkansas, New Jersey and Maryland, have construed like clauses in constitutions of those States in the same way. If there are any contrary decisions, they have escaped my attention. It is true, that under the constitution and laws of several of these States, express power is given to the executive to grant pardons upon such terms as he may think proper; but the courts there hold that the power in question is conferred by the general words, and exists independently of these enactments. Mr. Wirt, while Attorney-General of the United States, expressed the opinion, that the power of pardoning absolutely includes the power of pardoning conditionally; on the
794 *principle that the greater power includes the less. *Opinions of Attorney-General*, 250.

These doctrines have received the unqualified assent of the most approved writers on criminal law in the United States. The rule is thus expressed in Bishop on *Crim. Law*, vol. 1, sec. 760: A pardon may be full or partial, absolute or conditional. In some of the States this is so by the express words of the constitution; and where the words are not express, the same result flows from the

doctrine that with us a power general in its terms takes the construction given it in the English common law, whence our law is derived.

This citation of authorities would be incomplete without some notice of the case of *ex parte Wm. Wells*, 18 How. U. S. R. 307; a well considered decision of the Supreme court of the United States. In that case Wells was convicted of murder in the first degree, and was sentenced to be hanged. A pardon was granted him by President Fillmore, upon condition that he be imprisoned during his natural life; which was accepted by the prisoner. He, however, applied for a writ of habeas corpus, on the ground that the pardon was absolute, and the condition void. The Supreme court was of opinion, that the language used in the constitution, as to the power of pardoning, must be construed by the exercise of that power in England prior to the revolution, and in the States prior to the adoption of the constitution; that the power of the president to pardon conditionally is not one of inference, but is conferred in terms; the language being, "to grant reprieves and pardons"; which includes conditional as well as absolute pardons.

It must be borne in mind that under the Federal system there are no common law offences; the courts have no common law jurisdiction; and the President can only exercise such powers as are specifically granted in the constitution. Whereas
795 in this state the common law *has been adopted, and made the rule of action, unless plainly repugnant to the constitution and statutes of the state. The reasons with us for adhering to the common law doctrines in regard to granting conditional pardons, are much stronger, therefore, than any applying to the Federal courts. The practice of granting such pardons, it will thus be seen, is fully recognized in England; is fully sustained by the most approved writers in this country; by the decisions of both Federal and state courts. The identity of the words used in nearly all the constitutions, the uniformity of construction given to those words by all the courts which have had the subject under consideration, lead irresistibly to the conclusion that the framers of our constitution employed the same terms in the sense thus explicitly and plainly established.

The counsel for the prisoner tells us, however, that whatever may be the rule elsewhere, the case of *Commonwealth v. Fowler*, 4 Call, 35, has established a different doctrine in Virginia. A slight examination of the case will show that this is a mistake. Fowler was convicted of felony in the General court; and was pardoned by the Executive on the express condition that he (Fowler) shall forthwith submit himself to such authority as the Executive shall put over him, for the purpose of confining him to labor bodily in such manner and on such works as a majority of the directors of public buildings shall direct; and he shall continue to work thereon as a common laborer for the space of three years, and shall not be absent therefrom at any time without due

license first obtained. This court decided this condition to be illegal. No reasons are given, and we are therefore left to conjecture the grounds of the decision. It will be noted, however, the court do not say that the governor is not authorized to grant conditional pardons; but that "the condition annexed to this pardon is illegal." And so it might well be held. The effect of the condition was to make the prisoner practically a
796 slave *for three years. The authority to be put over him might at any time be changed at the caprice of the governor; and the labor he was required to perform might be varied or increased at the pleasure of persons controlled by no law or authority. It is obvious that the punishment was unknown to our system of jurisprudence, and might have been perverted to purposes of the grossest injustice and tyranny. No court could hesitate to pronounce such a condition illegal; and this was all the court intended to say. The case is no authority upon the present question, and would never have been relied on as such but for the mistake of the reporter in his statement of the points decided.

The counsel for the prisoner, in the course of his argument, cited a section reported by the revisors of 1847 and 1848, and recommended for adoption by the legislature. It provides that the governor, upon the petition of the person sentenced, may grant him a pardon upon such conditions, under such limitations and with such restrictions as may be deemed proper by the governor and assented to by the petitioner. The counsel relies upon this recommendation of the revisors and the refusal of the legislature to adopt it, to show that according to the prevailing opinion the executive did not possess the power to grant conditional pardons; and it was inexpedient in the opinion of the legislature to invest him with it. The revisors, however, do not assert that the executive does not possess the power in question. They merely say the regularity of a conditional pardon has been doubted in Virginia, and the section proposed will remove that doubt. The legislature may have declined to adopt the provision from a conviction that the constitution conferred upon the executive full power over the whole subject, and legislation was thought not only unnecessary, but improper. But whatever may have been the reasons controlling the legislature, it is clear that neither its collective will nor the opinions of the indi-
797 dual *members can, in any wise, impair or restrain the exercise of powers vested by the constitution in the executive department. It may be that the practice in Virginia has not been in conformity with the views here expressed. The question, however, is not one of practice, but purely of constitutional interpretation. The language of the constitution is, the governor "shall have power to grant reprieves and pardons." What kind of pardons? Unconditional it is said. But why unconditional? The constitution makes no such restriction. There are various kinds of pardons; full, absolute or

unconditional, partial and conditional. One of these is as fully embraced in the words of the grant as the other; all are contained in it. Can we conceive of a case in which the greater power does not include the less. To use the words of Mr. Justice Campbell, of the Supreme Court of the United States, "the real language of the constitution is general—that is common to the class of pardons, or extending the power to all kinds of pardons known in the law as such, whatever may be their denomination. We have shown that a conditional pardon is one of them."

These considerations, it seems to me, justify us in holding that the power to grant conditional pardons is vested in the executive of Virginia. In respect to the policy of so vesting it, there cannot be a question. The power of granting conditional pardons must reside some where; and by common consent of all the States it is vested in the executive department. It has been well said that the authority to suspend the operation of laws, is a privilege of too high a nature to be committed to many hands, or to those of any inferior officer in the State. If the chief magistrate can be trusted with the power of absolute and unconditional pardon, he is certainly a safe depository of the qualified power. Cases are constantly arising which call for the exercise of executive clemency in a modified form, by reason of circumstances
798 *subsequently occurring, or which could not have been taken into consideration by the courts and juries. Even the public good, which is the ultimate end of all punishment, sometimes requires that some milder form of punishment should be substituted for that which was enforced by the sentence of the law.

The objection sometimes urged, that no man can contract for his own imprisonment, is answered by the consideration that the convict, having already forfeited his life or his liberty, surrenders nothing by his contract with the executive. The substituted sentence is his own voluntary choice; and the courts merely execute that choice in the infliction of a milder punishment. A performance of the condition renders the pardon absolute; and entitles the felon to his discharge from all the penalties consequent upon the conviction. On the other hand, his failure to perform renders the pardon utterly void; and he may be brought to the bar and remanded, to suffer the punishment to which he was originally sentenced. Bacon Abridg. Pardon, E.

It is to be borne in mind there is a material distinction between a conditional pardon and a mere commutation of punishment. A conditional pardon is a grant, to the validity of which acceptance is essential. It may be rejected by the convict; and if rejected, there is no power to force it upon him. A commutation is the substitution of a less for a greater punishment, by authority of law, and may be imposed upon the convict without his acceptance, and against his consent. In this state the executive is only authorized to commute capital punishment; whereas he may grant conditional pardons in all cases

legally involving an exercise of the pardoning power.

It remains now to inquire whether the warrant of the executive in this case is to be regarded as an attempted commutation of punishment, or as a conditional pardon.

After reciting that Lawrence Murphy 799 is a fit subject for *commutation of sentence, the warrant declares that the punishment of the prisoner is hereby commuted from imprisonment in the penitentiary for the term of three years into imprisonment in the city jail of Richmond for the term of twelve months from the date hereof. And at the conclusion is the endorsement of the prisoner, "accepting the commutation with the condition set forth," and bearing the same date with the warrant.

Now it is true that this paper does not purport to be a pardon of any sort, but a mere commutation of punishment. But the question recurs, whether the acceptance by the convict of the terms imposed by the executive does not give to the warrant the operation and effect of a conditional pardon. Clearly the original punishment is remitted, and a milder sentence is substituted. It is true this could not be done without the consent of the convict. It is equally clear that with his consent it might be done. Commutation is simple the substitution of a less for a greater penalty or punishment. If followed by the acceptance of the convict, it practically amounts to the same thing as a conditional pardon. I do not mean to assert it has the effect of a full pardon, which, when performed, not only remits the original punishment, but restores the competency of the offender and removes the infamy of the conviction. Certain it is, it has the operation and effect of a partial pardon, which is described in many of the cases as merely remitting or releasing the punishment without removing the guilt of the offender. Perkins v. Stevens, 24 Pick. R. 277; Ex parte Garland, 4 Wall. U. S. R. 233, 380.

It has been argued, however, that this warrant cannot be considered a conditional pardon, because neither the word "pardon" nor any equivalent phrase is used therein. It is well settled that no technical words or terms are necessary to constitute a pardon. In some of the ancient pardons a variety of language is to be found, such as acquit, pardon, release and exonerate. In 800 Pennsylvania *the practice is "to remit the sentence," and this is equivalent to a pardon of the offence. Hoffman v. Coater, 2 Wharton R. 453. In Massachusetts similar words are construed a pardon of the punishment, but not as a removal of the disabilities consequent upon a conviction. And in South Carolina an instrument signed by President Monroe, ordering "that the prisoner be forthwith released from prison," was decided to be a full pardon, upon the ground that it accomplished all the benefit to the prisoner that is practicable, and seemed to be entitled to every liberality of construction that may not contravene any well settled adjudications. Jones v. Harris, 1 Strob. R. 160.

A case somewhat similar to the present is found in 14 Mass. R. 472. The opinion of the Supreme court of that State being asked upon the right of the Legislature to commute the punishment fixed by law, after sentence has been given; the judges unanimously certified that the Legislature had no such power; but that the power of pardoning offences was solely in the Governor, by and with the advice of the council; to which power the right of commuting punishment—if by such right be meant a right of pardoning upon condition of the convict's voluntarily submitting to a lesser punishment—must be a necessary incident. A note to this case by Chief Justice Cushing, shows he fully recognized the distinction between a commutation authoritatively imposed, which was unknown to the Massachusetts constitution, and a commutation voluntarily accepted by a felon, which might be regarded as a necessary incident to the pardoning power.

The object of the courts in construing instruments of this character is to carry out the intention of the parties; and wherever that is doubtful, the grant is interpreted most beneficially for the citizen or subject, and most strongly against the king. This is an universal rule in the interpretation of pardons. 1 Bishop Crim. Law, Sec. 757, and cases cited.

801 *It is said, however, that the executive did not intend in this case, to grant a pardon of any kind, absolute or conditional. He certainly intended to remit the punishment imposed by the law, and to substitute another in its place. He certainly did not intend to do so without the consent of the convict, unless we are prepared to hold that he was either ignorant of his constitutional functions, or that it was his purpose to transcend them. We must presume it was his intention to exercise just such powers as are vested in him by the constitution; and we should give his official acts a fair and liberal interpretation, so as to make them valid if possible. In cases involving merely pecuniary rights and obligations, the courts are even astute to give effect to the contracts of parties. Thus a deed which cannot operate in the precise way in which it is intended to take effect, shall yet be construed in another, if in this other it can be made effectual. For example, a deed intended for a release, which cannot operate as such, may still take effect as a grant of the reversion, as a surrender or an attornment, or even as a covenant to stand seized. 2 Parsons on Cont. 504, and cases cited.

It is also held, if the king's grant admits of two interpretations, one of which will make it utterly void and worthless, and the other will give it a reasonable effect, then the latter is to prevail, for the reason, says the common law, that it will be more for the benefit of the subject and the honor of the king; which is more to be regarded than his profit. 10 Coke, 67 f.; 2 Pars. on Cont. 506, note N.

And the same rule should be held to apply to the grants of a State. It applies with peculiar force whenever the life or liberty of

the citizen is involved. The anxiety of the courts in all such cases to effectuate rather than defeat the intention of the State, expressed through its chief magistrate, must be regarded as eminently wise, just and beneficial.

802 *In the present case, should the convict be remanded to the penitentiary under the original sentence, the executive, if he adheres to his original purpose, will accomplish the object aimed at by a slight change in the phraseology of the warrant; but the intent will then be no more manifest than now; nor would the practical operation of the warrant be varied by this change. Indeed, the same result will be accomplished by a simple reprieve of the convict for one year, and a pardon at the expiration of that period.

Upon the whole, it seems to me, we are well justified in construing this warrant as a conditional pardon, if not of the offence, certainly of the punishment imposed by the law. The convict has the right to perform the condition by enduring the substituted punishment prescribed by the executive; and upon serving out the full term of twelve months in the city jail of Richmond, he will be entitled to his discharge from any further punishment. The period of his release on bail is, however, not to be included in estimating or computing his term of confinement in the jail. The judgment of the Circuit court of the city of Richmond must, therefore, be reversed, and the case remanded to be proceeded in in accordance with the views herein expressed. If the said Lawrence Murphy shall appear before said court in answer to his recognizance, he will be remanded to the city jail, to undergo the punishment prescribed in the warrant of the executive.

In the course of this opinion, nothing has been said in respect to the kind and nature of the conditions the executive may annex to his pardon. Nor is it intended to express any opinion upon that point, except to say they must not be impossible, immoral or illegal. It is clear, that he is authorized to substitute, with the consent of the prisoner, any punishment recognized by statute or the common law as enforced in this State.

803 *In this case there can be no question as to the legality of the condition.

Since the foregoing opinion was prepared, I have seen the case of Ball v. Commonwealth, 8 Leigh, 726. I have only to say the opinion expressed by Judge Fry and concurred in by the other judges, is a mere obiter dictum, was not called for by anything in the case; and is, therefore, no authority for this court. Besides, Judge Fry does not assert that conditional pardons are unconstitutional. He is very careful not to say so. He merely says that in this State pardons are absolute constitutionally or from practice. And in point of fact this latter is entirely correct. But as I have already attempted to show, it is not a question of practice; but purely of the interpretation of a plain constitutional provision.

BOULDIN, J. There can be no doubt about the extent of the pardoning power of the

British Crown. On that subject I concur entirely in the views of the court. But the question before us is not how a high prerogative is exercised by the King of Great Britain, but to what extent the power has been vested in the Governor of Virginia under her constitution and laws. On that question I am constrained to differ with my brethren. I do not concur in the opinion just expressed, that the pardoning power of the Governor of Virginia is, in general, co-extensive with that of the crown of Great Britain. On the contrary, I fully concur with Judge Fry and all the judges of the General court, in Ball's case, 8 Leigh, 726, 730, in the opinion that "the pardoning power in this State is, in its nature or practice, more limited than that of the King of England"; that the general power of conditional or commutative pardon does not exist in the executive of Virginia under the constitution and laws of the State.

In Virginia, ever since she became
804 an independent *State, the pardoning power has been exercised, not as a prerogative of the executive—an incident to executive power—but in a much more restricted form and under written laws. It was first granted to the Governor of Virginia by the constitution of 1776—the first written constitution. It will be seen, from the face of that instrument, that the people of Virginia, having just thrown off a foreign government and declared it dissolved, were exceedingly jealous of the exercise by the Governor of the State of any of the high prerogative powers of the British crown; and they were very careful, therefore, to provide against it in the adoption of their organic law. In conferring on the governor executive power, they did it in restricted terms. They provided expressly that he should, "with the advice of a council of State, exercise the executive powers of government," (not as then exercised by the King of England, but) "according to the laws of the Commonwealth; and shall not, under any pretence, exercise any power or prerogative by virtue of any law, statute or custom of England"; and then, as if to preclude the conclusion that the pardoning power was included in the grant of "the executive powers of government," that power is specially conferred in the following limited terms:

"But he shall, with the advice of the council of State, have the power of granting reprieves or pardons, except where the prosecution shall have been carried on by the House of Delegates, or the law shall otherwise particularly direct; in which cases no reprieve or pardon shall be granted, but by resolve of the House of Delegates." Constitution of 1776, 1 Rev. Co. 1819, p. 35, § 9.

It was under this restricted grant of the pardoning power, and not as an incident to "the executive powers of government," that the governors of Virginia, in the early period of her history, exercised the power of pardon; and it is obvious, from the very terms of the grant, that the exercise of that power
805 was not, as in *England, a discretionary executive right; but was expressly subject to legislative limitation, restriction

and control. It could only be exercised in accordance with this grant, and as limited and explained by the laws of the State.

But the power of "pardon" was certainly granted; and the question necessarily arises, what is the meaning and extent of that grant? what, under our constitution, is the meaning of "pardon"? To answer the question correctly, we must carry ourselves back to the time of the adoption of the first constitution, and ascertain what was the almost cotemporaneous exposition of both legislative and judicial departments of government.

That it did not, in the opinion of the legislative department of the government—consisting, doubtless, of many of the men who framed the constitution—include the powers of conditional or commutative pardon, is plainly to be inferred from the fact that as early as October 1785, an act of Assembly was passed conferring, for a limited period only, that power on the governor of the State in a certain class of cases. The first section of the act is as follows:

"1. Be it enacted by the general assembly, That it shall be lawful for the governor, and he is hereby (not by the constitution), empowered, with the advice of the council of State, to pardon or reprieve any person or persons adjudged or sentenced to suffer death for a felonious offence, upon such condition of bodily labor to be performed by each person so pardoned or reprieved, as to the governor with the advice of the council shall seem proper: provided, always, that no conditional pardon shall be granted by the governor for murder or treason."

And the third section provided, that the act should remain in force until the last day of December 1786, and no longer.

Here we have within a few years after the adoption of the constitution (and doubt-
806 less by many of those who *framed it), a legislative construction of the constitutional grant of the pardoning power. The Legislature of 1785 clearly thought that the power of conditional commutative pardon as exercised in England, did not belong to the governor under the provisions of the constitution, or they would not have been guilty of the useless and nugatory act of solemnly conferring the power, and for a limited time only. By formally conferring the power they show that, in their opinion, it did not already exist. By limiting it to one year, they show that they did not intend that it should be longer exercised.

It so happens that in the very same year we have a judicial interpretation of the grant of the pardoning power under the constitution of Virginia, by the Supreme Court of Appeals. In 1785, but prior to the passage of the act of assembly aforesaid, the governor of the State granted to one Fowler, who had been "attainted of felony," a conditional pardon, clearly within the pardoning power of the King of England; but Fowler broke the condition of his pardon, and the attorney-general moved in the General court for execution on the indictment. Fowler pleaded the pardon as an absolute discharge; and the attorney-general replied that the par-

don was on condition and that the condition had been broken; and the question before the court was whether the condition was binding in law—in other words, whether the governor had the power of conditional pardon. The question was adjourned to the Supreme Court of Appeals for novelty and difficulty.

The only argument urged by the prisoner's counsel was "that the pardon was absolute and the condition void, as the executive had no power to pardon upon condition. That the constitution provided for pardons simply."

The court held that the condition was illegal and the pardon absolute. *Commonwealth v. Fowler*, 4 Call, 35; and Mr. Daniel Call, the learned and able reporter, gives the following syllabus as the substance of the decision:

807 "The governor cannot pardon on condition; for the condition is illegal and the pardon is absolute."

Here, then, in the same year in which the Legislature found it necessary to confer the power, we find the Supreme court declaring that it did not previously exist—thus showing a perfect concurrence between the legislative and judicial departments of the government very soon after the adoption of the constitution. But it is said that such is not the legitimate effect of the decision in *Fowler's* case—that the judgment was based on the peculiar character of the condition—on its illegality in itself, and not on the absence of power in the executive.

The condition would have been plainly legal in England; and was, in fact, just such condition as was allowed by the act of 1785, which was in force at the date of the decision, although not in force at the date of the pardon. But no such argument was addressed to the court, nor any such reason assigned in the judgment; and with the greatest respect for the opinions of my learned brethren, I must be allowed to say that I think the construction thus given by them is rather a strained construction of the decision of the court. The only argument for the prisoner addressed to the court, was that the power granted by the constitution to the governor was simply to pardon; that he had no power to pardon on condition; and therefore the condition was void and the pardon absolute. This was the only argument; and the court very briefly responded that the condition was illegal, and the pardon absolute.

What did the court mean? Evidently, I think, what had been contended for at the bar, and what Mr. Call, the learned and able reporter, who heard the case, said they meant, viz: that "the governor cannot pardon on condition; for the condition is illegal and the pardon is absolute." That, as we have seen, was the ground on which the prisoner's counsel rested his case, and that is

808 what Mr. Call, on his responsibility as a reporter, said "the court decided; and

I do not think it would be altogether just to the court, to search for other grounds for the decision, neither presented in the argument nor suggested by the court. The

meaning of the decision does not, to my mind, appear doubtful; but if it were, the syllabus of the learned reporter should, in my opinion, settle that doubt. On a question of such importance it would be neither just nor reasonable to suppose that the highest judicial tribunal in the State would base its decision on a ground not suggested in argument nor disclosed in the judgment; and thus leave the learned reporter and the community in error as to its real decision.

I think that the court intended to decide, and did in fact decide, exactly what Mr. Call reports it as deciding, viz: "The governor cannot pardon on condition; for the condition is illegal, and the pardon is absolute."

The act of 1785 expired by its own limitation at the end of the year 1786, and was not re-enacted; but in the year 1800 another act of Assembly was passed, authorizing the governor, in substance, to commute the punishment of slaves sentenced to death, to sale and transportation for life. Here again, is unequivocal proof that in the opinion of the Legislature, the power of conditional or commutative pardon did not reside in the governor. See § 39, of ch. 111, Rev. Co. 1819, vol. 1, p. 430.

This law remained on our statute in substance, as long as the institution of slavery existed. See Code 1860, ch. 17, § 20, p. 121.

No other act, having any important bearing on the question before us, was passed until the 28th of February 1826, when the governor was authorized in cases of judgments for contempt to "pardon the offence and remit the punishment, whether corporal or pecuniary, either wholly or in part." *Sess. Acts* 1825-'6, ch. 18, p. 20.

809 Such seems to have been the state of legislation and *judicial decision on this subject when the amended constitution of 1829-'30 was adopted. Down to that time, as I think I have shown, both the legislative and judicial departments concurred in opinion, that the constitutional grant to the governor of "the power of granting reprieves or pardons," did not authorize "conditional or commutative pardon."

The constitution of 1829-'30 conferred on the governor identically the same powers, and almost in the same words, with that of 1776. By the former, as we have seen, it is provided that the governor shall have "the power of granting reprieves or pardons," with certain exceptions; by the latter, power is given him "to grant reprieves and pardons," with the same exceptions.

The extent and effect of this grant of power had already, as we have seen, received legislative and judicial interpretation; and when under such circumstances, the grant is renewed in the same terms, it is unnecessary to cite authority to show, that the power must be regarded to be granted as explained and construed.

Accordingly we find, that in June 1837, the General court of Virginia, then the supreme criminal tribunal of the State, and composed of some of the most learned and able judges who ever sat on the bench of Virginia, were unanimously of the opinion, that in Virginia

the power of conditional or commutative pardon did not exist. Ball's Case, 8 Leigh, 726, 730-31.

It had been argued in that case that a new trial on a question of fact should not be granted, because, among other reasons, redress could be obtained by an appeal to executive clemency; and in answer to the argument, Judge Fry, delivering the unanimous judgment of the court, said:

"Besides the injury to the accused in denying a new trial, and giving resort to the pardoning power only, justice might often be defeated by it. The pardoning power in this

State is, in its nature or practice, more
810 *limited than that of the King of England. Commutative or conditional pardons are often granted there, by means of which a party may undergo a punishment more suitable to his crime, though less than that to which the judgment of the court consigned him. But with us pardons are, constitutionally or from practice, unconditional and absolute. A new trial might often redress an injury without wholly discharging from punishment—but a pardon would discharge altogether. A person indicted for murder might be convicted of murder in the first degree. It might be clear that this was not right, but that the offence was murder in the second degree or manslaughter. If the court could not grant a new trial, the executive must pardon and discharge the prisoner." There was no dissent from these views; and the other judges were Daniel, Field, Lomax, Scott, Leigh, Estill, Brown, Clopton, Allen, afterwards president of this court, Mason and Nicholas—"nominæ, clara et venerabilia."

The pardoning power, it is true, was not directly in issue in the cause; but the expression of an opinion as to its extent and effect was in some sort a necessity to meet the argument urged by the attorney general, that a new trial should not be allowed, because redress could be had by an appeal to the pardoning power—the mind of the court was called, therefore, directly to the point, and the views presented were doubtless well and carefully considered. An opinion thus expressed is entitled, in my opinion, to all the weight and force of a judicial decision.

In this state of the law, the revisors in 1847 recommended to the committee on revision, and the committee reported to the Legislature for adoption, the following provision:

"In any case wherein the governor has power to grant a pardon, instead of granting the same unconditionally, he may, after
811 sentence, upon the petition of *the person sentenced, grant him a pardon upon such conditions as may be deemed proper by the governor, and be assented to by the petitioner; and for the purpose of carrying into effect such conditional pardon, he may issue his order or warrant, directed to any proper officer, which shall be obeyed and executed instead of the sentence that was originally awarded. Especially it shall be the duty of the superintendent of the penitentiary to receive and confine therein, according to such order or warrant, any person convicted of any crime punishable with death, who shall

be pardoned on condition of being confined in the penitentiary." But the Legislature refused to adopt it: thus declining to confer on the governor the power of conditional pardon.

In 1851 a new constitution was adopted, by which, in addition to the power "to grant reprieves and pardons after conviction," the power "to commute capital punishment was, for the first time, given by the State constitution to the governor. The fact that this power of commutation in cases of capital punishment was thus expressly added to the power of pardon, clearly shows that the framers of the constitution concurred in opinion with the Legislature and judiciary, that it was not included in the power of pardon; and the fact that they confined it to cases of capital punishment, as clearly shows that the framers of the constitution did not intend to extend it further. The implication is almost irresistible that commutation, in other than capital cases, is forbidden by the constitution of 1851. "Expressio unius, alterius exclusio." The present constitution is to the same effect precisely, except that it does not, as all our previous constitutions did, place the pardoning power under the control of the Legislature.

Such is a brief history—perhaps an imperfect one—of the law on this subject in Virginia; and the question is, not whether a monarch of Great Britain, in the exercise of a high prerogative, may not
812 dispense clemency *at his own will and on his own terms—pardon absolutely, or impose such conditions of pardon as to him may seem right; but whether, under the constitution and laws of Virginia, understood as they seem to have been by her Legislatures, and expounded as they have been by her courts, a governor of Virginia has the unlimited power of pardon exercised by the crown of Great Britain. My opinion is that he has not. I concur fully with the Supreme Court of Appeals in Fowler's case, and with the General court in Balls' case, that the power of conditional or commutative pardon does not, under our constitution and laws, belong to the governor of Virginia, except, of course, in cases of capital punishment; to which, by the present constitution, it has been expressly extended.

The case before us is not, in my opinion, a case of conditional pardon. A conditional pardon always contains a condition which a prisoner may accept or reject at his pleasure. In this case there is no such condition, or anything like it; nor is there a word in the warrant about a pardon of the offence. There is neither pardon nor condition referred to in it. It is simply a mandatory commutation of a sentence of imprisonment in the penitentiary to imprisonment in the city jail of Richmond; and no acceptance or consent is required of the prisoner. It is, in my opinion, plainly the exercise of the power of commutation merely; and the case not being one of capital punishment, that power has not only not been allowed by the constitution, but by the strongest implication excluded. It does not come then within the

ruling in Fowler's case, where there was a valid pardon but a void condition, leaving the pardon absolute. Here there is no pardon and no condition; but simply an unauthorized commutation. The entire act of the governor is, therefore, in my opinion, illegal and void; and the prisoner, instead of being discharged by the Corporation court, 813 should have been remanded to *the custody of the sergeant of the city of Richmond, to be conveyed to the penitentiary, in obedience to the judgment of the Hustings court.

MONCURE, P. and ANDERSON, J., concurred in the opinion of Staples, J.

Judgment reversed.

814

*Nagle v. Newton.

November Term, 1872, Richmond.

Contract for Sale of Land—Specific Execution.—N sues J in equity to rescind, or enforce specific execution of a contract, for the sale of land by N to J. J answers, not objecting to specific execution, but insisting that he shall be compensated for injuries to which he has been subjected by the failure of N to comply with his contract, and by the intermeddling of N and his agents with J's possession of the land and the property upon it. **Held:**

1. **Same—Same—Compensation for Damages.***—The case being a proper case for decreeing specific execution of the contract, the court has jurisdiction, as ancillary thereto, to decree compensation to J for the damages he has sustained by the improper acts of N and his agents.
2. **Same—Same—Same—How Damages Ascertained.**†—The damages may be ascertained either by a commissioner, or by an issue of *quantum damni*. *Actus* to be tried at the bar of the court.

This was a suit in equity brought in February 1866, in the Circuit court of Prince William county, and afterwards removed to the Circuit court of Alexandria, by Isaac Newton, formerly of Pennsylvania, but then of Washington city, against John Nagle, Jr., to rescind a contract for the sale by Newton to Nagle, of a tract of land in the county of Prince William; or if the contract could not be rescinded, then for the specific execution. Nagle answered and did not object to the specific execution of the contract; but insisted that he had been subjected to great losses by

the failure on the part of Newton, to complete the contract at the proper time; and by the improper conduct of Newton, and his agents in getting possession of the land, and using or disposing of the personal property which Nagle had put upon the land, and injuring the buildings, &c., upon it.

815 The *material facts, as they appear from the pleadings and proofs, are as follows:

Isaac Newton was the owner of a tract of land of three thousand acres, in the county of Prince William, on which there was a deed of trust for \$30,000, a part of the purchase money, held by William H. Tayloe and Benjamin O. Tayloe. A part of this debt had been paid by Newton, and the remainder was evidenced by notes, each for two thousand dollars, payable annually. On the 12th of March 1861, Isaac Newton entered into a written contract with John Nagle, Jr., by which he agreed to sell to Nagle twelve hundred and ten acres of this land, to be estimated at twenty-five dollars per acre. And for this land Nagle agreed to give to Newton a mortgage upon it to secure the payment of twelve thousand dollars, payable according to the agreement between Newton and the Tayloes; namely, \$2,000 per annum, to pay \$500 at the execution of the deed, and give his note for \$500, payable in six months from date. To convey to Newton ten houses, situate in Camden, New Jersey, subject to a mortgage of \$700 each; two houses eighteen feet front each on Pepper street, Philadelphia, free from all incumbrances, and two ground rents of \$1,600 each, on lots situate on Seventh street, above Oxford, clear of all incumbrances. All the above deeds and papers to be delivered as soon as practicable.

In pursuance of this agreement, the deeds were prepared and executed by the parties. Isaac Newton and his son, George Bolton Newton, to whom he had conveyed five hundred acres of the land, executed to Nagle a deed for the twelve hundred and ten acres of land; Nagle executed deeds conveying the property in Camden and Philadelphia, and also the mortgage to secure the \$12,000; and a deed of release of the lien for the debt to the Tayloes, was executed by the trustees and Benjamin O. Tayloe, and was forwarded to Edward T. Tayloe, who was then residing in the State of Alabama, to be 816 *executed by him; but though he received it and executed it, it miscarried

on its return, and was found in the deadletter office at Richmond after the war was over. All the deeds, except this last, were placed in the hands of Philip R. Fendall, to be held by him as an escrow, until the deed of release from the Tayloes should be executed and ready for delivery. And on the 3d of April 1861, Benjamin O. Tayloe and Isaac Newton entered into a bond to Nagle, in the penalty of \$1,000, with condition that the deed of release should be executed and delivered within thirty days.

Nagle was put into possession of the land, and proceeded to make expensive improvements upon it, and took to it a large amount of stock and farming implements, for the

***Compensation for Damages.**—See Ayres v. Robins, 80 Gratt. 118; Stearns v. Beckham, 81 Gratt. 421; Ewing v. Litchfield, 91 Va. 580, 22 S. E. Rep. 362.

The rule laid down by the principal case, that jurisdiction to specifically enforce a contract carries with it, as ancillary, the jurisdiction to give damages, is followed by several subsequent cases citing the principal case as their authority. See Ayres v. Robins, 80 Gratt. 118; Stearns v. Beckham, 81 Gratt. 421; Campbell v. Rust, 85 Va. 608, 8 S. E. Rep. 664; Ewing v. Litchfield, 91 Va. 580, 22 S. E. Rep. 362.

†**How Damages Ascertained.**—This portion of the syllabus is sustained in Campbell v. Rust, 85 Va. 608, 8 S. E. Rep. 664, and Grubb v. Starkey, 90 Va. 884, 30 S. E. Rep. 784. See the principal case, distinguished in Witz, etc., Co. v. Mullin, 90 Va. 806, 30 S. E. Rep. 788.

purpose of cultivating it extensively; but in 1862, the land still standing in the name of Isaac Newton, it was sequestrated by the Confederate government, as his property; and all the personal property on the place was taken possession of by the officer of that government, and appropriated to the uses of the Confederate government.

When Nagle took possession of the land he found there Lewis Kurtz, who had been in the employment of Newton; and Kurtz was employed by Nagle to superintend and manage for him. Subsequently Kurtz seems to have been employed by Newton to hold the land for him. In May 1865, Nagle went to the farm with a number of men who he had employed to work upon the place, taking with him horses, cattle, provisions, &c., and he found Kurtz there, and told him he must move at once, or he would put his goods into the road. Kurtz asked for the delay of a day, which was twice allowed; but after several days his goods, which had been packed up by his family ready to be taken away, were put into the road. Kurtz thereupon applied to the military authorities who were stationed in the neighborhood, and a squad of soldiers were sent, who sent 817 off the men brought by Nagle, gave possession of the premises to Kurtz, and turned over to him the personal property of Nagle which was there. And Kurtz continued to hold possession of the premises, and use and dispose of the personal property, until March 1866, when he was ousted by a proceeding by unlawful detainer.

Nagle filed with his answer a statement of the moneys which he said he had expended upon the land and had incurred, either in paying Newton or in defending himself against his disturbances, a large part of which was lost, owing either to the failure of Newton to comply with his contract, or by his improper intermeddling with his possession and enjoyment of the premises through the instrumentality of Kurtz, and otherwise. This statement amounted to \$41,801.90. And he insisted that he should be allowed, in the adjustment of their contract for the land, the amount of the losses he had thus sustained.

In June 1866, the court made a decree referring the cause to a commissioner to take various accounts, and directed the deeds which had been delivered as escrows to be deposited with the clerk of the court. The commissioner reported that after crediting the mortgage of \$12,000 which Nagle was to give, there would be due from Newton to the Tayloes \$6,169, and that the net rents received by Nagle from the property in New Jersey and Philadelphia since the contract was \$3,819.68. He reported that Nagle had sustained damage by the intermeddling, &c., of Newton; but he did not state an account or the amount. And for his failure to be so Nagle excepted.

The cause came on to be heard on the 1st of June 1867, when the court made a decree to enforce the specific execution of the contract between Newton and Nagle, and directed the different deeds to be delivered, including

the deed of release from the Tayloes; and that Nagle should pay to Newton 818 \$3,819.68, the net rents aforesaid; and that each party should pay his own costs. And being of opinion that for any injury Nagle had sustained by the misconduct of Newton, he must seek his redress in another forum, no decree was made on that point. From this decree Nagle obtained an appeal to the District court of Appeals at Fredericksburg; where the decree, so far as it enforced the specific performance of the contract and the payment of the rents by Nagle to Newton, was affirmed; but it was ordered that an account should be taken of the damages sustained by Nagle by the acts of Newton or his agents. And thereupon Nagle applied to this court for an appeal; which was allowed.

Neeson, for the appellant.

F. L. Smith and Wells, for the appellee.

CHRISTIAN, J., delivered the opinion of the court.

The court is of opinion that there is no error in the decree of the Circuit court of Alexandria county, so far as the said court decreed a specific performance of the agreement for the sale of certain real estate entered into between Isaac Newton and John Nagle, Jr.

The bill and the undisputed facts in the record present a clear case for specific performance. The answer of the defendant does not resist a specific performance of the contract entered into between him and the plaintiff; but claims that he is entitled to compensation for damages sustained by him arising out of the acts of the plaintiff (Newton) and his agents in interfering with the possession and enjoyment of the land bought by him of said Newton. The defendant does not seek a rescission of the contract; but expresses his willingness to perform it on his part, and his desire to have the same specifically executed whenever the court shall award to him compensation for the damages he has sustained in consequence of the acts of the plaintiff and his agents.

819 *The whole controversy in the case, which has been one of protracted and bitter litigation, is now narrowed down to the single point (as the case is presented before this court) of a claim on the part of the defendant, for compensation for damages sustained in consequence of the acts of the plaintiff and his agents.

The Circuit court of Alexandria decreed a specific performance of the contract between the parties; but refused to direct any enquiry as to the compensation claimed by the defendant; that court being of opinion that "if Newton has interfered with Nagle's possession and rights, either through the agency of Kurtz or otherwise; if he has been the cause of personal loss to Nagle, or disturbed him in the enjoyment of his private or personal rights, he must seek redress in another forum."

Upon an appeal from this decree to the

District court of the Fourth judicial district, held at Fredericksburg, that court, reversing to this extent only, the decree of the said Circuit court, was of opinion "that the appellee, Isaac Newton, is liable to the appellant for any damages which may have been sustained by him arising from the acts of said Newton or his agents in interfering with the appellant's possession and enjoyment of the land bought by him of said Newton, and that an account ought to be taken of the amount of any such damages; and the liability of said Newton therefor, ought to be enforced in this suit." An appeal from this decree brings up the case to this court.

The court is of opinion that there is no error in the decree of the said District court.

While there is some conflict in the English cases, and in some of the American decisions, as to how far courts of equity will entertain bills for compensation or damages, except as incidental to other relief, it seems to be now well settled, that where a court of equity clearly has jurisdiction of the subject of the controversy, jurisdiction for compensation or damages will always attach where it is

820 *ancillary to the relief prayed for. 2 Story's Eq., § 798, 799, Ed. 1866.

The case before us does not come within the rule attempted to be settled in the conflicting decisions referred to and relied upon at the bar. The question in those cases, upon which the authorities are much divided, is whether a court of equity will hold jurisdiction of a case merely to make compensation to an injured party where it cannot give specific performance. In other words, is compensation within the power of equity only as an incident of, or collateral to, a specific performance, which would otherwise be inequitable, or can it decree compensation by itself, without reference to specific performance. There is very high authority, including the Supreme Court of the United States, for the proposition, that courts of equity have this distinct and independent power of compensation. *Pratt v. Law & al.*, 9 Cranch R. 456; *Philip v. Thompson*, 1 John. Ch. R. 131; *Woodcock v. Bennet*, 1 Cow. R. 711.

But many cases might be cited which hold the contrary doctrine, both in England and in the States of the Union. See note (v.), 3 Parsons on Cont. 403.

It is not necessary in this case to attempt to reconcile these conflicting authorities. It is sufficient to remark that the cases referred to at the bar were generally cases where specific performance was denied. And yet in many of these cases the jurisdiction of the court to make compensation and direct an issue quantum damnificatus was expressly affirmed.

But the case before us is one in which specific performance was decreed, and was manifestly a case in which specific performance ought to have been decreed. The court, therefore, having full and complete jurisdiction, and having properly exercised that jurisdiction in decreeing specific performance, the only question is, whether or not the court of chancery may not, as an incident to the relief sought, collateral

821 to the specific *performance, which would otherwise be inequitable, direct an enquiry as to the damages which the defendant has sustained in consequence of the acts of the plaintiff or his agents; or whether the case must be retained in the court of chancery until the question of damages can be ascertained in another form, to wit: in a court of law.

As before intimated, we think the doctrine on this subject is now well settled, and may be succinctly stated to be this: that where the court of chancery has jurisdiction of the case, and where it is a case proper for specific performance, it may, as ancillary to specific performance, decree compensation or damages; and where the ascertainment of damages is essential, in order to do complete justice between the parties in the case before it, the court ought not to send the parties to another forum to litigate their rights; but should refer the matter to one of its own commissioners, or direct an issue quantum damnificatus to be tried at its own bar. 2 Story Eq. Ed. 1866, §§ 798-9, note; Fry on Specific Performance, second Am. Ed. p. 448.

The last named author, treating of the subject under consideration, says: "In early times the courts did not entirely disclaim jurisdiction in respect of damages, where they were incident to the subject matter already in contention before the court. Subsequently, however, the jurisdiction was disowned, and a broad distinction set up between compensation and damages." After some comments on a decision of Lord Eldon on this subject, he proceeds: "At present, however, the courts manifest an inclination to return to the original view of its jurisdiction, and to assist in the ascertainment of damages where these are essential to complete justice in the case before it."

In a recent English case, *Prothero v. Phelps*, 25 Law Jour. ch. 105 (L. J. J.), Lord Justice

Turner said: "That is competent for 822 this court to ascertain damages, *I feel no doubt. It is the constant course of the court in the case of vendor and purchaser, where a sufficient case is made for the purpose, to make enquiry as to the deterioration of the estate: and in so doing, the court is, in fact, giving damages to the purchaser for the loss sustained by the contract not having been literally performed."

It is impossible not to see the great propriety of courts of equity being clothed with such a jurisdiction; so that in cases coming before them by way of specific performance, complete justice may be done to suitors, without their resorting to any other forum. Under the modern practice of courts of equity, aided by legislative enactment, these courts are now provided with all the machinery necessary to aid its jurisdiction to make an end of a cause properly before it. An issue out of chancery may now be tried at its own bar, instead of being sent (as formerly) to a court of law for trial. One manifest object of legislative changes in the administration of the law has been to enable courts of law and

courts of equity to do complete justice in matters arising within their respective jurisdictions; and it is in entire accordance with this that courts of equity should proceed by way of damages in cases where they properly have jurisdiction, and where complete justice requires the payment of damages.

It is impossible, therefore, to perceive either the necessity or propriety, in a case like this (where the court has complete jurisdiction of the subject, and with all the parties before it, and where a specific performance has been decreed), of sending the parties before another forum, in order to litigate rights arising directly out of the subject before the court of chancery, and especially where specific performance would be inequitable, and complete justice could not be done without an adjustment of these questions. Why

823 suits—a part of the controversy to *be adjudicated in a court of equity, and a part in a court of law? Why should two distinct and independent tribunals be invoked to dispose of a cause between the same parties, where their respective claims are so connected as to be inseparable? Why call upon a court of law to aid the court of equity, which has the undoubted original jurisdiction of the subject matter and of the parties, and is provided with all the machinery necessary to arrive at the same result, and in the same mode, if need be (trial by jury), which could be attained in a court of law? We cannot perceive the necessity or the propriety of such a practice. Nor can we find any authority among the modern decisions to require it.

The cases relied upon by the learned counsel for the appellee, are cases where the plaintiff came into a court of equity seeking compensation in damages for alleged fraud, misrepresentation, &c., and where upon the face of his bill or in the case made out, there is no ground for equitable relief.

The case of *Robertson v. Hogsheads*, 3 Leigh, 723, so earnestly relied upon by counsel, is not in any respect opposed to the principles and practice of courts of equity as above expounded. In that case the bill in form and upon its face was a bill claiming damages for the breach of a contract. It did not ask even for a rescission of the contract; but the claim of the plaintiff was merely for compensation in damages in consequence of certain alleged misrepresentations in respect to sufficiency of springs and their actual deficiency. It was argued by counsel in that case, that under the prayer for general relief he might claim a rescission of the contract. Carr, J. says, "Taking up the case either upon the bill and answer or upon the whole evidence, there is no ground furnished for a rescission of the contract in any stage; but after it was executed by giving and receiving a deed, taking possession, paying good part of the purchase money, executing bonds for the balance, and a deed of

824 *trust to secure the payment, there is not the shadow of a cause for a re-

cision. The bill then, so far as it related to the main end of it, was never sustainable; and taking away that ground there could be no propriety in filing a bill in equity for the sole purpose of obtaining compensation or damages for an alleged fraud, and to tie up a part of the purchase money until these damages were liquidated."

Tucker, P., said in the same case, "It is obvious, that no rescission of the contract could have been decreed or properly asked for in this case. * * * As the form of the proceeding excludes the possibility of rescission, the bill can only be looked on as a bill for an injunction to restrain the payment of an unpaid balance of purchase money until a claim for unliquidated damages for an alleged fraud shall have been settled by an issue to be directed by the court."

It will thus be readily perceived, that the case of *Robertson v. Hogshead*, is not, in the slightest degree, in conflict with the doctrines herein announced. In that case there was no possible ground upon which the jurisdiction of a court of equity could attach. But it was a bill filed by a plaintiff merely for the purpose of recovering damages for the breach of a contract. In the case before us the jurisdiction of a court of equity is unquestioned. The plaintiff files his bill for specific performance in a case where he is clearly entitled to it, and which is decreed by the court; and the defendant not objecting to specific performance, claims that he is entitled to compensation by way of damages arising from the acts of the plaintiff and his agents respecting the subject matter of the agreement. In such a case the court having obtained possession of the subject, it will do complete justice by disposing of the whole subject at its own bar, without sending the parties to another forum. This practice has been commended and established by numerous decisions of this 825 court. See *Payne v. Graves*, 5 Leigh, 561; *Billups v. Sears*, 5 Gratt. 31; *Lyons v. Miller*, 6 Gratt. 427; *Bank of Washington v. Arthur*, 3 Gratt. 173; *Martin v. Hall*, 9 Id. 8.

It may be further observed, that there is an obvious distinction between cases where the party seeks relief in equity as plaintiff, and where compensation is sought by the defendant in resistance or modification of the plaintiff's claim. In the latter case, the maxim prevails that he who seeks equity shall do equity. 2 Story's Eq. § 799 (a). Where a plaintiff in equity seeks the aid of the court to enforce specific performance, he can only receive such relief upon equitable terms; and if it would be inequitable to grant relief without compensation to the defendant (whether such compensation be by way of damages, or otherwise), it is competent for the court having possessed itself of the subject by proper exercise of its jurisdiction, to do complete justice between the parties; and as ancillary to that purpose, may ascertain damages sustained

by the defendant, either by an enquiry made by a master or by a jury upon an issue quantum damnificatus to be tried at its own bar.

We are therefore of opinion, that there is no error in the decree of the said District court, and that the same must be affirmed.

Decree of District court affirmed.

826 *Edelin & als. v. Pascoe & als.

November Term, 1872, Richmond.

Absent, BOULDIN, J.*

1. **Building Fund Association—Redeemed Shares—Equity Jurisdiction.**—A court of equity has jurisdiction, at the suit of the shareholders of unredeemed shares in a building fund association, to call the redeemed shareholders to account, enforce payment of what they respectively owe, distribute the fund among the unredeemed shareholders, and wind up the institution.

2. **Same—Same—Interest.**—In taking the accounts of the redeemed shareholders, interest is not to be charged upon the interest and premiums charged against them on the books of the association.

In April 1866, Robert J. Edelin and six others filed their bill in the Circuit court of Alexandria county against the Mechanics Building Association of Alexandria, William Arnold and others, for the purpose of winding up the association, compelling the respective parties to pay their dues, and having the fund distributed among the unredeemed shareholders.

The case was referred to a commissioner, who made a report, showing how much each of the shareholders of redeemed stock was indebted; and there being no exceptions filed to the report, the court, on the 29th of August 1869, made a decree against each of said shareholders of redeemed stock, for the amount reported to be due by him. And it was decreed that unless the money was paid by them respectively within four months the deed of trust given to secure the association should be enforced upon terms stated in the decree.

Of the parties against whom this decree was made, two, John L. Pascoe and 827 H. W. Hardy, had not been *served with process; and Hardy having died, upon the application of his administrator, widow and heirs, and Pascoe, the decree was set aside as to them, and they were allowed to appear and defend themselves. They thereupon demurred to the bill for want of equity, and answered relying upon the lapse of time, and insisting that the dealings of the association were usurious.

The case came on to be heard on the 1st of March 1870, when the court held that the contracts were usurious, and all the bonds, deeds of trust, &c., evidencing the usurious

transactions, were void; and dismissed the bill as to Pascoe and Hardy's administrator and heirs, with costs. And thereupon the plaintiffs applied to this court for an appeal from the decree; which was allowed. The facts are sufficiently stated in the opinion of the court.

Wattles and A. & C. E. Stuart, for the appellants.

F. L. Smith, for the appellees.

ANDERSON, J., delivered the opinion of the court.

This association was formed prior to 1852, and was afterwards incorporated pursuant to the act of Assembly passed May 29, 1852.

By article XL. of the association, whenever there was sufficient money on hand, and due the association, to pay on each unredeemed share to the holder thereof, the sum of \$480, over and above all liabilities of the association, all arrearages of monthly dues, fines, &c., are required to be paid without delay, the debts and liabilities of the association to be paid; and then the owner of each unredeemed share, to receive an equal dividend of all sums on hand, and which shall afterwards be collected, until the whole shall be divided; and no further monthly dues, or premiums, shall be payable from the commencement of the payment of dividends; except that all arrears 828 shall be fully paid up. *The trustees are required to deliver to each mortgagor who has fully complied with the condition of his mortgage, a discharge, &c. And then, it is provided, the association shall cease to exist, and shall not sooner be dissolved.

The act of 1852, above referred to, limits the ultimate or par value of the stock to \$200. The articles of this association stipulate, that it shall be \$480; which it seems was fixed as its value prior to the act of 1852; and is sanctioned and legalized by the act passed February 19, 1853.

On the 1st of January 1860, there were only twenty-three shares, held by seven stockholders, which had not been redeemed. And in April 1866, they filed their bill in chancery in the Circuit court for Alexandria county, against the said building association, James E. McGraw, George H. Markell and R. J. Edelin, trustee thereof, and H. W. Hardy, John L. Pascoe and others, members of the association, for the settlement of the accounts of members with the association, to enforce the payment of arrearages due to the association from its members, and a sale of the real estate conveyed in trust by members of the association to secure the fulfillment of their obligations, and for a division of the assets amongst the members whose shares were unredeemed.

The Circuit court directed an account to be taken by one of its commissioners; who made a report. In stating the account he debited each stockholder with the arrearage due from him, up to 1st of January 1860, on account of monthly dues, premium, fines

*The case was argued before his election.

†See monographic note appended to White v. Mech. B. F. Ass'n, 22 Gratt. 338, on "Building & Loan Associations," section V; Davies v. Creighton, 33 Gratt. 708; Parker v. U. S. B., L. & L. Ass'n, 19 W. Va. 788.

and interest; and upon the sum so ascertained to be then due, he debits him with interest to the 1st of April 1867. The whole indebtedness to the association on that day, aggregating \$11,236.14, divided amongst twenty-three unredeemed shares, would give to each share \$488.52%, subject to a deduction for the costs of this suit. And he returns with his report a descriptive list of the deeds of trust *held by the association, as security for those sums reported to be due from different members of the association.

The court confirmed the report, to which there was no exception, and pronounced a decree against each defendant, who thus appeared to be indebted, and upon his failure to pay within the time specified, directed sale to be made under his deed of trust, to satisfy the amount declared to be due by him. Two of the defendants, John L. Pascoe and H. W. Hardy, had not been served with process. And upon petition, the decree as to them was set aside, and the suit as against the said Hardy, who had died since it was instituted, was revived in the name of his widow and heirs, and his administrator. These defendants demurred to the bill, answered and pleaded usury. And upon the hearing, on the 1st day of March 1870, the Circuit court sustained the plea of usury; declared the bonds and deeds of trust executed by the said Pascoe and Hardy to be null and void, and dismissed the bill as to them. From that decree the plaintiffs have appealed to this court.

The court is of opinion, that there is no ground for demurrer to the Bill. It was entirely competent for the plaintiffs to file a bill in equity against the other members of the association, and the trustees who hold the title of the trust property, for a settlement and adjustment of the affairs of the association, and for a division of its assets amongst the shareholders who were entitled to the distribution; and as a means to that end, to ascertain and enforce the liabilities of the members, and the execution of the deeds of trust and other securities therefor. The subject is peculiarly appropriate to a court of equity. And the bill is not obnoxious to the objection of multifariousness; because it introduces no matter which is not directly related to the end proposed, which is within the jurisdiction of a court of equity, and necessary to its attainment, and to doing complete justice between the parties.

830 *The court is further of opinion that there is no usury in the transactions between John L. Pascoe or H. W. Hardy and the association. The association was at first organized as a partnership concern, before the act of Assembly of May 29, 1852. Afterwards it became a body corporate under the provisions of that act, as was more than once admitted by the appellee, John L. Pascoe, under his hand and seal, and as is inferable from other facts in the record. By that act the association is expressly authorized to redeem the shares

of any of the shareholders, and to demand and receive interest, not exceeding six per cent. per annum, upon the actual amount paid upon the shares so redeemed, and also to demand and receive from said advanced stockholder the monthly instalment on stock, fines and other regular charges, until the assets are sufficient to pay to the holders of the unredeemed shares the par or ultimate value of their shares, after payment of all the debts and liabilities of the association. Reference is here made to the case of *White v. Mechanics Building Fund Association*, recently decided by this court, supra 233, for the exposition of this statute.

In this case John L. Pascoe is charged with no interest upon the sum of \$612, which he acknowledges by his deed of release had been advanced to him on his three shares; but he is charged with a monthly premium of eighty cents on each share, which is less than six per cent. interest, which the association was expressly authorized to charge by the act aforesaid. And with regard to H. W. Hardy, the commissioner's report shows that he was debited on the ledger with \$20.40 interest, which is carried into the account against him by the commissioner. But it does not appear that this interest was charged upon the sum paid him on the redemption of his shares. The presumption is that it was not, but that it was charged upon some other account.

The descriptive memorandum of the 831 deed of trust accompanying *the report (the deed itself is not copied into the record) shows that it was executed "to secure his monthly dues, \$2.80 on one (each) share, fines, &c." Two dollars is the monthly instalment required by the articles to be paid on each share of stock, and eighty cents is the premium; so that no provision is made in the deed for the payment of interest. Nor is there in any of the deeds of trust, according to the descriptive memorandum accompanying the report, although it appears that several of the shareholders are charged with interest on the ledger, and the item of interest is carried by the commissioner into their accounts, but not as charged upon money advanced to them for the redemption of their shares. The entries made in the ledger being made prima facie evidence, by the agreement of the parties in their articles of association, and there not being a particle of evidence in the record to show that it is an improper charge, the presumption is that it is correct. Whether the taking a premium exceeding six per cent. interest would taint with usury and invalidate the whole transaction, is a question which does not arise upon this record; inasmuch as the premium charged to J. L. Pascoe is not equal to the interest which the statute expressly authorizes to be charged, and it does not appear that the premium charged to H. W. Hardy exceeds the interest with which he was lawfully chargeable. But interest should not be charged upon these premiums, they being interest, in fact, nor upon interest; and so far as the account

of the commissioner is liable to this objection, it should be reformed and corrected.

The court is, therefore, of opinion that the interlocutory decree of August 29, 1868, except so far as it is liable to the objection last mentioned, is correct in principle, and should be reinstated. And that it is not shown by the record that the association has made exactions of either of the appellees which it was not authorized to make by the act of Assembly under which 832 it was *incorporated, and therefore, that the decree of the 1st of March 1870, is erroneous; and the court is of opinion that the same be reversed and annulled.

The decree was as follows:

The court having maturely considered the record in this case, is of opinion, for reasons assigned in writing and filed with the record, that the decree of the Circuit court, pronounced on the 1st day of March 1870, is erroneous. It is, therefore, considered that the same be reversed and annulled; and that the appellees pay to the appellants their costs expended in the prosecution of their appeal here. And the cause is remanded to said Circuit court for Alexandria county, for further proceedings to be had therein, according to the principles declared in the foregoing opinion.

Decree reversed.

833 *Antoni v. Wright, Sheriff, &c.
Wright, Sheriff, &c. v. Smith.

November Term, 1872, Richmond.

Absent, MONCURE, P.*

1. **Statute—Payment of Public Debt—Contract.**—The act of March 30, 1871, entitled "An act to provide for the funding and payment of the public debt," provides that the coupons attached to the bonds to be issued under that act "shall be payable semi-annually, and be receivable at and after maturity, for all taxes, debts, dues and demands due the State; which shall be expressed on their face." The act constitutes a contract on the part of the State, which can not be repealed by the General Assembly, and the contract follows the coupons in the hands of the holders thereof, though purchased after an act repealing the said act.

2. **Same—Same—Constitutional.**—The act is not repugnant to § 7 of article 8, nor to § 9 of article 10 of the constitution of Virginia.

3. **Same—Same—Repeal of Inconsistent Acts—Unconstitutional.**—The act of March 7, 1872, which directs what shall be received in payment of taxes, dues, &c., to the State, and repeals all acts incon-

*He declined to sit in the cause, because he was interested in the question.

†**Statute—Constitutional.**—As to the constitutionality of this act, see the principal case, cited as authority in *Clarke v. Tyler*, 30 Gratt. 187 *et seq.*, where the principal case is strongly approved. See also, *Williamson v. Massey*, 33 Gratt. 247.

‡**Same—A Contract.**—Several cases cite the principal case as authority for the proposition "that a statute must be assumed to be constitutional and

consistent with it, so far as it respects the provision of the act of March 30, 1871, in relation to the coupons of bonds issued under this last act, is repugnant to the provision of the constitution of the United States, which forbids a State to pass any law impairing the obligation of contracts.

These cases were heard together in this court. They involve a single, and the same question; and that is whether the act of March 7th, 1872, which provides "that hereafter it shall not be lawful for the officers charged with the collection of taxes or other demands of the State, due now or that shall hereafter become due, to receive in payment thereof any thing else 834 than gold *or silver coin, United

States treasury notes, or notes of the national banks of the United States," is repugnant to the provision of the constitution of the State or of the United States, which forbids a State to pass any law impairing the obligation of contracts. And this question depends upon the question whether the act of March 30th, 1871, entitled "An act to provide for the funding and payment of the public debt," which provides that "the coupons attached to the bonds to be issued under that act, shall be payable semi-annually, and be receivable at and after maturity, for all taxes, debts, dues and demands due the State, which shall be so expressed on their face;" constitutes a contract on the part of the State, which cannot be rescinded, and follows the

valid 'until some one complains whose rights it invades.'" For instance "It has been held that the objection that a legislative act was unconstitutional, because divesting the rights of remaindermen against their will, could not be successfully urged by the owner of the particular estate, and could only be made on behalf of the remaindermen themselves." See *Speer v. Commonwealth*, 23 Gratt. 938; *Shepherd v. City of Wheeling*, 30 W. Va. 485, 4 S. E. Rep. 637.

The proposition, that those who came forward and "funded their bonds according to the provisions of the act of March 30, 1871, could not be affected by the act of March 7, 1872, and that as to them the act is unconstitutional as impairing the obligation of contract," has been followed in many subsequent cases, citing the principal case as authority on the subject. See *Wise v. Rogers*, 24 Gratt. 171; *McCullough v. Com. of Va.*, 172 U. S. 102, 19 Sup. Ct. Rep. 135, 136; *Royall v. State of Virginia*, 116 U. S. 572, 6 Sup. Ct. Rep. 515.

The proposition in the principal case, that the act of March 30, 1871, constitutes a contract within the state and the bondholder, is sustained by many subsequent cases. See *Greenhow v. Vashon*, 81 Va. 340; *Commonwealth v. Jones*, 82 Va. 795, 1 S. E. Rep. 84; *Com. v. Maury*, 82 Va. 886, 1 S. E. Rep. 186; *Antoni v. Greenhow*, 107 U. S. 769, 2 Sup. Ct. Rep. 92 and 109; *Polindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. Rep. 907; *McGahey v. State of Va.*, 135 U. S. 662, 10 Sup. Ct. Rep. 974.

As to *mandamus* in such case, see *Robinson v. Rogers*, 24 Gratt. 324; *Antoni v. Greenhow*, 107 U. S. 769, 2 Sup. Ct. Rep. 93.

See the principal case distinguished in *Board of Public Works v. Gannt*, 76 Va. 463; *Greenhow v. Vashon*, 81 Va. 336.

coupon into the hands of any holder for value.

The first case is an application to this court by Andrew Antoni for a writ of mandamus to John Wright, sheriff of the city of Richmond, to compel him to receive from Antoni a due coupon of one of the bonds issued under the last mentioned act, in payment of taxes due from Antoni to the State; upon which Wright made a return the same as set out in the next case. The other was a similar application by A. Austin Smith, to the Circuit court of the city of Richmond. The sheriff made his return to the rule upon him, and set up several objections to the issues of the mandamus. 1st. That the mere legislative declaration, that such coupons shall be receivable in payment of taxes, does not authorize him to receive them, they not having been tendered before the repeal of that provision of the act of March 30th, 1871. That the act of March 7th, 1872, forbids the receipt of the coupons in payment of taxes; and repealed the provision of the act of March 30th, 1871, authorizing them to be received. 2d. That if the holder of the coupons had the imperative right to demand that they should be received in payment of taxes, then the act was in conflict with the 5th section of 835 article 10 of the constitution *of Virginia; and the general Assembly had the right to repeal it. 3d. That the auditor had instructed the respondent, in writing, not to receive the coupons issued under the act of March 30th, 1871, in payment of taxes. That if the act created a mode of appropriating the State revenues different from that ordained by the constitution of the State, it was in violation of the constitution; or if it was intended to make them bills of credit, then it was in contravention of the constitution of the United States. And that said Smith was never the owner of the bonds from which the coupons were taken; and he became the owner of the coupons tendered by him after the passage of the act of March 7, 1872. 4th. A mandamus will not lie when the party has other adequate remedies.

To this return Smith demurred, and the court sustained the demurrer, and directed that a peremptory mandamus be awarded, directed to the said John W. Wright, sheriff of the city of Richmond, commanding him to receive from the plaintiff matured coupons issued by the State of Virginia under the provisions of the act of March 30, 1871, to an amount equal to the sum due from the plaintiff for taxes due to the State for the year 1871. And thereupon Wright applied to a judge of this court for a writ of error, which was awarded.

The cases were argued by the attorney-general for the sheriff, and Ould & Carrington and B. T. Johnson & Royal for the petitioner and appellee.

BOULDIN, J., delivered the opinion of the court.

The first of these cases is before the court

on an original application by Antoni for a writ of mandamus to Wright as sheriff of the city of Richmond, and the other, on a writ of error to a judgment of the Circuit court of the city of Richmond, by which a peremptory writ of mandamus was awarded against the same sheriff. The object of

the proceedings in both cases was to 836 compel *the sheriff to receive from the parties respectively, in payment of taxes due the State, certain matured interest coupons issued by the State of Virginia, under the act of the General Assembly approved March 30th, 1871, known as the funding act; which coupons had been duly tendered to said sheriff in payment of taxes, and were as is agreed by the parties in form and substance as follows:

"Receivable at and after maturity for all taxes, debts and demands due the State.

"The Commonwealth of Virginia will pay the bearer three dollars interest, due 1st July 1872, on bond No. 3501.

Geo. Rye,

"Treasurer of the Commonwealth of Virginia.

"Coupon No. 2."

The sheriff refused to receive them, because as he alleged, he was prohibited from so doing by the act of March 7th, 1872. Sess. Acts 1871-'2, ch. 148, p. 141, entitled "An act declaring what shall be received in payment of taxes, or other demands of the State." There being no conflict of fact, the case was submitted to the court on the legal questions arising on the record, and the Circuit court awarded a peremptory writ of mandamus requiring the sheriff to receive the coupons aforesaid in payment of taxes due the State; and the cases are now before this court on a writ of error to the judgment aforesaid of the Circuit court, and on the original application of Antoni, to which the sheriff makes the same defence.

The questions involved in the two cases are identical; and as was said by Judge Davis, of the United States Supreme court, in a similar case, *Furman v. Nichol*, 8 Wall. U. S. R. 44, are of much greater "importance than difficulty."

They are the following:

1. Was there under the act aforesaid of March 30th, 1871, a valid contract between the State and such of her 837 *creditors as excepted and complied with the terms of the act, that the interest coupons issued thereunder should be "receivable at and after maturity for all taxes, debts, dues and demands due the State?"

2. If so, was the obligation of this contract impaired by the act aforesaid of March 7th, 1872, which substantially declares that the collecting officers of the State shall not receive the coupons aforesaid in discharge of any "taxes or other demands of the State now due or that shall hereafter become due?"

The first and all essential question is, was there a valid contract between the State and her bondholders?

To consider this question intelligently, a brief reference to the substance of the funding act, and to the facts and circumstances under which it was passed, is proper and perhaps necessary.

We know as a matter of history, that prior to the late war between the United States and the Confederate States, and before her violent dismemberment, the State of Virginia for the common benefit of the whole and every part of the State, had contracted a very heavy debt, amounting at the date of the funding act, to about \$40,000,000 of principal. During the war, and by an act of violence she was powerless to resist, about one-third of the territory and population of the State was cut off, and formed into a new State called West Virginia; and by that name that portion of the State of Virginia has been acknowledged as a State by the constituted authorities of the Federal government, and admitted as a member of the Federal Union. Both States in their constitutions and by legislation have acknowledged their respective liability for a just and equitable proportion of the old debt; and efforts had been made from time to time, to adjust that liability; but very little progress towards a settlement of any kind seems to have been made. In the mean-

time, the payment of interest on the
838 *debt was for a time wholly suspended, and afterwards only partially resumed by the State of Virginia alone; whilst West Virginia had not, and has not to this day, paid any part of the debt, principal or interest; and the entire debt standing in the name of the State of Virginia, and her bonds being held for the whole amount, much anxiety was felt and manifested on the subject as well by the State as by her creditors.

Under these circumstances, and hopeless of any early settlement with West Virginia, the State of Virginia proposed to her creditors, by the act aforesaid of the 30th of March 1871, a separate adjustment of what she deemed her own indebtedness, which she assumed to be two-thirds of the entire debt. Her object, as declared in the preamble to the act, was "to enable the State of West Virginia to settle her proportion of said debt with the holders thereof, and to prevent any complications or difficulties which might be interposed to any other manner of settlement; and for the purpose of promptly restoring the credit of Virginia by providing for the prompt and certain payment of the interest upon her proportion of said debt as the same shall become due;" and her offer was to issue to her creditors new bonds for two-thirds of the entire debt, principal and interest, to run for thirty-four years, with interest payable semi-annually on the aggregate amount of principal and interest, the bonds to be coupon or registered, at the option of the creditor, and to be convertible the one into the other at like option; and to secure "the prompt and certain payment of the interest as the same shall fall due," and to give the coupons greater value, they were to be "receivable,

at and after maturity, for all taxes, debts, dues and demands due the State," which should be so expressed on their face.

As to the remaining third assumed to be the just proportion of West Virginia, 839 the State of Virginia proposed *the adjustment set forth in the following certificate; like certificates to be issued to all creditors who should accept the terms proposed by the State:

"Commonwealth of Virginia, Treasurer's Office,

"Richmond, Virginia, — 187 —

"No. — \$ —

"This is to certify, that there is due unto —, heirs, executors, administrators or assigns, — dollars, being one-third of bond surrendered under the provisions of an act approved March the 30th, 1871, entitled 'An act to provide for the funding and payment of the public debt,' (viz: bond No. —, with interest amounting to — dollars), payment of said one-third, with interest thereon at the rate of six per cent. per annum, will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia, existing at the time of its dismemberment, and the State of Virginia holds said bonds, so far as unfunded, in trust for the holder hereof or his assigns.

"In testimony whereof, this certificate has been signed by the Treasurer and countersigned by the Second Auditor, as provided by law.

"— Treasurer of the Commonwealth of Virginia.

"— Second Auditor of Va."

"For value received, — assign unto — of — the within certificate of the Commonwealth of Virginia, and hereby transfer all of my right, title and interest therein — Dated — 18 — Executed in presence of —, a Notary Public of —"

Upon the receipt by the creditors of the bonds of the State for her assumed indebtedness, and of the certificates aforesaid, the creditors thus accepting the terms offered by the State, were to surrender their old bonds to be cancelled.

A large proportion of the creditors accepted the terms proposed, received the bonds of the State for two-thirds 840 *only of their claims—received certificates as aforesaid for the remaining third—and surrendered their old bonds to be cancelled; and the question is, whether the undertaking by the state set forth in the coupons issued under the act, that they should be "receivable at and after maturity for all taxes, debts, dues and demands due the State," is a valid legislative contract upon sufficient consideration? Were it a contract between individuals, the mere statement of the case would suggest the answer. To illustrate: A and B owe to C a joint debt, but in unequal proportions as between themselves. B leaves the country, and the pecuniary condition of A, and the circumstances of the case, make it reason-

able, in A's judgment, that he should propose a separate adjustment of the amount due from him as between himself and B, and as part of the arrangement, proposes, as agent and trustee, to collect for C, B's proportion of the debt. C accepts the proposition, takes from A his individual bond for the principal and interest of his part of the debt, with largely extended credit; takes his undertaking in writing, as agent and trustee, to collect, if practicable, and account for B's proportion of the debt, and surrenders to A for cancellation the joint bond of A and B. Is there an intelligent judicial tribunal on earth that would, for a moment, tolerate the defense by A that his bond was without legal consideration? We think not. The surrender alone by the creditor to the debtor of a bond or note to be cancelled, constitutes, of itself, ample legal consideration for its renewal, with all arrearages of interest added, and is a daily transaction between individuals. A fortiori, is there ample legal consideration, when other considerations, involving principles of compromise, enter into the adjustment; when one-third of the principal and interest is temporarily or permanently abated, and when the new bond is taken for only two-thirds of the debt?

Such would certainly be the case on 841 such a contract *between individuals; and what is a valid consideration between individuals is alike valid between the State and individuals. We have never had in such matters one code of law and morals for the State, and another for individuals: the same laws govern both.

Authority on the question whether the adjustment we are considering is a contract—and a contract on sufficient consideration, would seem to be scarcely necessary; but the case of *State of New Jersey v. Wilson*, 7 Cranch's R. 154, involving in substance the same question, is directly in point. The arrangement claimed to be a contract in that case, was a stipulation by the Legislature of the then colony of New Jersey, in a grant of lands to the Indians within the colony, that the lands granted should be forever exempt from taxation. In the year 1804, more than fifty years after the date of the grant, when the colony had become a State of the American Union, and after the Indians had sold their lands and left the State, an act of Assembly was passed by the State of New Jersey, repealing the privilege aforesaid of exemption from taxation; and a question arose between an owner of a portion of these lands and the State of New Jersey as to the validity of the act of repeal. In deciding the case, Chief Justice Marshall said: "The question is narrowed to the inquiry, whether, in the case stated, a contract existed, and whether that contract is violated by the act of 1804. Every requisite of a contract is found in the proceedings between the then colony of New Jersey and the Indians. The subject was a purchase on the part of the government of extensive claims of the Indians, the extinguishment of which would

quiet the title of a large portion of the province. A proposition to this effect is made, the terms stipulated, the consideration agreed upon, which is a tract of land with the privilege of exemption from taxation; and then in consideration of the arrangements previously made, one of which 842 this act of Assembly is *stated to be, the Indians make their deed of cession. This is certainly a contract, clothed in forms of unusual solemnity. The privilege, though for the benefit of the Indians, is annexed by the terms which create it to the land itself, and not to their persons." And he held that the law of the State of New Jersey passed in 1804, more than fifty years after the grant, and after the Indians had sold the land and left the State, repealing the section by which the privilege of exemption from taxation was secured, impaired the contract, and was void. He says, "this contract is certainly impaired by a law which would annul this essential part of it." Ibid, p. 166-7.

Now, it will be seen on examination, that all the requisites of a contract referred to by Chief Justice Marshall in the case of *State of New Jersey v. Wilson*, exist in the cases under consideration. The subject matter was an equitable adjustment of the State debt under the novel and anomalous condition in which the State of Virginia was placed; so that complications with West Virginia might be avoided, and the amount for which Virginia was willing to be held directly bound to her creditors might be distinctly ascertained, and her bonds given for that amount, in lieu of the old bonds; "a proposition to this effect is made—the terms stipulated—the consideration agreed upon; which is" the issue by the State of the bonds and certificates aforesaid, with the extended credit thereby secured to the State, and the further consideration of the surrender by the creditors, of their old bonds to be cancelled. The consideration on the part of the creditors is, in fact, complied with by the surrender of their bonds to the State to be cancelled, and the State issues to them bonds and certificates as agreed on, with the privilege aforesaid of receivability for taxes, &c., secured on the face of the coupons. Is this a contract? In the language of Chief Justice Marshall in the case just referred to, we say, "This is certainly a contract clothed in forms 843 of unusual solemnity;" "and like the privilege of exemption from taxation in that case, the quality of receivability in payment of taxes and other dues to the State, in these cases, is annexed not to the persons of the holders, but to the coupons themselves, and follows them wherever they may go.

But we are not without other authority on this question, more directly to the point. In 1836 the Legislature of the State of Arkansas chartered a bank called the Bank of the State of Arkansas, the whole capital of which belonged to the State, and the president and directors were appointed by the General Assembly. A section of the

charter provided "that the bills and notes of said institution shall be received in all payments of debts due to the State of Arkansas;" but this section was repealed in 1845. At the date of the repeal a large amount of the issues of the bank were in circulation, a portion of which were acquired after the date of the repeal, by Woodruff, a judgment debtor of the State, and were tendered by him to the collecting officer of the State in payment of the judgment, who refused to receive them because the law making them receivable had been repealed.

A mandamus was applied for to compel the officer to receive them, but was refused by the Supreme court of the State; whereupon the case was taken by writ of error to the Supreme court of the United States; and the judgment of the State court was reversed.

The United States Supreme court held that the legislation aforesaid making the notes of the bank receivable in payment of debts to the State constituted a contract between the State and the holders of the notes, which was binding on the State. *Woodruff v. Trapnall*, 10 How. U. S. R. 190. Judge McLean, delivering the opinion of the court, said, "The entire stock of the bank is owned by the State. It furnished the capital and receives the profits. And in addition to the credit given to the notes

of the bank by the capital provided, 844 *the State declares in the charter they shall be received in all payments of debts due to it. Is this a contract? A contract is defined to be an agreement between competent parties to do, or not to do, a certain thing. The undertaking on the part of the State is to receive the notes of the bank in payments from its creditors.

"This comes within the definition of a contract. It is a contract founded on good and valuable consideration—a consideration beneficial to the State, as its profits are increased by sustaining the credit and consequently extending the circulation of the paper of the bank.

"With whom was this contract made? We answer with the holders of the paper of the bank. The notes are made payable to bearer; consequently every bona fide holder has a right, under the 28th section, to pay to the State any debt he may owe it in the paper of the bank. It is a continuing guaranty by the State that the notes shall be so received. Such a contract would be binding on an individual, and it is not the less so on the State." *Ibid*, p. 205-6. "The guaranty included all the notes of the bank in circulation as clearly as if on the face of every note the words had been engraved,—"This note shall be received by the State in payment of debts." And that the Legislature could not withdraw this obligation from the notes in circulation at the time the guaranty was repealed, is a position which can require no argument. Any one had a right to receive them and to test the constitutionality of the repeal." *Ibid*, p. 206.

All this reasoning applies with full force to the contract under consideration. Indeed, the contract in the cases before us stands on higher ground than that in the case of *Woodruff v. Trapnall*, in this; that here the State is herself both creditor and debtor, directly and immediately. It is her own debt, and not the debt of an insolvent corporation which she has contracted to receive. And it stands on higher ground in this also—that here the receivability 845 of the coupons in payment to *the

State is engraved on the face of each coupon, whereby the State makes known to every one who may desire to acquire them, that they will be received in all payments to the State, and thus invites him to take them; whereas, in the case of *Woodruff v. Trapnall*, although the same right was secured by law, yet it did not appear on the face of the notes. And furthermore, the consideration in this case is more valuable and beneficial to the State than that in *Woodruff v. Trapnall*, because here the State secures a temporary or permanent abatement of one-third of her debt, and a credit of thirty-four years on the residue. If then the contract in *Woodruff v. Trapnall* be a contract on good and sufficient consideration, and binding on the State, a multo fortiori would the contract here appear to be on good and sufficient consideration, and binding on the State?

It is true that four of the judges dissented in the case of *Woodruff v. Trapnall*; but the same question identically arose in the recent case of *Furman v. Nichol*, 8 Wall. U. S. R. 44; and the decision in *Woodruff v. Trapnall* was reaffirmed by the Supreme court without a dissenting voice.

The question in that case arose under the charter of the Bank of the State of Tennessee, which, like the Bank of the State of Arkansas, was exclusively a State institution, chartered for the benefit and sustained by the credit of the State. The 12th section of the charter provided "that the bills or notes of said corporation, originally made payable, or which shall become payable, on demand, in gold or silver coin, shall be receivable at the treasury of this State, and by all tax collectors and other public officers, in all payments for taxes and other moneys due the State." Held that this provision constituted a valid contract by the State with all persons receiving them; that the bank notes issued whilst that section should remain in force should be received in payment of all public dues; 846 that the guaranty was in no *sense a personal one, but attached to the notes themselves as much as if written on the back thereof; that this guaranty went with the notes every where as long as they existed, and was a standing invitation to all persons to receive them notwithstanding the fact that after the notes had been issued the section had been repealed.

The court say, p. 61, without a dissenting voice, "The quality of negotiability is annexed to the notes in words that cannot be misunderstood, and which indicate the

purpose of the Legislature that they should be used by every one who is indebted to the State."

Every word thus quoted will apply to the coupons in this case—using the word "coupons" in lieu of "notes." The court go on to decide that the contract thus made could not, under the constitution of the United States, be impaired by subsequent legislation.

These decisions, made directly on the point, upon elaborate argument by the Supreme court of the United States—a tribunal which assumes to act, and has been generally regarded, as the appellate tribunal in the last resort in such cases—would seem to be conclusive of the question.

But a very earnest assault has been made on the first of those cases—Woodruff v. Trapnall; the opinion of one of the minority judges had been commended to us, and we have been warned not to render servile submission to the decisions of the United States Supreme court. This court will always pay due respect as well to the decisions of the Supreme court as to the opinions of its judges; but if controlled by either, will certainly prefer, as a general rule, to be guided rather by the decisions of the court than by the opinions of the minority—especially when, as in the case of Woodruff v. Trapnall, the decision of the court commends itself to us as justly propounding the law. The views of the minority in that case certainly found no favor in the judgment of this court when, in the case of the Exchange Bank of Virginia 847 *v. Knox, &c., 19 Gratt. 739, the decision of the court, and not the opinion of the minority, was unanimously approved by this court (Judge Anderson being absent, but concurring, as shown by his opinion in this case, with the other four judges).

The case of Woodruff v. Trapnall had been pressed on the court as ruling the cases then under argument; but in deciding those cases, Judge Christian, delivering the unanimous opinion of the court, drew a distinction between the case of Woodruff v. Trapnall and these cases, and said of the case of Woodruff v. Trapnall: "The court decided that the act of 1845, repealing the ninth section of the act of 1836, was unconstitutional, because it impaired the obligation of the contract created by that section between the State and the billholder, to receive its own notes (the State being the bank in this case) in payment of debts due to it. The judgment in this case was a debt due to the State of Arkansas, and the provision was that the notes and bills of this institution shall be received in payment of all debts due the State of Arkansas. This was clearly a case of contract which could not be impaired by legislation." 19 Gratt. p. 753.

Such was the unanimous opinion of this court on the contract in the case of Woodruff v. Trapnall. Whilst they distinguished the case from the cases before them, all the judges held that the provision in Woodruff

v. Trapnall was "clearly a case of contract which could not be impaired by legislation," because they considered the bank and the State as, in effect, the same, and that the contract was, in substance, between the State and her creditors. Much more "clearly," then, is this a "case of contract which could not be impaired by legislation," since here the State, not indirectly through her interest in the bank, but directly and immediately, is both creditor and debtor, and as such enters into the agreement with her creditors set forth on the face of 848 the "coupons, that they shall be receivable in payment of all taxes, debts and demands due the State;" that a debt of hers past due shall be received in payment of a debt due to her.

But it is earnestly argued that it is not within the legitimate power of the Legislature to make such a contract; that it would tend to trammel and embarrass the action of subsequent Legislatures—to deprive them of proper control of the annual revenue—and might, by absorbing the revenue, substantially annul the taxing power, and put a stop to the wheels of government.

It is unquestionably true, that one Legislature cannot, by an act of ordinary legislation, bind or control, in any manner, subsequent Legislatures. Such acts of legislation are, and of right should be, always subject to amendment or repeal. But it is equally true, that by special legislation amounting to a contract, a subsequent Legislature may be bound. It is bound irrevocably by a legislative grant, forever parting with the real or personal property of the State, which is held to be a contract not to be impaired by legislation; by a temporary or perpetual exemption of specific property or interests from taxation; by a bond or certificate of debt issued by the State for money loaned, or other good and sufficient consideration; by charters of incorporation, unless the right to modify or repeal them is reserved by law; and by all legitimate legislative contracts. The exercise of such power in special cases, although necessarily controlling, to a certain extent, subsequent Legislatures, has been always held to be salutary, and one of the "essential elements of sovereignty."

The power exercised in the cases referred to, or in most of them, goes far beyond that exercised in this case; for here, no rightful power is surrendered, but simply a provision made for a debt. The annually accruing interest on the debt of a 849 State is, in all well regulated governments, deemed an essential part of the annual expenses of government, and is always annually provided for.

To add, as an additional sanction to this high obligation already existing, for the purpose of securing its prompt and punctual performance, that coupons for interest shall be received as money in payment of debts due to the State, would seem ordinarily to be, not only a very innocent, but a just and convenient measure; for it would pre-

vent a double process of collection and payment, by applying to the State the familiar law of setoff, which is good between individuals; and, even as the general law now stands, is good against the State in any case in which she may happen to be a plaintiff against a person holding a debt of hers, past due. The setoff could be pleaded against her, and the courts would be bound to allow it. The rule, as we have said, is one of justice and convenience, and there is no good reason why, in cases like those under consideration, it should not with her consent, through her Legislature, be applied to the State. That consent has been given in these cases, and in giving it, the Legislature certainly did not act without precedent.

By the act of March 13, 1847, Sess. Acts 1846-7, ch. 73, p. 65, the sheriffs of the Commonwealth were required "to take in payment of taxes, county and parish levies within their respective counties, at par value, all claims that may have been allowed against the county by the County courts," &c., when offered by the creditor. This is nothing but a quasi setoff, adopted as a matter of convenience; and the law is still in force, having been on our statute books for more than a quarter of a century. Code 1860, ch. 49, § 30, p. 285.

Again, in 1856, in order to borrow money for the use of the State, an issue of treasury notes was authorized to be made from time to time, not to exceed one million three hundred thousand dollars at any one time, and the *third section of the act provided that these notes should be transferable by delivery and assignment endorsed thereon by the person to whose order on the face thereof the same shall have been made payable.

The fourth section was as follows:

"§ 4. The said treasury notes shall be received by way of setoff in liquidation of all taxes and debts due to the Commonwealth after the 30th day of September next, that being the close of the present fiscal year, other than moneys due on the sale of her bonds: provided, that such taxes and debts are due and payable at the time when said treasury notes may be so offered in liquidation as aforesaid," &c., &c.

The authority to issue these notes continued until the end of the fiscal year in 1858; the amount to be outstanding at one time being diminished from time to time. Here again is a precedent for the principle of setoff allowed in the cases under consideration.

And yet again, by the act of April 25th, 1867, Sess. Acts 1866-7, ch 103, p. 904, the second auditor was required to issue certificates for interest on a portion of the public debt therein mentioned, in the nature of coupons, to such persons as might require it; and the third section of the act provides: "The certificates aforesaid may be used and shall be received in payment of all State taxes and other public dues." The fourth section makes a similar provision in relation to holders of interest coupons,

for the payment of which provision has been made.

We see, then, that in the course of twenty years, from March '47, to April '67, three different Legislatures of the State had, prior to the funding act, exercised the power so liberally denounced. The first two of them were elected and assembled when Virginia was herself and represented by her sons; and the last, although it assembled since the war, and amidst clouds and darkness, was yet elected by Virginians, 851 and had among its *members some of the best and ablest men of the State. These are the Legislatures which had furnished to the General Assembly of 1871 the precedents for the setoff feature of the funding act—a feature, we repeat, just and equitable in principle and convenient in practice. It withdraws not one dollar's worth of the property from taxation. It interferes in no manner whatever with the legitimate power of subsequent Legislatures. It does, it is true, incidentally place an obstacle in the way of the power, not the right, of subsequent Legislatures to decline to provide for an obligation which they are forbidden by the constitution to impair. In other words, it may have the effect, incidentally, of an appropriation of a portion of the annual revenue of the State for thirty-four years to meet during that period the annually accruing interest on a specific debt.

Whether the exercise of this power at the time, and under the circumstances, was wise or prudent, is not a question before this court. That was a matter left exclusively to legislative discretion; but such legislation does not seem to be a great stretch of power, or very alarming legislation, for a State whose organic law not only contemplates the punctual annual payment of the interest on her entire debt, but imperatively requires, on the creation of a debt, that a sacred sinking fund shall be at once established, to be applied solely to the extinction of the debt; thus not merely authorizing, but requiring, the Legislature which creates a debt to bind all future Legislatures by the establishment of a fund to be applied solely to the extinction of the debt itself.

This may be, and, we believe, usually is, for thirty-four years, but may be for a longer or shorter period.

If it be said that such legislation may, and probably would, result in crippling the power and resources of the State in time of war or other great calamity, we can only say that legislation cannot well be adapted in advance to extraordinary and exceptional cases. Such *cases must and will occur at times with all nations, and must always be provided for by the wisdom and prudence of the government for the time being. At such a time, however, the honored name and high credit secured to a State, by unbroken faith, even in adversity, will, apart from all other considerations, be worth more to her in dollars—incalculably more—than the comparatively insignificant amount of the interest on a

portion of the public debt enjoyed by breach of contract.

We think the incidental appropriation of a portion of the annual revenue of the State for the period of thirty-four years (a mere point of time in the life of a nation) to meet the annually accruing interest on a specific debt, is certainly not a larger exercise of legislative power than the creation and irrevocable dedication of a fund for thirty-four years, or longer, to the extinction of the debt itself, as required by the constitution; nor a larger exercise of power than the purchase by the State of an extensive tract of land, and a grant of the same forever, with perpetual exemption from taxation, as was done in the case of *New Jersey v. Wilson*. The one—the act in question—to say the most of it, is only a temporary appropriation in advance of a portion of the public revenue to the payment of a debt of the State, past due when the appropriation takes effect, and which ought to be paid. The other is an absolute and unconditional surrender forever of a portion of the public revenue—that is to say, of so much thereof as would arise from the taxes remitted.

Nor do we think it a larger exercise of power than the surrender forever of the right of the State to tax the property and income of great and wealthy corporations. On the contrary, we think the latter immeasurably greater than the former.

That such powers may be legitimately exercised has been over and over again decided by the courts of the States, and of the United States; and in the face of the
853 *very argument now urged, over and over repeated, and as often overruled.

In one of the latest cases on the subject, *Home of the Friendless v. Rouse*, 8 Wall. U. S. R. 430, the court, at p. 438, says: "The validity of this contract is questioned at the bar, on the ground that the Legislature had no power to grant away the power of taxation. The answer to this position is, that the question is no longer open for argument here; for it is settled by the repeated adjudications of this court, that a State may, by a contract based on a consideration, exempt the property of an individual or corporation either for a specific period or permanently." "And it is equally well settled that the exemption is presumed to be on sufficient consideration, and binds the State, if the charter containing it is accepted," citing, in a note, numerous cases which we need not repeat.

But as we have been warned against too ready obedience to the decisions of the Supreme court, we will fall back on an authority which all of us are bound to respect. We mean the unanimous decision of this court in the case of the *City of Richmond v. The Richmond and Danville Railroad Company*, 21 Gratt. 604, in which this court, with entire unanimity, concurred with the United States Supreme court that the question was no longer open. Had the question in the then state of judicial decision been considered open, there might have been in that case some room for relying on

the principle established in the case of *Burroughs v. Peyton*, 16 Gratt. p. 470; and for insisting that the duty of paying taxes and the duty of rendering military service were analagous, and that neither could be surrendered without endangering the very life of the State. But the question was regarded by this court as already settled. In delivering the opinion of the court, Judge Staples says: "The power of exemption, as well as the power of taxation, is one of the essential elements of sovereignty."

854 *The right of the Legislature to surrender the power of taxation in specific cases has been the subject of one of the ablest and most exhaustive judicial discussions ever known in the Supreme court of the United States, and is now regarded as established upon the most solid foundations of public policy and expediency." This authority, at least, will not be questioned here, and we think the principle established not only covers the cases before us, but goes far beyond them. If not, however, the cases of *Woodruff v. Trapnall* and *Furman v. Nichol*, directly on the point, approved as the former case (*Woodruff v. Trapnall*) has been, by the unanimous opinion of this court in *The Exchange Bank of Virginia v. Knox, &c.*, already cited, are decisive of the question; and we are of opinion, in the absence of other objections, that the power of the Legislature to make the contract under consideration is unquestionable.

But conceding that proposition, it is argued that the contract in this case is void, because it is repugnant to the eighth section of the eighth article and the third section of the tenth article of the State constitution, dedicating certain portions of the State revenue to the support of free schools.

We think there is no such conflict in the case. The interest on the debt funded may be paid in the mode prescribed, and the constitutional provisions in relation to the schools respected and complied with. It only requires that the obligations of succeeding Legislatures shall be firmly met; that there should be what the creation of every new debt imperatively demands, to wit: an increase of taxation, if the existing rate be insufficient. The argument is based on the assumption that subsequent Legislatures will fail in their duty, and pursue such a course as may result in a malappropriation of the funds referred to; that they will decline to meet faithfully the high obligation resting on them, and then rely on the irregular consequences of their
855 own default *as an argument against the validity of the debt for which they will have failed to provide. The malappropriation which would follow would not be the legitimate result of the funding act, but in effect would be the act of the Legislature failing to discharge its duty. The obligation to provide for the interest due by these coupons is as high as the duty of applying the capitation tax and other funds to the schools. Both duties are alike obligatory, and both may be discharged, as there

is no conflict between them. It is only by a failure to discharge the one that the performance of the other can be put in jeopardy, and it rests with the Legislature, by faithfully and fearlessly meeting both obligations, to preserve the plighted faith of the State, and protect her constitution from violation.

It is contended further, that the entire funding act is unconstitutional and void, because it violates the ninth section of the tenth article of the constitution, which provides that the unfunded debt of the State "shall not be funded or redeemed at a value exceeding that established by law at the time said debt was contracted." It might, perhaps, with good reason be held that the provision cited does not apply to the funding act at all, as the debt funded was not the "unfunded debt" of the State, but her old funded debt and its accretions. But it is unnecessary to decide that question, because, conceding the section to be applicable, we are of opinion that its provisions are not violated by the funding act. The provision of the constitution under consideration might certainly have been made more clear as to its intent, by the addition of a very few words; but we do not regard it very difficult of solution as it is written. One definition of the word "value" is "rate." If that word had been used instead of "value" the difficulty of construction would disappear. We would understand at once that it was forbidden to fund or redeem the unfunded debt at a greater "rate" 856 of interest than that "established *by law" at the creation of the debt. We are of opinion that this was the true intent, and is the proper construction of the provision, and that there was no reference whatever to the amount of the debt.

The rate of interest has always been "established by law" in this State; but we do not well see how the constitution could reasonably speak of the amount of an unfunded and floating debt as "established by law," at the time of its creation. A maximum might be "established by law," beyond which no floating debt should be created, but from its nature the actual amount of such debt must be left to circumstances—must be fluctuating and uncertain.

Another and equally conclusive objection to the construction contended for, is, that it would prohibit the payment of all arrearages of interest on the redemption of the public debt; because the constitution forbids alike either the funding or redemption of the unfunded debt of the State at a value exceeding that "established by law" at the creation of the debt.

If "value" means "amount," as argued at the bar, then the large arrearages of interest at the date of the funding act could not have been paid at all, even were the money in hand, and the State entirely ready and willing to redeem, instead of funding; since the arrearages of interest, when added to the principal, would make an aggregate amount greatly larger than the original amount of the debt; and in that sense the

"value" of the debt redeemed would be largely in excess of its value when created. Under that construction the arrearages of interest, amounting at the date of the funding act to about \$7,000,000, could have been neither funded nor redeemed, and must, therefore, have been wholly lost to the creditors. Such, certainly, is not the meaning of the constitution.

Again, we are told that the funding act is void, because it impairs the obligation 857 of the contract made by *the State with the holders of coupons for interest, under the act of April 25th, 1867.

It is enough to say that no such question arises in these cases. No holder of those coupons, if indeed any such holder now exists (which is at least doubtful), is here complaining that he is injured in any way by the funding act; and it is well settled that the courts will never pronounce a statute unconstitutional because it may perhaps impair the rights of others not complaining. "The statute is assumed to be valid until some one complains whose rights it invades." Cooley on Constitutional Limitations, p. 163-4, and cases there cited.

As to the objection, that the funding act violates that portion of the tenth section of the tenth article of the constitution which provides that "no money shall be paid out of the State treasury, except in pursuance of appropriations made by law," we need only say, that it has no application to the cases before us. By the equitable principle of setoff allowed by the funding act, the taxes are paid or extinguished by the coupons without ever going into the State treasury, and consequently no money is actually paid out of the treasury. If, however, by legal intendment it should be regarded as such payment, then, by like intendment, the funding act would be regarded as an act of appropriation. But we think there is no payment of money out of the treasury in the case; the taxes being intercepted by setoff.

Upon the whole, the court is of opinion, that the undertaking on the part of the State in the funding act, as set forth on the face of the coupons issued thereunder, constitutes a valid legislative contract on good and sufficient consideration, that the said coupons should be received in payment of all taxes, debts and demands of the State; and that the obligation of such contract cannot under the State and Federal constitutions be impaired by subsequent legislation.

That provision of the State and 858 Federal constitutions *which forbids the State to impair by legislation the obligation of contracts, has received mature consideration by this court in the recent cases of Taylor v. Stearns, 18 Gratt. 244; and in the Homestead Cases, to be reported in 22 Gratt. 266. In delivering the unanimous opinion of the court in the last mentioned cases, Judge Christian says: "The inviolability of contracts, public and private, is the foundation of all social prog-

ress, and the cornerstone of all the forms of civilized society, wherever an enlightened jurisprudence prevails;" and we do not think he has attached an undue importance to this great principle. It must be preserved.

Has the obligation of the contract of the State in this case been impaired by the act of March 7th, 1872?

The simple statement of the substance of each will furnish the answer to the question.

The contract of the State is, that the coupons issued under the funding act shall when matured be received in payment of all taxes and public dues.

The act of March 7th, 1872, forbids the collecting officers of the State to receive, in payment of "taxes and other demands of the State, anything else than gold or silver coin, United States treasury notes, or notes of the national banks of the United States," and repeals "all acts or parts of acts inconsistent with that act," thus repealing, or attempting to repeal, that portion of the funding act which makes the matured coupons receivable in payment of all taxes and public dues. In the language of Chief Justice Marshall, in the case of State of New Jersey v. Wilson, "this contract is certainly impaired by a law which would annul this essential part of it."

We are of opinion, therefore, that the act aforesaid of March 7th, 1872, is repugnant to the constitutions of this State and of the United States, inasmuch as it impairs the obligation of the contract of the State with

859 the holders of the coupons issued under the funding act, as above *set forth, and is on that account and to that extent void. And being further of opinion, both on principle and authority, that the writ of mandamus is the proper remedy in both cases—the duty of the sheriff being purely ministerial—a peremptory writ of mandamus must be awarded in the case of Antoni v. Wright, and the judgment of the Circuit court of the city of Richmond in the case of Wright v. Smith must be affirmed.

The court is sensible that a grave, responsible and painful duty will be cast on the General Assembly by this decision, in the present impoverished condition of our people, but we feel assured that it will be faithfully and wisely met.

We think with the entire court in the Homestead Cases, that temporary relief from pecuniary pressure is too dearly bought, at the price of the violated faith of Virginia. She has just emerged from a terrible trial—an ordeal of fire—without a stain on her escutcheon. Impoverished, crushed and dismembered, but not dishonored, she is now taking a new departure, and we would hope to see it in the right direction. In the language of a vigorous writer, "Now is the seed time of faith and honor. The least fracture now will be like a name engraved with the point of a pin on the tender rind of a young beech, the wound will enlarge with the tree, and

posterity will read it in full grown characters."

This court is willing to inflict that wound.

STAPLES, J. I do not concur in the opinion just delivered. I do not concur either in the reasoning or the conclusions to which a majority of the court have arrived. It is not my intention, however, to attempt any elaborate discussion of the questions arising in this case. Regarding it in all its bearings and results as by far the most important that ever engaged the attention of this court, I deem it proper and becoming to state the reasons which influence my judgment. The first

860 point *to be considered is, whether the funding act is in conflict with any of the provisions of our State constitution. One of these declares that the proceeds of all public land donated by Congress for public school purposes, and of all waste and unappropriated lands, the proceeds of all escheated property, and all fines collected for offences against the State, and such other sums as the General Assembly may appropriate, shall be set apart as a permanent and perpetual literary fund. The capitation tax and an annual tax upon the property of the State, of not less than one nor more than five mills on the dollar, are also to be applied to the public free schools for the benefit of all the people of the State. It will be perceived that these provisions dedicate the proceeds of the sale of escheated and waste lands—lands donated by Congress, and all fines collected to the cause of education. How is this object to be accomplished if the funding bill creates a valid and binding obligation upon the State? The purchasers of the lands mentioned and parties assessed with fines will have the right to discharge their indebtedness with these coupons in all cases. The same privilege will, of course, be accorded to all persons assessed with the capitation tax. That this is practically a diversion of the funds mentioned from the objects designated in the constitution, would seem to be too clear for argument. It is said, however, the Legislature, by taxation of other subjects, may raise a revenue for the public schools equal to the amount so diverted, and thus comply with the requirements of the constitution. But how is the Legislature in any one year to anticipate the amount that may be realized from these sources, and then by necessary taxation make provision for the deficiency thus created? But if this objection were removed, what right has the Legislature to apply in payment of the public debt a fund sacredly dedicated to the cause of education? The difficulty is not obviated by another

861 law raising the same amount of *revenue from other subjects of taxation. The Legislature is not authorized to legislate at all in respect to the school fund, except in furtherance of the objects contemplated by the constitution. It has no right to expose this fund to any contingencies or hazards of any sort. My objection is not based upon any idea that a

specific sum is set apart in the public treasury in particular coin and notes for the common schools which may not be touched; but that the Legislature cannot constitutionally provide that the school tax shall be paid in any other medium than money or its equivalent. And for the obvious reason that a fund is to be raised from the particular source designated, to be applied to the establishment of public free schools for the benefit of all the people of the State. These objects are effectually defeated by the funding act. Suppose the Legislature had passed an act directing that all fines, the proceeds of waste and unappropriated lands, the capitation tax and the literary fund, shall for thirty-four years be applied to the payment of the public debt, but at the same time providing it should be the duty of every succeeding Legislature to raise the amount thus diverted by a resort to other taxable subjects, will any lawyer or court maintain that such a law is not a palpable violation of the constitution? Whatever form such an enactment might assume, no future Legislature would be under the slightest obligation to respect it. The money derived from the sources already alluded to is a trust fund, and the General Assembly is made a trustee for its inviolable application to the promotion of the cause of education; and that body is as absolutely prohibited from appropriating it to any other purpose as any other trustee is restrained from applying a trust fund to his individual debts. It is said that the obligation to pay the public debt is as strong and sacred under the constitution as that of providing for the support of the common schools. That may be so, still it does not follow that revenues, "dedicated by the constitution to one object exclusively, can be applied to the other."

The constitution of Iowa contains a provision that certain designated funds, and such other means as the Legislature may provide, shall be inviolably appropriated to the support of common schools throughout the State. The Supreme court of that State, in construing that provision, decided "that whenever the Legislature raises a fund, by taxation or otherwise, for the support of common schools, it cannot, by any contemporaneous or subsequent legislation, divert the fund to a different purpose." *City of Dubuque v. County Judge of Dubuque County*, 13 Iowa R. 250. In *Crosby v. Lyon*, 37 Cal. R. 240, the Supreme court says: The Legislature provided that the board of supervisors shall have power to levy a tax not to exceed a specific sum, for the support of common schools in their respective counties, and by force of the constitutional provision in question, the money, when collected, becomes inviolably appropriated to school purposes. It would hardly be considered a valid answer to these objections to say, that as the identical bank notes received were not appropriated, it was competent for the Legislature to devote the money to other objects, and supply the

deficiency by a resort to other objects of taxation. The language of our constitution is much stronger. The tax must be imposed and collected, and when collected, must be appropriated in the specific way designated. The practical operation of the funding bill is to defeat these objects, to divert the fund before it reaches the treasury, and apply it to the payment of the public debt, in plain contravention of the express language of the constitution.

These are some of my objections to the funding bill, as affected by the constitution of Virginia. It can hardly be necessary to adduce argument or authority to show that no valid contract can be founded on a law which violates the constitution of a State. No binding obligation
863 *can result from such a law. It confers no legal right on the one party and imposes no corresponding legal duty on the other. Its repeal can, therefore, in no manner impair the obligation of a contract.

Conceding, however, the constitutionality of the funding act, I propose to consider the question of the power of the Legislature to repeal it.

The interest upon the public debt is estimated in round numbers at two millions of dollars annually. To meet this sum, coupons will be issued and used, to a large extent each year, in the payment of the public dues. To what extent they will be so used, it is impossible, in the nature of things, even to anticipate. The Legislature must, therefore, impose annually, a tax sufficient to pay the entire interest. It must also lay a tax sufficient to defray the ordinary expenses of government and to carry on the system of public schools provided for in the constitution. It is, therefore, clear, whatever else may happen, provision must be made for the creditors of the State, or the government will fall to pieces for the want of means to sustain it. It is substantially, and in its practical effects, an appropriation by the Legislature of 1870-71 of the public revenues to the amount of two millions of dollars each year for the next thirty-four years, and probably longer. It is claimed that the act imposing this obligation constitutes an inviolable contract, which this court may compel the Legislature to perform. In support of this, as it seems to me, alarming and extraordinary doctrine, certain cases decided by the Supreme court of the United States are much relied on. I do not mean to discuss the question, whether in construing our own constitution and laws we are bound to follow, with blind submission, the decisions of the Supreme court of the United States, however erroneous and unjust we may consider them.

This may be said, however, our own books contain the report of a celebrated case, in which this court unanimously
864 *refused not only to obey, but even enter upon its records, a decision of the Supreme court of the United States, notwithstanding the case involved the va-

lidity of a treaty, and an appeal had been taken under the twenty-fifth section of the judiciary act, from the judgment of this court to the Supreme court of the United States. These are, however, old fashioned doctrines, and have now but few avowed supporters anywhere. Every day's history but teaches the melancholy lesson that the Federal courts, the Federal Legislature and executive will, in the end, absorb every vestige of the rights of the States.

The cases of *Woodruff v. Trapnall*, 10 How. U. S. R. 190, and *Furman v. Nichol*, 8 Wall. 224, are those principally relied on here. They present substantially the same points, and I shall content myself with a brief reference to the last mentioned decision. It appeared in that case that the Bank of Tennessee was essentially a State institution. The State owned the capital and received all the profits. The Legislature, in its anxiety to increase the circulation of the notes, provided they should be received in payment of all public dues. The effect of this provision was to prevent the return of the notes for redemption, and thus the State was enabled to realize a clear profit from the interest on its loans, and from the notes which were never returned for payment. In this way the State of Tennessee became, in fact, a bank, assuming all the obligations and reaping all the advantages that appertain to these corporations. In the present case, if the State will derive any benefit from the funding bill—if that enactment is founded upon a valuable consideration—I am unable to perceive it. It is said that the creditor has released one-third of his debt. I do not so understand it, and I will hazard the assertion, the creditor does not so construe the law. If this was the intention of the framers of the act, they have adopted an obscure and equivocal mode of ex-
865 pressing a *plain and simple agreement. The creditor surrenders his bond and obtains a new one for two-thirds of his debt, and coupons for the interest. For the remaining third the bond is held in trust by the State, and a certificate is given him stating that payment will be provided for in accordance with such settlement as may be made with West Virginia. If that State is faithful to the obligations resting upon her, the creditor will receive the other third also. On the other hand, if she repudiates these obligations, there is no agreement or understanding absolving the State from the payment of such third. It is as much bound for the payment of the whole debt as before the passage of the funding bill. I am, therefore, unable to perceive that the State has derived any advantage from the creditors' acceptance of the provisions of the funding act. The contract, if such it be, is wanting in the essential element of a valuable consideration, so much relied on in the opinion of the Supreme court of the United States.

But the material distinction between the cases lies in the fact, that the notes of the Tennessee bank were entirely valueless to

the holders, unless they were permitted to use them in the payment of State dues. In this case, the coupons, although they may not be receivable in discharge of taxes and other demands of the State, constitute, nevertheless, a subsisting obligation as valid and binding on the State as the original bond held by the creditor. As the bondholder gave no consideration for the privilege of using the coupons in the payment of his taxes, so he will lose nothing to which he is justly entitled by the withdrawal of that privilege. He may, perhaps, lose the opportunity of speculating in these coupons; and he will be required to pay his shares or proportion of the taxes in the currency exacted from every other citizen. The State does not seek to repudiate the debt, or deny its validity, but simply postpones the
866 period *of payment. If the creditor is not satisfied, he may resort, I imagine, to his original obligation, which is in nowise impaired. The Legislature of the State has often arrested for a time the collection of private debts, and however the constitutionality of such statutes may be doubted, as applied to individuals, no State can be justly chargeable with impairing the obligation of a contract because of a failure or refusal to discharge all its liabilities at the appointed day. Governments are established for the benefit of mankind. They constitute a trust created for the general good, and that general good sometimes requires the dedication of every resource to the common cause. A State, under some great and overruling necessity, may feel impelled to call to its aid every arm and every dollar in the final struggle for existence. And so in times of great pecuniary distress and embarrassment, when credit is prostrate, finances disordered and the people reduced to general bankruptcy and ruin, extraordinary measures become necessary to restore confidence and prosperity to a prostrate and languishing State. Disasters like these have occurred to us in times past, and will occur again. They come upon all people. They constitute a chapter in every history. Of the measures necessary at such periods the legislative department, and not the judicial, must be the judge. It belongs to the former, and not to the latter, to say when the public burdens shall be increased or diminished, whether the public interests demand a payment of the State debt, or its postponement. According to the theory and practice of our government, the whole subject of taxation, the raising and collecting public revenue, and its appropriation, are under the exclusive control of the representatives of the people. These are sovereign powers, which no Legislature is competent to surrender; nor can it, by any contract or enactment, deprive any future Legislature of the
867 right to adopt any laws, to impose *any burdens, and apply the public revenue in any manner the public interest may require, not prohibited by the constitution.

This court held, in *Burroughs v. Peyton*,

16 Gratt. 470, that the Congress of the Confederate States could not, by any agreement with a private citizen to exempt him from military duty, create an obligation which the same, or any future Congress might not disregard, if the public interest demanded it. Judge Robinson, in delivering the opinion of the court, said: "By the term contract in the constitution is not meant to include rights and interests growing out of measures of public policy. Acts in reference to such measures are to be regarded as rather in the nature of legislation, than of contract; and although rights and interests may have been acquired under them, those rights and interests cannot be considered as violated by subsequent legislative changes which may destroy them. Whatever in the nature of a contract could be considered to exist, there must be implied in it a condition that the power is reserved to the Legislature to change the law thereafter, as the public interest may, from time to time, appear to require." Every word that is here said applies with peculiar force to the subject of taxation. What is taxation but the tribute paid by the citizen for the protection which he receives. It is not asked, but demanded, exacted by the government to fill the public coffers, that the general welfare may be promoted and the rights and the liberties of the people protected. In particular specific instances, it may be the subject of contract, and may be surrendered by the government. And this is all that was claimed or asserted in the opinion just quoted, which was delivered by me in the case of the City of Richmond v. Richmond and Danville Railroad Co., 21 Gratt. 604. And this is as far as the courts have gone in any case—that for a consideration received, the State may exempt from taxation certain rights and franchises; 868 but if the exemption *is made as a privilege only, it may be revoked at any time. But what is the exemption of a church or an institution of learning, or even a railroad corporation, probably called into existence by an agreement for such exemption—what is all this compared with an abandonment of the power of collecting the public revenue to the amount of two millions annually for more than a quarter of a century.

It is impossible to imagine a stronger instance of an attempt, by an irrevocable law, to diminish the powers of succeeding Legislatures in respect to the subject of taxation and the public revenue—powers inherent in all governments, and important to the well being of every organized society.

In the case of the Ohio Life Insurance and Trust Company v. Debolt, 10 How. U. S. R. 416, Chief Justice Taney, in discussing this subject, said:

"They (the Legislature) cannot, therefore, by contract, deprive a future Legislature of the power of imposing any tax it may deem necessary for the public service, or of exercising any other act of sovereignty confided to one legislative body, unless, indeed, the power to make such contract is

conferred upon them by the constitution of the State."

In Virginia it has been the uniform practice for each Legislature to impose the taxes necessary for the purposes of the government during the existence of such Legislature; and this attempt, thirty years in advance, to appropriate the sum of two millions yearly to a specific purpose, beyond the control of every power in the State, is believed to be without precedence in the history of this or any other State. If there be any advantage in the frequent recurrence of popular elections, it is only in the act, that the burdens annually laid upon the people are imposed by those fresh from their midst, and familiar with their condition, wants and circumstances. An irrevocable law, therefore, imposing 869 taxes to a large *amount, and dedicating the revenue thus raised to any specific object, even the payment of a public debt, would seem to be contrary to the genius and spirit of our institutions. If some future Legislature, in an hour of madness or folly, should provide that the bonds of the State should be received in payment of all public dues, we must equally hold that such legislation constitutes a valid and binding contract. This is the necessary result of the decision just made.

In *Woodruff v. Trapnall*, the Supreme court of the United States went so far as to hold that a defaulting collector, against whom a judgment had been rendered, had the right, even after the rendition of the judgment, to buy up the worthless notes of an insolvent bank, and with them discharge a judgment for gold. It is gratifying to know that this case was decided by a majority of one only, in a court consisting of nine judges. Mr. Justice Greer, with whom Justices Catron, Daniel and Nelson concurred, delivered a very able dissenting opinion. He protested against the assumption that the Supreme court had the power to compel a State of the Union, who repudiates her debts, to pay them, upon any idea that such refusal or repudiation impaired the obligation of a contract. He protested against the decision, because under it, so long as any portion of the three millions of dollars of notes issued by the bank before 1845 remained unpaid, the State of Arkansas could not collect a dollar of taxes of citizens in lawful money. He denied that when a State published to the world its willingness to accept payment of its notes in the issues of a bank, it amounted to a contract by implication, with the public and each individual comprising it, to guarantee the notes held by said banks; that this contract was with and is attached to said notes in the hands of the bearer, provided the notes were issued before such offer was withdrawn. Now, whether the majority or minority of the court 870 was right—with such *a division—the case, if it were analogous in all respects to the present, could not be regarded as binding authority, or even a precedent, in any other than a Federal court. It is

true that the subsequent decision was made by an unanimous court; but in the meantime Judges Catron and Daniel had left the bench, and we are to presume that the other dissenting judges had not abandoned their long entertained and most deliberate convictions, but simply acquiesced in the decision of a majority. However this may be, I do not consider either of the cases as involving the questions arising in this, and with the greatest possible respect for my brethren, I do not believe the Supreme court of the United States will ever hold that one Legislature can, by any form of enactment, bind succeeding Legislatures and the public revenue in the manner attempted in the provisions of the funding act; and until they so decide I am not willing that this court should sanction a precedent which may prove most disastrous to all the vital interests of the State, and under authority of which, practically, liens and mortgages may be given upon the future revenues of the State by statute assuming the form of contracts. We have heard a good deal of violated faith, and of the obligation and duty of paying the public debt. These are questions for the consideration of the Legislature, and not of the courts. They who purchased the bonds of the State were well aware of this when they made their investments. They who deliberately, and in defiance of a positive enactment of the Legislature that these coupons will not be received in payment of public dues, persist in purchasing them, are not entitled to the least favor or consideration, and should receive none from the court.

Upon this question of public faith I will say this: that for four years Virginia bore upon her bosom the burden of a civil conflict as great as any recorded in history.

871 She came out of the struggles presenting a lamentable *spectacle of a prostrate and bleeding State, without a currency, without any organized system of labor, one-half of her territory almost a waste, and vast numbers of her citizens reduced to hopeless insolvency and ruin. For years after the rage of battle had ceased she was kept in subjection to military power, under the rule of aliens and strangers, unacquainted with her laws, her traditions and her sufferings—and yet her statutes exhibit the gratifying spectacle of an honest endeavor on the part of her representatives, while still under the shadow of these great disasters, to make some provision for the payment of her creditors. I believe it will still be done, and payment be made from time to time until the last farthing is paid. But regarding the whole subject as involving the exercise of legislative functions of sovereign powers, I am content to leave it where it properly belongs, under our constitution and form of government. Virginia's representatives will not fail to preserve untarnished Virginia's honor.

After the decision of the court was announced, the attorney-general moved the

court for a rehearing of the case. This question was, according to the practice of the court, submitted to the judges who had concurred in the decision.

ANDERSON, J. When the decision of the court in these causes was announced a few days ago, I briefly stated orally the grounds of my opinion. And as they are brought before us again, on the petition of the attorney-general, for a rehearing, I deem it proper to state the reasons which have conducted me to the conclusion to which I have arrived.

It is the practice of this court to grant a rehearing if any one of the judges who united in the decision is in doubt as to its correctness. And considering the importance which has been attached to this 872 decision, and *that the motion is on behalf of the Commonwealth, I should be disposed to favor a rehearing if I could see any ground to doubt the correctness of the decision, or the slightest probability that it would be changed upon a reargument. But that not being the case, it would be worse than an unprofitable consumption of time to keep the public mind in suspense as to the final decision.

The whole case is embraced in this one inquiry, did the State contract, in the sense in which the word is used, in both the Federal and State constitutions, to receive these coupons from the holders thereof in payment of taxes or other dues to the Commonwealth? If so, the act of 1872 in question annuls a contract, and consequently impairs its obligation, and falls within the prohibition of the Federal constitution, art. I., section 10, which declares that no State shall "pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts"; and of the Virginia constitution, article V., section 14, which declares that "the General Assembly shall not pass any bill of attainder or any ex post facto law, or any law impairing the obligation of contracts," &c.

That a State may make a contract with an individual, which is binding on the State, will hardly be questioned by any one whose opinions are entitled to respect, or who has any self-respect. And that a State law impairing the obligation of such a contract is unconstitutional, is no longer an open question. If any doctrine of law can be said to be settled, this has been since *Fletcher v. Peck*, 6 Cranch, R. 87, 137, decided in 1810, upon the unanswerable reasoning of C. J. Marshall, and which afterwards, in the case of *State of New Jersey v. Wilson*, 7 Cranch, R. 164, was recognized, and by all the courts since, State and Federal, as far as I am informed, as the settled doctrine on that subject.

But it is said that one Legislature cannot bind a future Legislature. That is 873 not fairly the question here. It *does not fully present the case made by this record. The question rather is this: When a contract is made by the State with an individual, by authority of the supreme legislative power of the Commonwealth, can

a subsequent General Assembly annul it? I hold that it cannot. If it was such a contract as the Legislature had the power to make, or to authorize to be made, it is binding upon all subsequent General Assemblies, just as it is binding on the other departments of the government. The question is then reduced to this, had the General Assembly of 1871 power to authorize, on the part of the State, the contracts in question to be made?

The argument that the contracts are not binding, because not for valuable consideration, can hardly require an answer. The plainest understanding will comprehend that if I owe you a debt, upon which interest has accumulated, which I have not been prepared to pay, and I give you a new bond for the principal and accrued interest, and you surrender my old bond, it is a contract for valuable consideration. And not only that, but the consideration is sufficient to support a deed of trust on property, to secure its payment. *Exchange Bank for, &c., v. Knox & al.*, 19 Gratt. 739, 747; citing 13 Gratt. 427 and 15 Gratt. 153. If the receivability provision be regarded as security for payment, the pre-existing debt was sufficient consideration.

It matters not whether the State is released from one-third of the debt or not; if the new bond had been given for the whole of the debt, it would have been a valid obligation for a valuable consideration. Whether the State is released or not from one-third of the debt, it is very clear that in this transaction she has only assumed to pay two-thirds of it. And I could not say that she is bound for any more. That question, though one of great interest to the State, is not involved in this case. Because, however, it may be decided the obligations assumed by the State are for valuable consideration.

874 *The release of the State from a part of the old debt may, and does, affect the question, whether the contract was very beneficial to the State or not, but cannot affect the question whether the contract was valid or not. A contract may be for valuable consideration, and binding, although it may not be beneficial to the party; else the binding obligation of a contract would depend upon whether the contractor had made a good bargain or not, which is an absurdity. Whether the contracts made on behalf of the government with the public creditors were beneficial to the State, is a question about which men differ in opinion. It is not a question for the courts. When they are called upon to expound and enforce contracts, if the contract was fair and for a valuable consideration, it is not for them to inquire whether it was a good bargain or not for either party.

But it is argued that the Legislature had no power, under the constitution, to authorize a contract to be made binding the State to receive the interest coupons when due in payment of taxes, &c., upon the ground—First, that it is incompatible with other obligations imposed upon the Legislature

by the constitution of the State. And in support thereof, it is said those provisions of the constitution which set apart certain funds, and a certain proportion of the tax for the public schools, would be defeated by this legislation. It would seem to be a sufficient reply to say, that if it were impracticable to raise a sufficient revenue for both purposes, the latter did not impose an obligation on the Legislature paramount to the obligation to provide for the payment of the interest on the public debt. That was an obligation antecedent and paramount to the constitution itself, and could not be repudiated by the constitution, if it had so provided. But it is not repudiated nor ignored; but the obligation is clearly recognized by sections 7, 8, 19 and 20 of article 10—at least to pay Virginia's proportion. And, furthermore, this 875 being an obligation of debt, and *not eleemosynary in its character, as are the other provisions referred to, however desirable and important it may be, that they should be carried out, I hesitate not to say, this is of higher obligation. A man must be just before he can be generous.

But there need be no clashing of duties here. It is only required that the Legislature should levy a tax sufficient for both objects; a duty imposed on it by the constitution. It has not been the practice to set apart in the public treasury the identical money received for the public schools; nor is it required by the constitution, or act of Assembly. And the Legislature has discharged its constitutional obligation when it has set apart the required amount for that purpose.

But secondly, it is urged that the whole subject of taxation, the raising and collecting the public revenue, and its appropriation, is under the exclusive control of the representatives of the people, and that it is a power which cannot be surrendered. That principle will not be questioned; but to give validity and effect to the coupon provision of the act of 1871 does not in any sense, or in any respect, conflict with that principle. For it was the act of the representatives of the people. It was the act of a legislative assembly clothed with precisely the same powers with which the present General Assembly is vested. Indeed, it is the same legislative department of power in the government, though the persons delegated by the people to its exercise are not identical. Neither Assembly is superior to the other; and the acts of one, within the limitation of its powers by the State and Federal constitutions, are entitled to the same respect that the acts of the other are, and have the same binding force. A subsequent Assembly may, indeed, repeal the acts of a preceding, not because it is superior, but because it is equal, in legislative power. But the repeal, where rights have vested, can only operate prospectively. When it 876 undertakes to annul and invalidate *rights which have vested under the previous act, which was enacted

within the scope of the powers of the Assembly, it claims a superiority, and invades the rights of individuals which are guaranteed by the constitution.

A majority of this court, in *Griffin v. Cunningham*, 20 Gratt. 31, went very far in the expression of their sacred regard for this doctrine of vested rights, when they held that decrees of certain persons, who had been detailed or appointed by a military commander, to fill the office of judges of the Supreme court of Appeals of Virginia, during the military rule, and which were pronounced, after whatever of authority they had under the military appointment had ceased, against the protestation of at least one of the parties who complained, could not be reviewed by this court, because rights had been vested by the said decrees. And that an act of the Legislature which expressly authorized this court to review them, upon the petition of any party who felt himself aggrieved, was unconstitutional. J. Staples, in delivering his opinion, said: "The parties interested in them (the decrees) acquired thereby vested rights, of which they cannot be divested by special enactments of a retrospective character." Two of the judges held that the pretended decrees vested no rights, and that the law was constitutional.

In the case of the *Bank of the Old Dominion v. McVeigh*, 20 Gratt. 457, the court held that an act of the Legislature was unconstitutional, which authorized payment of a debt contracted to be made to the President and Directors of the mother bank, by a citizen of the Confederate States, to be made to the branch bank, when the place of business and the directory of the mother bank were within the enemy's lines, because it impaired the obligation of contract. In dissenting from that decision I did not controvert the principle, that if the law violated a contract between the State and the bank, or between the bank and its debtor, it was unconstitutional
877 *and void. But I held that it did not violate the contract between the State and the Banks, because the Legislature had reserved, in the act of incorporation, which was the contract with the banks, the right to alter and amend the charter; and under that reservation had the right to change the name and domicile of the bank, and the organ through which the body corporate might act and speak; and that it did not impair the obligation of the contract between the bank and its debtor, because the debt was not due to the President and Directors of the mother bank *proprio personis*, but was due the body corporate, and that a payment to the new agency was as much a payment to the creditor as payment to the old, who were not within the jurisdiction of the State, while the corporation was, and therefore was no violation of contract between the bank and its debtor.

It is true, that government may, in the exercise of the right of eminent domain, divest individuals of their rights of property, which public necessity requires should

be appropriated to public uses. But it is equally the settled law, that government cannot exercise this power without compensating the individual for the fair value of his property. This principle of eminent domain can, therefore, have no application to the questions involved in these causes.

But the doctrine that one legislative Assembly cannot invest rights which a subsequent Assembly may not divest, which has recently been promulgated, can find no warrant in reason or authority, and leads to the most pernicious consequences. If the Legislature may enact laws divesting you of your rights of property in contracts and personal securities, it may divest you of your title to your lands; for the bondholder is as much entitled to his bond as to his land. And as all our titles to real estate are mediately or immediately vested by acts of legislation, and as no time runs against the Commonwealth, if that doctrine be
878 true the tenure by *which we hold our lands is the will of the Legislature.

And so it may be said with regard to the rights and franchises which have been invested in all our railroad, manufacturing, and industrial and financial associations. Such a doctrine would doubtless be pleasing to those who hold that all private estates should be divested, and an equal division made amongst the people, "without distinction of color"—that it is against natural right that one man should have more of this world's goods than another. It is the principle of the freebooter and the highwayman, and can find no toleration within the sacred precincts of law and justice.

Thirdly, It is objected, that no rights vested by virtue of the contract on the part of the State, to receive the coupons in payment of taxes and public dues, because the General Assembly had no power to appropriate a part of the revenues of the State for a period of thirty-four years, for the payment of interest on the public debt in a way to bind future Legislatures. Is this so? Cannot one General Assembly make an appropriation of future revenues of the State, so as to vest in parties the right to the appropriation in such manner that it cannot be divested by a subsequent General Assembly?

The power to appropriate, as well as the power of taxation, is a legislative function.

Indeed, it is claimed by those who sustain the act of 1872 that they are sovereign legislative powers, which cannot be surrendered by the Legislature. By article V., section 1, of the constitution of Virginia, the legislative power of the Commonwealth is vested in the General Assembly. Consequently the Assembly which enacted the act of 1871 in question, was, during the term of its existence, fully invested with the whole legislative power of the State, and could appropriate the revenues, or such part of the revenues as was necessary to meet the annual legitimate liabilities of the State, as long as those liabilities existed,
879

isted, unless its powers in this *respect are limited by the State or Federal

constitutions. For it is an established principle that the State Legislatures are invested with all legislative powers which are not prohibited by the constitution of the State or of the United States. It is not pretended that any restriction of this legislative power can be found in the Federal constitution, and it is not embraced in the limitation of the powers of the General Assembly in the State constitution.

The convention which framed our State constitution might have withheld this power from the General Assembly, and doubtless would have done so if it had so designed, because it was then no novel principle of legislation in America. By the act of the Virginia Legislature of March 18th, 1856, treasury notes were authorized to be issued, not to exceed, at any one time outstanding, \$1,300,000 in principal, which, it was provided by the act, shall be received by way of setoff in liquidation of all taxes and debts due the Commonwealth after the 30th of September 1856. The issue of \$1,000,000 of notes was authorized by the act of March 14th, 1861, bearing six per cent. interest; \$2,000,000 by ordinance of April 30th, 1861, and \$4,000,000 by the ordinance of 28th of June 1861. All these issues were made receivable in payment of taxes and dues to the Commonwealth, and a doubt was never raised, that I ever heard, as to the constitutionality of that provision. The same principle of legislation had been practiced in other States of the Union—in Michigan as far back as 1841, and in Tennessee as far back as 1836, and by the Congress of the United States more frequently and on a more extended scale, from 1847 down to the act of July 17th, 1865; embracing an issue of bonds, registered and coupon, and treasury notes exceeding one billion, the coupons and treasury notes of the entire issue being made receivable and payable for taxes and public dues, except import duties, &c.

880 *I think I am, then, well warranted in saying that this was no novel principle of legislation when the constitution of Virginia was framed; and I infer from the fact that there is no limitation in the constitution of the powers of the General Assembly in this respect, that no limitation was intended.

But this power is recognized in the constitution, and the General Assembly is expressly required to appropriate a part of the revenue in advance for the extinguishment of the principal of the debt. Section eight of article X. of the constitution is in these words: "The General Assembly shall provide by law a sinking fund, to be applied solely to the payment of the principal of the State debt, which sinking fund shall be continued until the extinguishment of such State debt; and every law hereafter enacted by the General Assembly, creating a debt or authorizing a loan, shall provide a sinking fund for the payment of the same." This provision of the constitution does not invest the power in the General Assembly to appropriate a part of the annual revenues

of the State in advance, but imposes the obligation on it to exercise the recognized power with which it was invested for the purpose indicated in the way prescribed. And now, if it is a legislative function of the General Assembly to create a sinking fund, by an appropriation of a part of the revenue, thirty-four years in advance, to extinguish the principal of the public debt at its maturity, which appropriation cannot be disturbed or diverted from its object by subsequent General Assemblies, it would follow that to make an appropriation in advance for the payment of the interest of the public debt, is not contrary to the legislative function. And being stipulated for in this case, and made a part of the contract, its repeal by a subsequent General Assembly would fall within the prohibitory clauses of both the Federal and State constitutions above recited.

But fourthly, it is objected that the 881 provision in the act of 1871, obligating the Commonwealth to receive the interest coupons in payment of taxes and public dues, is a surrender or abdication of a power which, in future legislation, may be necessary to carry on the government, and incapacitates the Legislature to discharge important constitutional duties in future, and is, therefore, unconstitutional and void.

That the Legislature cannot enact a law which will disable and make it impossible for it to discharge important duties to the country, which the constitution devolves upon it, is a principle which I will not controvert. And this is the whole of *Burroughs v. Peyton*, 16 Gratt. 470, as far as it bears the remotest analogy to any question raised upon this record. In that case it was held to be the constitutional duty of Congress to provide for the common defence, and to call into the military service of the country every able-bodied citizen, if needed for the public defence, and that it was a power which Congress could not abdicate. And it was held that if the act of Congress could be construed to authorize, without limitation, able-bodied citizens to be released by contract forever afterwards from the obligation of rendering military service for the country, the act was unconstitutional, as it would, if carried into execution, divest Congress of the power to discharge an important duty essential to the public defence, which had been confided to it by the constitution, and the contract was void.

And it is now argued that, inasmuch as it is the constitutional duty of the Legislature to levy taxes and raise a revenue necessary to carry on the government and to fulfil its obligations—which it cannot fail to do without violating its constitutional duty—that an act, whether by the same Assembly or a previous one, which would deprive it of the power to discharge that constitutional duty, would be unconstitutional and void. What we have to consider, then, is, Is such the nature and effect of the coupon provision in the act of 1871?

882 *The presumption is in favor of the constitutionality of a law, and that the Legislature did not intend to enact a law which would in future incapacitate it to discharge its important legislative functions and constitutional duty. That was a matter which it concerned the Legislature to ascertain before they authorized the contract to be made. It was purely a legislative enquiry. It would not be meet or seemly in the judicial tribunals to go into extrinsic evidence of fact as to the operation of an act of the Legislature, to show that the act was unconstitutional. And when they enter upon such an enquiry they enter a field which is foreign to their jurisdiction. They invade the territory of another department of the government.

I would not say, however, that in no case would it be competent for the judicial tribunal to declare a law to be unconstitutional upon this ground. Such a case might be supposed. For example, if the Legislature should enact a law forever exempting the property, real and personal, of all the people of the State from taxation, who should claim the benefit of the exemption within a limited time, I am not prepared to say that such an act would not be unconstitutional. But if the judicial authority could interpose to annul a law enacted by the Legislature, upon the ground that it incapacitated it in future to discharge its important constitutional duties, it could only be in an extreme case, and where it was palpable on the face of the law, that such was intrinsically its nature, and that such must be its effect and operation.

It does not palpably appear from the intrinsic character of the act of 1871, or otherwise, that its provisions in relation to the receivability of the coupons amount to a surrender or abdication of any important power of the Legislature, or that it disables the Legislature now, or in future, to fulfil its constitutional obligation to raise a sufficient revenue to pay the interest 883 on the public *debt and carry on the government. It in fact only provides that the Legislature will do that which it is its constitutional duty to do, to levy a revenue sufficient to pay the interest on the public debt, and to carry on the government. To argue that an act which requires the Legislature to fulfil its constitutional duty is an abdication, or that it incapacitates it to do its constitutional duty, is a fallacy and a contradiction.

And the method which it adopts to secure it is not novel, as we have seen; nor is it an "ingenious contrivance" in any improper sense. It only authorizes the application of the equitable principle of setoff in such cases. And why is it not as equitable and just to apply this principle of setoff against the government as against individuals? Why should I not have the same right to setoff against a demand of the government against me, a just claim which I hold against the government, as I would have against an individual? It is said "governments are established for the bene-

fit of mankind." They should be, and not to trample on the rights of mankind. To be a benefit to mankind, they should act with the utmost good faith and integrity in all cases. They ought not to observe with less fidelity and integrity their contracts with individuals than they exact from them in their dealings with one another. In the *United States v. Mann*, 2 Brock. R. p. 9, which was a case of setoff against a demand of the United States, C. J. Marshall said: "The clearest principles of equity and law require that it (the setoff) should not be rejected; and if the court be permitted to take jurisdiction of the subject, it cannot be disregarded without disregarding also the soundest principles of law." The setoff was allowed against the United States demand.

Doubtless the General Assembly which enacted the law allowing the application of this principle believed they were making a judicious and beneficial arrangement for the Commonwealth; and that the re- 884 sources of *the State were sufficient to fulfil the engagements authorized to be made with the public creditors in good faith, and to carry on the government. A majority of the succeeding General Assembly, if not of a different opinion, believed it will be onerous on the people of the State to comply with the terms of those contracts, and at the same time to raise a revenue sufficient for the other purposes of the Commonwealth, which may be, in their opinion, of more importance or more beneficial to the State than paying the interest on the public debt, whilst a respectable minority believed that there is no incapacity on the part of the State to pay the interest on the public debt in fulfilment of the contract, and to carry on the government; and that to do so will not require any considerable increase of taxes. Which opinion is most correct is not a question for the court. But it is our province to say that the State cannot be relieved from the obligation of a contract any more than an individual can, because it is onerous.

We deeply sympathize with our fellow citizens in the burdens which have been thrown upon us as the result of the war, and the policy of the general government towards us since the war, which we have suffered in common with them. No people perhaps ever deserved better, and fared worse, than the people of Virginia. But the courage, firmness and fidelity to principle, with which they have borne the ravages of war, and none the less nobly the disasters consequent upon final defeat has attracted to them the admiration of all noble and generous minds; and I cannot believe that this same people would, for the sake of a few cents additional taxes upon the one hundred dollars value of property, be willing to repudiate their contract. I have no thought that a virtue which has been tried in the crucible of severest affliction, without faltering, will yield to so slight a pressure. It seems to be conceded by the action of the Legislature that the revenues

arising from the present rate of taxation *will be sufficient to meet all the other engagements and current expenses of the State, and pay four per cent. interest on the public debt, as adjusted by the act of 1871. To enable her then fully to redeem the pledge she gave to her creditors who accepted the adjustment proposed, would require an increase of but sixteen cents on the \$100 value of property, without resorting to other sources of taxation. I am not to be told that this great State, with such a population as she has, invested with a landed and personal property, actually assessed to be worth three hundred and seventy-five millions of dollars, which is probably at least a third less than its real value, is incapable of fulfilling the solemn contract which it made with its creditors through its Legislature. And the promulgation of such an idea would be ruinous to the public credit.

There is nothing then in the nature of the act itself, or in the circumstances of the country, to show that it is unconstitutional. But the constitutionality of such legislation has been settled, as far as it can be, by the Supreme court of the United States, in two cases, *Woodruff v. Trapnall*, 10 How. U. S. R. 190, and *Furman v. Nichol*, 8 Wall. U. S. R. 44. The former case was decided by a majority of only one. And I am free to say that there is much in the circumstances of that case, whilst I regard the principle as sound, which would cause me to doubt the correctness of the decision. But in the recent case of *Exchange Bank v. Knox*, 19 Gratt. 739, decided by this court, in which I did not sit, the principle decided in the above case was approved. And in *Furman v. Nichol* it was unanimously reaffirmed by the Supreme court of the United States.

In cases involving the construction of the constitution and laws of the United States, it seems now to be generally conceded that the decisions of the Supreme court are binding upon the State courts. And practically they are conclusive of the rights of the parties, whether *approved by the State courts or not. But I hold that this court is also supreme in its sphere, and is not bound to follow with "blind submission" any court on earth.

From the best consideration I have been able to give this subject, I have not a doubt on my mind that the decision is right. And such, I understand, is the case with the other judges who united in that decision. What, then, should this court do? We have been told, in the petition for a rehearing, that our decision has met with great disfavor. And outside of this hall the admonition has been given, that we hold our office at the will of the Legislature, and that it is perilous to thwart it. If this be so, that which has been regarded heretofore as indispensable to the security of the citizen in the enjoyment of his civil rights of life, liberty and property—the separation of the judicial power of the State from the legislative, and an independent judiciary—

is repudiated by our constitution. If we sit here to obey the behests of the Legislature, and to do its will and pleasure, why the mockery of having a judicial department in the State? The remarks of Judge Scott, in delivering his opinion in *Bouldin's case*, 6 Leigh, 639, in 1836, are appropriate to this occasion, some extracts from which I hope will not be considered out of place here.

Speaking of the convention of 1829-30—perhaps the most distinguished body of men that ever assembled on this continent, of which he was a distinguished member, he says: "No member of that body appreciated more highly than I did the inestimable value of an independent judiciary; none felt more intensely the thrilling appeal of the late Chief Justice (John Marshall, *clarum et venerabile nomen*), in which he deprecated 'an ignorant, a corrupt, or a dependent judiciary, as the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people,' and implored us not to 'draw down this curse upon Virginia.'" Again he *says:

"The courts of justice are the guardians of the dearest rights of man in a social state. To them is assigned the task of ascertaining and enforcing the rights and redressing the wrongs of every member of the community. It is there the ignorant find relief from the arts and frauds of the crafty and designing; it is there alone that wealth and poverty may contend on equal terms; it is there that the weak find refuge from the strong. They are formidable only to the guilty. It is not by laws alone, but by an enlightened, honest and fearless administration of justice, that every man may sit under his own fig tree, and there is none to make him afraid. What will be the condition of the poor and unfriended suitor? Who can resist a powerful and popular adversary? What chance for him who is marked out as a victim by government, if the judge stands in awe of political power? If ever those who lead and direct public opinion, not satisfied with victories in their appropriate field, shall wage war upon the courts, I trust the people will come to the rescue, and not realize the fable of the wolves and the sheep."

I am opposed to a rehearing.

The rehearing refused.

Mandamus awarded in the first case, and in the second judgment affirmed.

888 **Talley v. Robinson's Assignee.*

November Term, 1872, Richmond.

Absent, BOULDIN, J.*

1. *Specific Performance—Inadequacy of Consideration.*
—In September 1864, R sells land to T for Confederate money, which is paid, but the deed is not made.

*He had been counsel in the cause.

†*Specific Performance—Inadequacy of Consideration.*
—See *Stearns v. Beckham*, 31 Gratt. 391, also *foot-note* on this subject appended to *Ambrose v. Keller*, 23 Gratt. 769.

After the war T sues R for specific execution of the contract. If there be no other objection but inadequacy of price, the contract will be enforced.

2. **Same—Duress.**—R sets up the defense that the contract was made under duress: that he had been severely whipped by a mob and driven from the county. But it appears that T was in no way implicated in that outrage, though he had heard of it, and he gave R the price he asked for the land. The contract is valid.

3. **Contract—Unstamped—Admissible in Evidence.**—Though the contract was not stamped until it had been filed as an exhibit with the bill, it was admissible in evidence: and it would have been admissible though not stamped at the time it was offered in evidence.

4. **Specific Performance—Condition Precedent.**—T admitting in his evidence that he promised to pay to A for B \$75, in addition to the sum stated in the contract; though this is not stated in the contract or noticed in the pleadings, T should be required to pay it before specific performance is decreed.

This is an appeal from a decree of the Circuit court of Cumberland county, in a suit brought by the appellant, William D. Talley, against John Robinson, for the specific execution of a contract for the sale of a tract of land lying in said county, sold by Robinson to Talley by an agreement in writing, under the hand and seal of said Robinson, bearing date the 2d day of September 1864. The vendor is described in the agreement as a freeman of color, of the county of Amelia. The quantity of the land is not mentioned in the agreement,
889 *though the land is therein otherwise sufficiently described.

The said Talley thereby agreed "to pay to the said Robinson for the said land the sum of four thousand dollars in cash, as follows, viz: three thousand dollars, part thereof in Confederate treasury notes (new issue), and one thousand dollars, the balance thereof, in wheat, sheep, &c., viz: four sheep, eighteen bushels of wheat, and a small steer yearling." The whole amount of the price mentioned in the agreement, was paid down by the purchaser, but the land was not then conveyed to him; probably because the vendor had not then received a deed from Samuel Osborne, from whom he had purchased the land, or a part of it. Robinson having refused after the war, to make a deed to his vendee, according to the said agreement, the said vendee, Talley, in February 1867, brought this suit against Robinson and Osborne to enforce the execution of the said decree. Robinson filed his answer to the bill, insisting that the contract was invalid and not binding on him, because:

"1st, It was extorted from him, at a time when he was driven by violence from the county, and every right of a citizen denied him, and was made under duress; and,

"2d, The said contract, and the alleged receipt for \$3,000 (filed with the bill) are illegal and void, for the further reason that the same are not stamped according to the laws of the United States."

And he claimed a rescission of the contract

on principles of equity and justice. After the answer was filed Talley withdrew the agreement and had it stamped; after which he filed an amended bill, stating that he had had the agreement duly stamped since the filing of the answer; and in regard to the further ground relied on by Robinson for not performing his contract, "that he was driven from the county of Cumberland by violence, and that said contract was made under duress;" the complainant
890 *stated "that he had no agency whatever in driving the said Robinson from the county, nor any hand in oppressing him in any way, and that he entered into said contract freely and voluntarily, so far as complainant was concerned." He also stated that since the original bill was filed Osborne and wife had conveyed all their right, title and interest in the land to Robinson by deed duly admitted to record, of which an office copy was filed as an exhibit with said amended bill.

Robinson filed an answer to said bill, in which he contended that it was too late to stamp the contract and receipt after complainant had used them, and repeated the defences relied on in his original answer; and he further stated, "that the complainant did not pay a fair price for said land. That \$4,000 in Confederate treasury notes, in September 1864, was in fact but \$133. That such a contract is inequitable, and ought not to be enforced in a court of equity;" and that he was ready to pay to complainant the value, in currency, of the Confederate treasury notes paid him for said land, so that no injustice will be done to complainant, and respondent would be restored to his rights. The only evidence taken in the cause consisted of the depositions of the vendor and the vendee. The vendor, Robinson, in his deposition stated that he had been whipped by R. B. Trent and a good many others (some twenty-five or thirty men), driven from the county, and forbidden to be seen in it; that he would not have contracted to sell the land had he not been forced to do it by the treatment he received as aforesaid; that he did not know what best to do with the property; that they were cutting and chopping the timber so, he could not manage it; that being forbidden to be seen in the county he had to come in the night and go through the woods in the day, where he saw Mr. Talley and had a talk about the contract; that they afterwards met at the house of Margaret Lipscomb, where it seems
891 they entered into the contract; *that Talley told him that Mr. Coleman (of whom it seems witness had asked advice), had written the contract, although he knew at the time that witness was afraid to be seen, because he had been threatened to be shot if seen in the county; that he was so flurried he did not understand the contract; and that the land was worth \$4 per acre in good money at the time of the sale, and he thought it was worth the same when he gave his testimony.

In his cross-examination the witness admitted that Talley had made no threats against him, and was not with Trent's party when they whipped him. In answer to a question, "Did he apply to you to purchase the land in controversy, or did you make the application to him?" he answered: "We met in the woods on an old log. I went to see him about his blacksmith's account at my shop, and we then got to talking about the land, and he said he would not mind buying to straighten his line." To another question, "What did Mr. Talley agree to give you for the land?" he answered: "He said he would give me \$4,000 for the land, and that he would pay to Betsy Anderson about \$78 that I owed her for her dower right in another lot of land." The witness admitted that full payment had been made by Talley for the land, with the exception of the \$78 agreed to be paid to Betsy Anderson, which witness said had not been paid.

The vendee, Talley, in his deposition, in answer to a question, "Whether or not he had any agency whatever in mobbing the defendant, John Robinson, and driving him from the county of Cumberland?" stated as follows, to wit: "None at all. I was opposed to the whole proceedings, which John Robinson very well knew. I think I told him so the very day he speaks of in his deposition, when we were sitting on the log in the woods, where he came to me. I told him if they drove him off on account of his being a rogue, there would be
892 *a plenty more left behind. I was opposed to the whipping of him by Trent and his party. I was solicited to join them and refused. They were not the right sort of men for me." Being asked to state, as well as he could recollect, all the circumstances attending his purchase of the land, he answered: "The subject might have been mentioned the day we were sitting on the log, but I don't recollect it. John Robinson sent for me to meet him at Frank Lipscomb's, and I did so. We undertook to make a trade, and I agreed to give him \$4,000, his price, for the land. He wished to reserve a parcel of timber trees, and this split us in the trade. I think the second morning afterwards he came to my house and called me out. He told me that he would agree to leave the timber out if I would agree to alter the contract, and take some wheat, and yearling and some sheep, to the amount of \$1,000. I agreed to this proposition. He said that he would get Creed Coleman to draw up the contract, and it was agreed that we should meet at Margaret Lipscomb's, and we met accordingly. The contract was drawn by Mr. Coleman and the money, \$3,000, paid; receipts were delivered, and the property he was to get, as specified in the contract, was afterwards delivered to John Robinson." In his cross-examination he admitted that at the time he contracted for the land he agreed to pay to Mrs. Betsy Anderson \$75 for John Robinson, in addition to the \$4,000, and that he had not paid it, though he said

he was ready to pay it at any time he might get the deed. Being asked "Did you know at the time you made the contract that John Robinson had been severely whipped and driven from the county, and that he had been forbid to come to the county?" he answered: "I did not know it, because I did not see it; but heard so and believed it."

In August 1869, it appearing to the court that the said Robinson was a bankrupt, and that Samuel R. Seay had been appointed as his assignee, by consent of parties,
893 *it was ordered that the cause be there-after proceeded in in the name of said Seay as such assignee. On the 11th day of March 1870, the cause came on to be heard, when the court made a decree in the words, or to the effect, following, to wit: "It appearing from the evidence in this cause that the defendant, John Robinson, in disposing of the land in the proceedings mentioned, was induced to do so because of lawless violence, which, after inflicting great bodily injury on him, kept him in fear and jeopardy of his life; of all which the plaintiff was informed when he entered into the contract with the said Robinson for the purchase of the said land; and it appearing that the price agreed to be paid for the said land is inadequate; and it also appearing that the said contract was made for treasury notes of the Southern Confederate States as the standard of value, and that the \$4,000 was, on the day the contract was made, only worth \$166, and that the said land was, on the 2d day of September 1864, worth \$500 at the least;" the court "doth adjudge, order and decree that unless the said William D. Talley shall, in ninety days, pay to Samuel R. Seay, assignee in bankruptcy of John Robinson, the sum of \$334 in gold, or its equivalent, he shall deliver to said Seay, assignee as aforesaid, the tract of land in the proceedings mentioned. But before the said Seay shall take possession of the said land, he shall pay to the said Talley the sum of \$166 in gold, or its equivalent, it being the true value of the \$4,000 in Confederate treasury notes paid by said Talley to said Robinson for the purchase of said land. And the court doth further adjudge, order and decree that unless the said plaintiff shall comply with this decree in ninety days, the sheriff of this county do deliver possession of the said land to the said Seay, assignee of said Robinson, as soon as he shall have paid the sum of \$166 to the said Talley as aforesaid." From this
894 decree Talley applied to a *judge of this court for an appeal, which was accordingly allowed.

Marshall, for the appellant.
J. Alfred Jones, for the appellee.

MONCURE, P., delivered the opinion of the court. After stating the case he proceeded as follows:

The ground of inadequacy of consideration relied on in this case, in resistance of

the claim for the specific performance of the contract in the proceedings mentioned, is wholly unsustainable. In the first place, there is no proof of such inadequacy in the case. There is no proof that the land was not sold for its full value, in Confederate money. There is no proof as to what it was worth in Confederate money. There was some proof as to what it was worth in gold, or its equivalent, at the time of the sale. But it was not sold for gold or its equivalent; and could not have been at that time. The only currency of the country then was Confederate States treasury notes; and all sales of land then made for cash in that part of the country were made for that currency. Confederate money, though greatly depreciated at that time, had a value in the purchase of land and many other commodities, which greatly exceeded its value as compared with gold.

But if it could be considered, that the price for which the land was sold was inadequate; in other words, if there had actually been as great a disparity between the real value of the land, and the value of the consideration for which it was sold, as the court below supposed that there was; it has been held by this court, that mere inadequacy of consideration is not, of itself, a sufficient ground for refusing a specific execution of a contract. In order to have that effect, there must be something else in the case, which, in connection with 895 the ground of *inadequacy, would make it inequitable or unconscionable to enforce the specific performance of the contract. *Hale v. Wilkinson*, 21 Gratt. 75.

Then, is there any other ground of defence in this case, which, either in itself, or in connection with the supposed inadequacy of consideration, is a good defence to the suit?

The only other ground relied on which can possibly have that effect, is the alleged ground of duress. Can that ground have that effect?

Undoubtedly, a great outrage was perpetrated by certain persons upon Robinson (whatever his offence may have been), by whipping him and driving him from the county; and the perpetrators of it were liable to a prosecution and condign punishment therefor. And if any person concerned in or connected with, that outrage, had thereafter, and by means thereof, made the contract with Robinson for the purchase of his land, the contract might have been considered as made by him under duress; and certainly a court of equity would not have afforded its aid to such person to compel the specific execution of the contract.

But it is not pretended by Robinson that Talley was in any manner concerned in, or connected with, that outrage. And Talley proves that he was not; that he was opposed to the whole proceeding; and that Robinson very well knew the fact. Possibly, Robinson might not have sold his land if he had not been driven from the county and forbidden to return to it. But how can that affect the question if the sale was fairly

made to one having no connection with the outrage committed against him? The contract was deliberately and fairly made; the offer seems to have been first made by Robinson to Talley, after an ineffectual effort to sell the land to another; and Talley made the purchase at the price at which the land was offered to him by Robinson. There

appears to have been a total absence 896 of any attempt or *wish on the part of Talley to take advantage of Robinson's situation, or to get the land at an undervalue. How then can it be said that the contract was made by Robinson under duress? He, Talley, had heard and believed that Robinson had been severely whipped and driven from the county, and forbidden to return to it. But that fact did not incapacitate Robinson to sell the land, or Talley to buy it. To be sure it was good cause for exciting the cautious scrutiny of the court, to ascertain if there was any unfairness in the transaction. But having ascertained, upon the closest scrutiny, that the conduct of the purchaser was perfectly fair, as it seems clearly to have been, there was nothing in the situation of Robinson, or the circumstances under which the contract was made by him, to afford him any good ground of defence, either taken by itself or in connection with the supposed inadequacy of price, to a suit for the specific performance of the contract.

There is certainly no ground for the defence of duress in the case, as the authority cited in the brief of the counsel for the appellant clearly shows. The duress (as the counsel correctly say) must have for its object the procurement of the contract. "The threatening, beating or imprisonment must be to this end; and hereupon the deed must be made; for otherwise the deed shall not be said to be by duress." "If I be imprisoned at one man's suit (be the cause just or not), and being in prison, I make an obligation or any other deed to a third man, this shall not be said to be by duress, but it is a good deed." 1 Sheppard's Touchstone, p. 61.

There was another ground of defence taken by Robinson, to wit: that the contract and receipt for the purchase money were not duly stamped according to the laws of the United States when the suit was brought, and, therefore, could not have been used as evidence in the suit. There are two sufficient answers to this ground of defence:

1st. That the said instruments were 897 duly *stamped in the progress of the cause, and before they were used as evidence therein; and 2ndly. That the omission of a stamp required by a law of the United States, while it may be an offence punishable by the courts of the United States, does not affect the question of the admissibility of evidence in a State court. 21 Gratt. 78.

We think, therefore, that this is a proper case for the specific execution of the contract.

But it appears from the evidence in the cause that, in addition to the price agreed

in the contract to be paid for the land, Talley agreed to pay to Mrs. Betsy Anderson \$75 for Robinson, and had not paid it when his deposition was taken; though he said therein that he was ready to pay it when he got the deed. To be sure, nothing is said in the pleadings in the cause, or in the written contract, about this \$75. But still it ought to be paid, if it has not already been paid, and such payment ought to be made as a condition of the relief to be given by the court by way of specific execution of the contract.

We are, therefore, of opinion that the decree appealed from ought to be reversed, and the cause remanded to the court below for further proceedings to be had therein, in order to a specific execution of the contract according to the principles declared in the foregoing opinion; and that an account should be taken, if necessary, to ascertain whether the said payment has been made to Mrs. Anderson, and if such payment has not already been made, it ought to be required to be made, as a condition of the specific execution of the contract in behalf of the appellant.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the appellant is entitled to have a specific execution of the agreement filed with 898 *the bill. But although he has paid the full amount of the consideration expressed in the deed, yet as it appears from his admission in his testimony, that he had agreed to pay to Mrs. Betsy Anderson seventy-five dollars for the appellee, John Robinson, in addition to the four thousand dollars, the amount of the consideration expressed in the deed, and had not paid the said sum of seventy-five dollars at the time he gave his testimony; the court is of opinion that he ought to be required to make such payment, if he has not already made it, as a condition of the specific execution of the said agreement, and that an inquiry should be made by a commissioner of the court, if necessary, to ascertain whether such payment has been made or not. Therefore, it is decreed and ordered that the said decree be reversed and annulled; and that the appellee, Samuel R. Seay, assignee in bankruptcy of the appellee, John Robinson, do pay, out of the assets of the said bankrupt, to the appellant his costs by him expended in the prosecution of his appeal aforesaid here. And it is ordered that the cause be remanded to the said Circuit court to be further proceeded in to a final decree, in pursuance of the foregoing opinion. Which is ordered to be certified to the said Circuit court of Cumberland county.

Decree reversed.

899 *Canada v. Commonwealth.

November Term, 1872, Richmond.

Absent, CHRISTIAN and BOULDIN, Js.*

Case at Bar—Indictment—Verdict.—C is indicted for feloniously and maliciously cutting, striking,

*BOULDIN, J., had been counsel in the case.

†See monographic note on "Autrefois, Acquit and

wounding, &c., H, with intent to maim, disfigure, disable and kill. The indictment charges that C made an assault upon H, and feloniously and maliciously, &c. The jury find "the prisoner not guilty of the malicious cutting and wounding as charged in the within indictment; but guilty of an assault and battery as charged in the within indictment, and assess his fine at \$500. **Held:**

1. **Same—Interpretation of Verdict.**—This is an acquittal of the prisoner of the felony charged, whether of the "malicious" or "unlawful" cutting, &c., with intent to maim, &c.; and it is a conviction for the misdemeanor of assault and battery.

2. **Same—"Malicious"—"Unlawful."**—Though the indictment only uses the word "malicious," the jury might have found the prisoner guilty of the "unlawful" cutting, &c., with intent, &c.

3. **Indicted of Felony—Convicted of Misdemeanor.**—Though the indictment is for a felony, the assault and battery being charged in it, the prisoner may be acquitted of the felony, and convicted of the misdemeanor; and the jury may assess a pecuniary fine upon him, but not imprisonment.

4. **Same—Same—Imprisonment—Fine.**—Upon such a conviction the court may sentence the prisoner to be imprisoned in the county jail, in addition to the pecuniary fine.

In January 1872, John M. Canada was indicted in the County court of Halifax for the feloniously and maliciously cutting, stabbing and striking J. H. High, with intent to maim, disfigure, disable and kill him. The jury found him not guilty of the malicious cutting and wounding, but guilty of an assault and battery, and 900 *assessed his fine at five hundred dollars. And the court rendered a judgment against him for the fine, and costs; and that he be imprisoned in the county jail for six months. The prisoner took two exceptions to rulings of the court; and carried the case by writ of error to the Circuit court of Halifax county; where the judgment was affirmed. He thereupon applied to a judge of this court for a writ of error, which was awarded. The case is fully stated by Judge Moncure in his opinion.

E. Barksdale and J. Alfred Jones, for the appellant.

The Attorney-General, for the Commonwealth.

MONCURE, P. In January 1872, John M. Canada was indicted in the County court of Halifax for feloniously and maliciously inflicting bodily injuries on J. H. High, with intent to maim, disfigure, disable and kill. There were three counts in the indictment, charging the injuries in a different manner—as 1st. By cutting; 2ndly. By

Convict," appended to Page v. Commonwealth, 26 Gratt. 948; see also, *foot-note* to this case. See also, Stuart v. Commonwealth, 28 Gratt. 908, and *foot-note*; Jones v. Com., 31 Gratt. 833, 834; Benton v. Commonwealth, 89 Va. 574, 16 S. E. Rep. 725; State v. Newsom, 13 W. Va. 807; State v. Howes, 26 W. Va. 113; State v. McClung, 35 W. Va. 285, 13 S. E. Rep. 655; *Ex parte* Garrison, 36 W. Va. 668, 15 S. E. Rep. 418.

wounding; and 3dly. By beating, striking, wounding and cutting "him, the said J. H. High, with a certain wagon spoke," whereby "he, the said John M. Canada, by means of the blows, cuts and wounds inflicted with the said wagon spoke," "feloniously and maliciously did cause the said J. H. High great bodily injury." In each of the counts the same technical words of description of the offence are used, and the only words so used are "feloniously and maliciously," and in each of them the act is charged to have been done "with intent to maim, disfigure, disable and kill." In the first two counts the manner of the injury is described by one only of the acts enumerated in the statute creating the offence, the word used in the first being the word "cut," and that used in the second being the word "wound." In the last count the manner of inflicting the bodily injury is more minutely and specifically stated.

At the commencement of each of the 901 counts, as is usual, "if not necessary, in every indictment for an offence involving personal violence, it is charged that the accused 'did make an assault' upon the party injured.

Afterwards, to wit: in February 1872, the accused having been arraigned upon the said indictment, pleaded not guilty thereto, and was tried by a jury, which found a verdict in the following words: "We, the jury, find the prisoner not guilty of the malicious cutting and wounding, as charged in the within indictment, but guilty of an assault and battery, as charged in the within indictment, and assess his fine at five hundred dollars." Thereupon the prisoner moved the court to arrest the judgment, because the verdict was insufficient. But the court overruled the said motion, and gave judgment against the prisoner for the said fine and the costs of the prosecution; and also that he be imprisoned in the county jail of said county for the period of six months.

Two bills of exception were taken by the accused to the said judgment, and made a part of the record. In the first it is stated "that upon the trial of the cause, the court instructed the jury that, upon the indictment, they could find the prisoner guilty of the offence therein charged, or done maliciously, 'with intent to maim, disfigure, disable or kill, and punish him by confinement in the penitentiary not less than one nor more than ten years; or if they believed the acts therein charged were done unlawfully, but not maliciously, with the intent aforesaid, the accused could, at their discretion, either be confined in the penitentiary not less than one nor more than five years, or be confined in jail not exceeding twelve months, and fined not exceeding five hundred dollars; or they might find him guilty of assault and battery, and fine him not exceeding five hundred dollars, and imprisonment at the discretion of the court. And after the jury had rendered their verdict, the accused moved the court to arrest the judgment, on the ground that ac-

cording to the terms of the statute 902 *under which the indictment was found and the accused tried, to wit: the 9th section of chapter 191 of the Code of 1860, the punishment prescribed for a white person found guilty of unlawfully, but not maliciously, committing the offences mentioned in said section, is confinement in the penitentiary not less than one nor more than five years, or confinement in the jail not exceeding twelve months, and a fine not exceeding five hundred dollars, at the discretion of the jury, and not a fine alone without imprisonment, as was found by the verdict of the jury." But the court overruled the motion in arrest of judgment; and the accused excepted.

In the second bill of exceptions it is stated "that upon the trial of this cause, after the jury had rendered their verdict, the court ordered that the prisoner, who is a white man, be confined in the county jail for the term of six months in addition to the punishment imposed by the jury. And thereupon the prisoner, by counsel, moved the court in arrest of judgment, on the ground that, according to the provisions of the statute" aforesaid, "the punishment prescribed for a white person found guilty of unlawfully, but not maliciously, committing the offence mentioned in said section, is confinement in the penitentiary not less than one nor more than five years, or confinement in jail not exceeding twelve months and a fine not exceeding five hundred dollars, at the discretion of the jury, and not of the court." But the court overruled the said last mentioned motion also; and the accused again excepted.

To the said judgment of the said County court the accused obtained a writ of error from the judge of the Circuit court of said county; by which last mentioned court the said judgment was affirmed. And to the said judgment of affirmance the accused obtained a writ of error from a judge of this court; which is the case we now have to dispose of.

The statute under which the accused 903 was indicted is *to be found in the Code, page 784, ch. 191, sec. 9, which declares that "if any free person maliciously shoot, stab, cut or wound any person, or by any means cause him bodily injury, with intent to maim, disfigure, disable or kill, he shall, except where it is otherwise provided, be punished by confinement in the penitentiary not less than one nor more than ten years. If such act be done unlawfully, but not maliciously, with the intent aforesaid, the offender shall, at the discretion of the jury," &c., "either be confined in the penitentiary not less than one nor more than five years, or be confined in jail not exceeding one year, and fined not exceeding five hundred dollars."

This statute was taken, substantially, from the act of 1847-8, called the "Criminal Code," ch. 3, sec. 10, Acts of Assembly 1847-8, p. 96, the said tenth section of the said act being a substitute for sections 1 and 2 of chapter 156 of the Code of 1819,

entitled "An act to reduce into one act the several acts against malicious or unlawful shooting, stabbing, maiming and disfiguring." 1 R. C. p. 582. Section 1 of the said chapter was against "unlawful shooting, stabbing, maiming and disfiguring;" and section 2 was against "malicious shooting, stabbing, maiming, and disfiguring."

The invariable practice in prosecutions under the act of 1819 was to insert two counts in the indictment, one charging the offence as having been committed "unlawfully," in violation of the first section, and the other charging the offence as having been committed "maliciously," in violation of the second section of the act. And if the jury considered the accused guilty of committing the act charged "unlawfully," but not "maliciously," they would find him guilty under the first count, and not guilty under the second.

By the present Code, ch. 208, § 29, p. 838, it is provided that "on any indictment for maliciously shooting, stabbing, cutting or wounding a person, or by any
904 *means causing him bodily injury, with intent to kill him, the jury may find the accused not guilty of the offence charged, but guilty of maliciously doing such act with intent to maim, disfigure or disable, or of unlawfully doing it with intent to maim, disfigure, disable or kill such person." According to this provision it is only necessary to insert one count in an indictment for any offence named in the 9th section of chapter 191 of the Code, and in that count to charge the act as done "maliciously." Under such an indictment the accused may be found guilty generally, or guilty of doing the act charged in the indictment with the intent therein mentioned, "unlawfully," but not "maliciously," according to the evidence.

The indictment in this case was framed in conformity with the provision aforesaid, except that it charges the act as having been done "with intent to maim, disfigure, disable and kill," and not "with intent to kill" only, as mentioned in the said provision. There are three counts in the indictment, charging the act in different forms; but all of the counts charge it as having been done "maliciously," and the word "unlawfully" nowhere occurs in the indictment. Still, by the express terms of the provision aforesaid, it was competent for the jury to have found the accused not guilty of doing the act therein charged "maliciously," but guilty of doing it "unlawfully." Though, if the jury had found the accused not guilty of maliciously doing the acts charged in the indictment, with intent as therein mentioned, and had found nothing more, that would have been an acquittal of the whole offence charged, including any offence, whether felony or misdemeanor, of which the accused might have been convicted under the indictment.

It was not only competent for the jury to acquit the accused of "maliciously" doing the act charged against him, and to con-

vict him of "unlawfully" doing it
905 with *intent as aforesaid, both of which offences are felonies; but it was also competent for them to acquit him of the former offence, and to convict him of any other offence substantially charged in the indictment, whether such other offence be felony or misdemeanor. The Code, chapter 208, section 27, p. 838, declares that "if a person indicted of felony be by the jury acquitted of part and convicted of part of the offence charged, he shall be sentenced for such part as he is so convicted of, if the same be substantially charged in the indictment, whether it be felony or misdemeanor." The offence of assault and battery, which is a mere misdemeanor, is substantially charged in the indictment in this case, the acts which constitute it being part of the felony therein charged. If the accused had been convicted of the felony, then the misdemeanor would have been merged in the felony. But if the accused was acquitted of the felony, it was competent for the jury to convict him of the misdemeanor, to wit: of the assault and battery substantially charged in the indictment. That this is the true construction of section 27 of chapter 208 of the Code, is fully shown by the case of Hardy and Curry v. The Commonwealth, 17 Gratt. 592. The application of that section to this case is much stronger than it was to that. There, though an assault was expressly charged, a battery was not charged, in terms, in the indictment. Here both assault and battery are expressly and necessarily charged. And if the section does not apply to this case, it is difficult to conceive one to which it would apply.

Then the only question is, did the jury, by their verdict, acquit the accused of the felony and convict him of the assault and battery charged in the indictment? And this is a mere question of the construction of the verdict. What was the meaning of the jury?

In my view of the case their meaning is very plain, and their verdict is directly
906 responsive both to the law *and the instruction which they receive from the court. Under the indictment the jury were authorized by law to convict the accused either of a felony or of a misdemeanor, to wit: assault and battery; each of which offences, or the facts constituting each, are expressly and fully charged in the indictment. And they found him not guilty of the felony, but guilty of the misdemeanor charged as aforesaid. That was the effect, and almost the very words, of their finding. And that such was their meaning is confirmed by all the surrounding circumstances of the case. I say they found him not guilty of the felony charged in the indictment. It is true, they say in their verdict "not guilty of the malicious cutting and wounding as charged in the within indictment." Is not that equivalent to finding him not guilty of the felony charged in the indictment? What is the felony charged in the indictment? Is it

not, in effect, "the malicious cutting and wounding," with intent to maim, disfigure, disable and kill? And is not this charge made in the very language of the Code, chapter 208, section 29? It is true that the same section authorizes the jury on such a charge to find the accused not guilty of the offence charged, but guilty of unlawfully doing the act charged, with intent to maim, disfigure, disable or kill. They might have so found, but they did not. They merely found, as to the felony charged, "not guilty of the malicious cutting and wounding as charged in the within indictment," which was, in effect, a finding of "not guilty of the felony charged in the indictment." While the Code, chapter 191, section 9, creates two offences, to wit: "malicious" and "unlawful" wounding with intent to kill, &c., both of which are felonies, the Code, chapter 208, section 29, authorizes the indictment to be so drawn as to charge the act to be done "maliciously," without using the word "unlawfully," and authorizes the jury under such an indictment

to find the accused guilty of unlawfully doing the act *charged with intent, &c. In other words, in such an indictment the word "maliciously" embraces in its meaning the word "unlawfully" also, and a general finding of "not guilty of the malicious cutting and wounding as charged in the within indictment," is, in effect, a finding of not guilty of unlawful, as well as of malicious, cutting and wounding, &c. Surely, if the word "malicious" is sufficient in the indictment to embrace the word unlawful, it is sufficient for that purpose in a verdict on such an indictment. Beyond all question, a verdict which negatives a charge of felony in the very words in which the charge is made must be a sufficient finding of not guilty of the whole felony charged, unless, indeed, there be in the same verdict an express finding against the accused of some particular felony embraced in the charge, either actually or by provision of law.

But it is contended that in this case the jury did not only find the accused not guilty of the "malicious" cutting and wounding as charged in the indictment, but also, in effect, found him guilty of "unlawfully" doing the act therein charged, with intent to maim, disfigure, disable and kill.

The words of the verdict, after finding "the prisoner not guilty of the malicious cutting and wounding, as charged in the within indictment," are "but guilty of an assault and battery, as charged in the within indictment, and assess his fine at five hundred dollars."

It seems to be strange to argue that the jury intended to convict the accused of a felony, when they expressly convicted him of a misdemeanor—that is, of an assault and battery; and perhaps still more strange, that such an argument should be made by the counsel of the accused. If they had intended to convict the accused of a felony, other than the doing of the act charged with the intent charged,

"maliciously"—in other words, of doing it "unlawfully"—there was a plain mode of such conviction, *and that mode was expressly prescribed by the statute, Code, chapter 208, § 29, to wit: by finding him "guilty of unlawfully doing the act with intent to maim, disfigure, disable or kill." Instead of that they expressly find him "guilty of an assault and battery."

Now, it was just as competent for the jury to find the accused guilty of an assault and battery under the said indictment, according to the Code, chapter 208, § 27, as it was for them to find him guilty of unlawfully doing the act therein charged, with intent as aforesaid, and they found the former in express terms, and not the latter. How, then, can it be said that they meant to find the latter?

It is argued, notwithstanding this express finding of the former, that they meant to find the latter, because they say they find the accused guilty of assault and battery, "as charged in the within indictment;" which words, it is argued, mean that they find him guilty of all the acts charged in the indictment, with all the intents therein charged, except that the acts were not done "maliciously;" and therefore, that they find him guilty of felony in "unlawfully" doing them with the intents aforesaid.

A person cannot be convicted of any offence, even though it be of a misdemeanor, under an indictment for felony, unless the offence, or the acts constituting it, be charged in the indictment. And, therefore, the expressions, "as therein charged in the indictment," seem to mean nothing more than the law would imply in their absence. Indeed, they seem to serve an appropriate, if not a necessary, purpose in applying the general words "an assault and battery," and making the verdict more certain as to the particular assault and battery of which the accused was intended to be convicted. In fact, these words are used in conformity with the express language of the statute, which authorizes a conviction for misdemeanor under an indictment for felony.

That *statute declares that a person indicted of felony, and acquitted of part and convicted of part of the offence charged, shall be sentenced for such part as he is so convicted of, if the same be substantially charged in the indictment, whether it be felony or misdemeanor. Now, when a person indicted of a felony is acquitted of the felony, and convicted of a misdemeanor substantially charged in the indictment, it cannot be inappropriate, to say the least, for the jury expressly to find that the misdemeanor of which they find him guilty is the same which is charged in the indictment.

But great emphasis was laid in the argument on the relative word "as" used in the verdict—that is, "of an assault and battery as charged in the within indictment," and it was contended that that word related to all the acts and intents charged in the indictment, except that the acts were done

with a malicious intent; and, therefore, that the acts and intents thus found by the jury constituted the felony of unlawfully doing the said acts with the said intent.

I think too much effect is thus given to this little word "as" in this connection. I do not think it was intended to alter the sense of the other words used in connection with it. I do not think it was intended to be a substitute for the express finding of an unlawful wounding with intent to maim, disfigure, disable or kill, in the form which the statute sets forth; nor that it was intended to contradict the express finding of an assault and battery, with which it is immediately connected; nor to qualify the general finding of not guilty of the felony charged in the indictment. I think it relates for its antecedent only to the words "an assault and battery" immediately before it, and that the meaning is "of an assault and battery as" it is "charged in the within indictment." The jury having found the accused not guilty of the felony as it is charged in the indictment, proceeded to

find him guilty, as the statute authorized *them to do, of a misdemeanor as it is charged in the indictment.

In other words, they found him guilty of the acts, without the quantity and the intents charged in the indictment. Those acts with the quantity and intents constituted a felony, and without them constituted an assault and battery only.

I think my construction of the verdict is confirmed by the fact that the jury only assess a fine against the accused, and do not ascertain his term of imprisonment in jail, as the law requires in cases of conviction of an unlawful wounding with intent to maim, &c. Code, chapter 191, section 9. As they found him guilty of a misdemeanor only, to wit: an assault and battery, it was proper for them only to assess his fine. They had nothing to do with his imprisonment. Misdemeanors are punishable by fine and imprisonment, except where some other punishment is prescribed by law.

No other punishment is prescribed by law for the offence of assault and battery. On a conviction for a misdemeanor so punishable, it belongs to the jury to assess the fine, and to the court to determine whether any imprisonment shall be superadded to the fine, and if so, to ascertain the term of such imprisonment. And the jury in this case having found the accused guilty of an assault and battery merely, and assessed his fine, were functi officii, and therefore, properly abstain from saying anything about his imprisonment, which was a subject exclusively for the consideration and determination of the court.

I think my construction is further confirmed by the fact that the court expressly charged the jury as to the law which should govern their finding, telling them what offences they might find the accused guilty of under the indictment, and what office they had to perform in regard to the punishment. The correctness of this charge,

in point of law, was admitted in the argument, and properly so. The court in 911 this charge, after *telling the jury of what felonies they might convict the accused, and how they were punishable, and that the quantum of such punishment within the limits prescribed by law was ascertainable by the jury, instructed them that, instead of finding him guilty of felony as aforesaid, "they might find him guilty of an assault and battery, and fine him not exceeding five hundred dollars;" and that his imprisonment in that case was to be "at the discretion of the court." In direct and immediate response to that instruction, the jury found the accused guilty of an assault and battery, as charged in the indictment, and assessed his fine at five hundred dollars, saying nothing about his imprisonment; and the court, perfectly understanding the meaning of the jury, not only rendered judgment for the fine assessed by them and the costs of the prosecution, but also for six months' imprisonment, which, in the exercise of the discretion which the law reposed in him, he considered proper.

I thought this a plain case on the statement made of it in the argument, and would not have deemed it proper to deliver so long an opinion in it, but for the ingenious and earnest manner in which it has been argued by the learned counsel for the accused. I am of opinion that there is no error in the judgment, and that it be affirmed.

The other judges concurred in the opinion of Moncure, P.

Judgment affirmed.

912 *Thomas v. Commonwealth.

November Term, 1872, Richmond.

Absent, CHRISTIAN and BOULDIN, J's.*

Criminal Law—Case at Bar.—T is indicted in the Corporation court of Lynchburg, for petit larceny; and the indictment states he had been previously convicted and sentenced for a like offence, before C, the mayor of the city. On the trial the warrant of the mayor for the arrest of T and the endorsement thereon by the mayor of the conviction and sentence to imprisonment of T is introduced in evidence, and there is proof of its genuineness and that T is the same person. There is a verdict of guilty as charged in the indictment, and T is sentenced to imprisonment in the penitentiary. **Held:**

1. **Statute—Jurisdiction.**—The mayor, by § 1 of the act of March 30, 1871, has concurrent jurisdiction with the Corporation court, of all petit larcenies; and his sentence of T was legal.
2. **Evidence—Warrant.**—The warrant and endorsement with proof of the genuineness of the paper and the identity of the party, are proper evidence in the cause.
3. **Previous Conviction—Must Be Admitted by Prisoner or Found by Jury.**—That the plea of "not

*BOULDIN, J. had been counsel.

†See Miller v. Com., 88 Va. 680, 14 S. E. Rep. 979; Brown v. Epps, 91 Va. 729, 21 S. E. Rep. 119.

guilty" does not put in issue the allegation of the previous conviction and sentence of T. and the verdict of "guilty," simply, does not respond to that allegation. It must be admitted by the prisoner or found by the jury, to warrant the sentence of confinement in the penitentiary.

In August 1872, the grand jury of the Corporation court of Lynchburg indicted Mike Thomas for stealing a pair of pants of the value of \$2.25. And they further stated in the indictment that Mike Thomas was on the 27th of January 1872, tried and convicted for a like offence in the Mayor's court for the city of Lynchburg, 913 *and in said court was sentenced to four months' confinement in the city jail; setting out the offence.

On the trial the jury rendered a verdict as follows: "We the jury find the prisoner guilty as charged in the within indictment;" and the court sentenced the prisoner to be confined in the penitentiary for one year. He thereupon applied to a judge of this court for a writ of error; which was allowed.

In the progress of the trial the prisoner excepted to an opinion of the court, admitting in evidence the warrant issue by J. M. Cobbs, mayor of the city of Lynchburg, directing one of the policemen of the city to bring before the said mayor, or some other justice, Mike Thomas, to answer a charge of stealing certain goods named in the warrant, of the value of \$5.50; and the endorsement thereon, which was as follows: "The within charge against Mike Thomas is sustained, and the defendant sentenced to city jail for four months. Given under my hand this 26th January 1872. J. M. Cobbs, mayor."

After the verdict was rendered the prisoner moved the court for a new trial, on the ground that the verdict was contrary to the evidence; but the court overruled the motion, and he excepted. And the court certified that the only evidence before the jury to sustain the charge that the prisoner had been previously convicted and sentenced for petit larceny, was the warrant and endorsement before mentioned, and proof that the prisoner was the person named in the warrant, and that he was convicted and sentenced by said J. M. Cobbs, mayor, for said offence.

There was no counsel for the appellant.

The Attorney General, for the Commonwealth.

ANDERSON, J., delivered the opinion of the court.

This is an indictment for petit 914 larceny, with an allegation *that the accused, before the committing the offence charged, had been convicted and sentenced in the mayor's court of the city of Lynchburg for a like offence.

The court is of opinion that the mayor of the city of Lynchburg, by virtue of the 6th section of chapter 48 of the Code of 1849, being a justice of the peace, was invested

by the 1st section of "An act to extend the jurisdiction of police justices and justices of the peace in certain cases," approved March 30, 1871, with concurrent jurisdiction of all petit larcenies with the county and corporation courts.

And consequently, that he had jurisdiction to try and convict and sentence the plaintiff in error of the petit larceny, of which it is alleged in the indictment he had been convicted and sentenced by the said Mayor's court, before the committing the petit larceny which is charged in the indictment in this case, and that such sentence brings him within the penalty of the act.

The court is further of opinion that the paper mentioned in the first bill of exceptions, purporting to be the warrant of the said mayor for the apprehension of Mike Thomas on a charge of petit larceny, dated 26th of January 1872, with the indorsement thereon in these words: "The within charge against Mike Thomas is sustained and defendant sentenced to city jail for the term of four months. (Signed) J. M. Cobbs, mayor," was proper to be given in evidence to the jury, with other evidence, to prove the identity of the accused and the genuineness of the paper, which it appears by the second bill of exceptions was given to the jury.

And the court is further of opinion that if the prisoner had admitted, or if it had been found by the jury, that he had been sentenced by the said mayor as aforesaid, there would have been no error in the judgment of the Corporation court for the city of Lynchburg sentencing the prisoner, the plaintiff in error, to imprisonment in 915 *the public jail and penitentiary house of the Commonwealth for the period of one year, under section 27, chapter 200 of the Code of 1860.

But the record shows that such admission was not made by the prisoner, nor the fact found by the jury, unless it be by the general finding of guilty, upon the plea of not guilty. The verdict is responsive to the issue, which is, guilty or not guilty of the offence charged in the indictment. Not whether he is guilty or not guilty of a like offence, of which it is alleged in the indictment he had been before convicted and sentenced. The plea of not guilty did not put in issue his guilt or innocence of that offence. It only puts in issue his guilt or innocence of the charge with which he was then to be tried. Nor does the plea of not guilty traverse the allegation in the indictment, that he had been previously convicted and sentenced for a like offence. That was a matter outside of the issue, and should have been specially found. The statute does not require an issue to be made upon it in the pleadings. It requires that it shall be alleged in the indictment. And not only that, but "admitted or by the jury found," to warrant a sentence of confinement in the penitentiary for a petit larceny. The court is, therefore, of opinion that the verdict is fatally defective in not responding to this

requirement of the statute. It is, therefore, considered, that the judgment be reversed and annulled, the verdict set aside, and that the cause be remanded to the Corporation court for the city of Lynchburg for further proceedings to be had therein.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record:

1st. That the mayor of the city of Lynchburg, by the 1st section of the "Act to extend the jurisdiction of police justices and justices of the peace," approved 916 *March 30, 1871, was invested with concurrent jurisdiction with the Corporation court of all petit larcenies, and had jurisdiction to pronounce the sentence alleged in the indictment to have been before pronounced against the accused for a petit larceny; and that such sentence would bring him within the penalty of the act.

2nd. That the paper mentioned within the first bill of exceptions, purporting to be the warrant of the said mayor for the apprehension of Mike Thomas on a charge of petit larceny, with the indorsement thereon, was proper to be given in evidence to the jury, with other evidence to prove the identity of the accused and the genuineness of the paper; such as appears from the second bill of exceptions was given to the jury.

3d. That the plea of not guilty does not put in issue the allegation in the indictment that he had been previously convicted and sentenced for a like offence. The statute does not require that issue shall be made in the pleadings upon that allegation. It is a matter outside of the issue, and must "be admitted or by the jury found," to warrant a sentence of confinement in the penitentiary for a petit larceny. And not having been admitted or found by the jury in this case, the verdict is not responsive to a material requirement of the statute. It is, therefore, considered by the court that the judgment be reversed and annulled, the verdict set aside, and a new trial awarded. And the cause is remanded to the Corporation court of the city of Lynchburg for further proceedings to be had therein in accordance with this order.

Judgment reversed.

917 *Neal v. Commonwealth.*

November Term, 1872, Richmond.

Absent, BOULDIN, J.†

1. Statute—Licensed Eating House a Public Place.—A licensed eating house in a town is a public place in the meaning of the Code, ch. 198, § 4, p. 806.
2. Same—Betting—"Bagatelle."—Betting on the game of "bagatelle," at a public place is a violation of the statute, Code, ch. 198, § 4, p. 806; and it is equally so if the person plays as well as bets.
3. Betting at Public Place—Unlawful.—It is unlawful to bet at any game at a public place.

*For monographic note on Gaming, see end of case.

†He had been counsel.

This was a presentment against John C. Neal and four others, in the Corporation court of Danville, for that they did unlawfully play and bet at a game or table commonly called "bagatelle," at the restaurant and eating house of Jerry Nicholas, a public place in said town.

On the trial of Neal, the Commonwealth proved that within twelve months Neal played at the game of bagatelle, and bet the sum of three dollars at the said game, at the eating house of Jerry Nicholas on Main Street in the town of Danville. And then the attorney for the Commonwealth moved the court to instruct the jury as follows: "The court instructs the jury that if they believe from the evidence, that John C. Neal, the defendant, did as charged in the indictment, bet at the game of "bagatelle," at the eating house of Jerry Nicholas, in Danville, they must find the defendant guilty." This instruction was given by the court; and the plaintiff

918 *excepted. The jury then found him guilty; and the court rendered a judgment thereon for the fine of thirty dollars, and the costs. And thereupon Neal applied to this court for a writ of error; which was awarded.

Jones & Bouldin, for the appellant.

The Attorney General, for the Commonwealth.

MONCURE, P., delivered the opinion of the court.

Two questions arise in this case: 1st. Whether an "eating house" is a "public place," in the meaning of the Code, chapter 198, § 4, p. 806, which declares that "If a free person bet or play at any such table or bank as is mentioned in the first section (that is, A B C or E O table or faro bank, or a table of the like kind); or if at any ordinary, race-field, or other public place, he play at any game, except bowls, chess, backgammon, draughts, or a licensed game, or bet on the sides of those who play, he shall be fined thirty dollars, and shall, if required by the court, give security for his good behavior for one year; or in default thereof, may be imprisoned not more than three months." And 2ndly. Whether it be contrary to the said section to bet at the game of bagatelle at such public place, though the said game be a licensed game.

As to the first question, we are of opinion that an "eating house" is a "public place" in the meaning of the said section. What constitutes an "eating house" is defined by law. "Any person who shall cook, or otherwise furnish for compensation, diet or refreshments of any kind for casual visitors at his house, and sold for consumption therein, and who is not the keeper of an ordinary, house of private entertainment or boarding house, shall be deemed to keep an eating house;" is required to obtain a license for doing so, and is subject to a fine for keeping such a house without obtaining such license. Acts of Assembly

919 1869-70, p. 239, § 27; *1870-71, p. 107, § 126, p. 281, § 40; 1871-72, p. 190, § 124, p. 481, § 42.

As to the second question, we are of opinion that it is contrary to the said section to bet at the game of bagatelle at such public place, though the said game be a licensed game, as is admitted to have been the fact in this case.

The keeping of a bagatelle table is a business capable of being licensed, and was so capable at the time the gaming in the indictment mentioned is therein charged to have taken place. Code, ch. 38, § 1, Acts of 1869-70, p. 240, § 31; 1871-72, p. 190, § 126, p. 482, § 45. To play at the game of bagatelle at a licensed bagatelle table, is to play at a licensed game, and is lawful under the Code, ch. 198, § 4, though such game be played at a public place.

But is it lawful under the said section to bet at such licensed game at a public place? That is the question we now have to solve.

"If a free person bet or play at any such table or bank as is mentioned in the first section," is the language in which the 4th section commences. Here the words "bet and play" are both used, and it is made unlawful to bet or to play at any such table or bank as is here referred to, either at a public or a private place. Such a gaming table is incapable of being licensed. The section then proceeds: "or if at any ordinary, race-field or other public place." Here the place of the gaming is material, and it must be a public place: "he play at any game except bowls, chess, backgammon, draughts or a licensed game." Here the word "play" alone is used, and not both the words "bet" and "play" as in the commencement of the section. Why was this difference made, if the Legislature intended to place betting and playing on the same footing in this part of the section, as was intended and expressed in the first part of the section?

If the Legislature had so intended, it 920 *would have said, "if at any ordinary, race-field, or other public place, he bet or play at any game, except bowls, chess, backgammon, draughts, or a licensed game." Then it would have been expressly made lawful to bet, as well as to play, at the excepted games, of which "a licensed game" was one; and there could have been no doubt in that case of the legislative intention. That mode of expressing it was the simplest and most obvious that could have been adopted. It required the use of only two additional words, "bet or," and it would have followed the same mode of expression just before used in the first part of the section. Instead of that, the word "play" only is here used, and the section, after the words "except bowls, chess, backgammon, draughts, or a licensed game," thus proceeds: "or bet on the sides of those who play, he shall be fined," &c. "Who play" at what? At any game at a public place. The meaning is as if the section had run thus: "If at any ordinary, race-field, or other public place, he play at any game except," &c., "or bet on the sides

of those who play at any game;" that is, "of those who game." In 1 R. C. 1819, ch 147, § 5, p. 563, the words actually used are "or shall bet on the sides or hands of such as do game;" and the same language is used in our former acts on the subject, from which the act in the Code of 1819 was taken. See the Codes of 1803 and 1814, ch. 96, § 5. The evils recited in that section and the corresponding section of the act of 1819, which it was intended to remedy, confirm the construction we have put upon the 4th section of chapter 198 of the Code of 1860. That construction is that it is unlawful to bet at any game at a public place.

If this be not the true construction, then it is lawful to bet to any extent, no matter how great, at any of the excepted games, or on the sides of those who play at such games, at a public place. Can it be possible that the Legislature intended to 921 legalize so great an evil? *We think not, and we think this conclusively appears by comparing the 4th and 5th sections of chapter 198, standing side by side in the Code.

We have seen what the 4th section is. The 5th is in these words:

"§ 5. If a free person, by playing or betting at any game or wager, elsewhere than at a public place, lose or win, within twenty-four hours, a greater sum, or anything of greater value, than twenty dollars, he shall be punished as in the preceding section."

This section plainly applies to any game whatever, without exception. That is the express meaning of the words "any game or wager" standing by themselves. In the Code of 1819 the words are "any game or wager whatsoever." But this word "whatsoever," though emphatic, was unnecessary to express the plain meaning of the other words without it, and was, therefore, dropped in the present Code.

Then if the construction of the 4th section contended for by the plaintiff in error be correct, a person who, by playing or betting at a licensed game elsewhere than at a public place, loses or wins, within twenty-four hours, a greater sum, or anything of greater value, than \$20, is punishable; whereas a person who, by betting on the sides of those who play at a licensed game, at any ordinary, race-field, or other public place, loses or wins, within twenty-four hours, a sum or thing of any amount or value, however great, is not punishable?

This would certainly be a great incongruity in the law, and could never have been intended by the Legislature. Such an intention will not be imputed to the Legislature, unless it be plainly expressed in the law. It is not so expressed. On the contrary, the intention which we attribute to the Legislature is much more reasonable, and sufficiently appears from the language of the law. According to our view

922 of the two sections, *four and five, a person is punishable, under section four, who bets or plays at faro bank, or a table of the like kind, anywhere, or plays

at any game, except bowls, chess, backgammon, draughts, or a licensed game, at any ordinary, race-field, or other public place, whether anything be bet or not upon the game, or bets anything of any value or amount on the sides of those who play at any game, at any ordinary, &c.; and under section five, who by playing or betting at any game or wager, elsewhere than at a public place, loses or wins, within twenty-four hours, a greater sum, or anything of greater value, than \$20.

In the Code of 1819 the words "elsewhere than at a public place," which we find in section 5 of ch. 198 of the present Code, were not inserted. So that under the Code of 1819 a person who, by playing or betting at any game or wager at a public place, lost or won, within twenty-four hours, a greater sum, or anything of greater value than twenty dollars, was certainly punishable, as much as he would have been if the game or wager had been at a private place. The Legislature surely did not intend to change the law in that respect, by inserting the words "elsewhere than at a public place," in § 5 of ch. 198, of the present Code. It is much more reasonable to suppose that those words were so inserted because the Legislature considered that any betting to any amount at a game played at a public place was punishable under section four of the same chapter; and, therefore, only the case of betting at a game or wager, elsewhere than at a public place, remained to be provided for by section five.

It is argued by the plaintiff in error, by counsel, that section four does not prohibit betting on one's own game, but on the sides of others who play. We think this construction is wrong, and that section four, in prohibiting a person from betting on 923 the sides of those who play, includes the case of a person betting on his own game.

Upon the whole, we are for affirming the judgment of the Corporation court of Danville.

STAPLES, J., doubted, but yielded his doubt.

Judgment affirmed.

GAMING.

I. Nature and Validity of Gaming Transactions.

- A. In General.
 - B. Partnership in Gaming.
 - C. Loans for Gaming Purposes.
 - D. Obligations and Securities for Gaming Considerations.
 - E. How Money or Property Lost at Gaming Recovered Back.
- ##### II. The Wager.
- A. Necessity for a Wager.
 - B. What Constitutes a Wager—Mutuality of Risk.
 - C. Amount Staked.
 - D. Participation in Wager—Renting Room to Gamesters.
 - E. The Contract of Wager—Where Made.

III. Gaming in Particular Places.

IV. Particular Games Prohibited.

V. Betting on Elections.

VI. Prosecution and Punishment.

- A. Jurisdiction.
- B. Indictment and Information.
 1. Sufficiency in General.
 2. Description of Game or Device.
 3. Allegations as to Place.
 4. Charging Several Offenses in One Indictment.
- C. Appearance by Attorney.
- D. Right to Trial by Jury.
- E. Evidence.
- F. Issues, Proof and Variances.
- G. Sentence and Punishment.

I. NATURE AND VALIDITY OF GAMING TRANSACTIONS.

A. In General.—A direction by a testator that all his just debts be paid out of the proceeds of the sales of certain lands does not authorize the payment of a gaming debt out of the proceeds of such sales. *Carter v. Cutting*, 5 Munf. 223.

B. Partnership in Gaming.—A house was purchased, furnished and used by partners in gambling, one of the partners paying the whole consideration. Upon the death of the other partner, it was held that the house and furniture were not to be regarded as unlawful property, and that the partner who had paid the whole price was entitled to be reimbursed from the estate of the deceased partner, and to have the furniture sold and one-half of the proceeds paid to him, and, as he was the administrator of the deceased partner, that the other half was to be credited to the estate. *Watson v. Fletcher*, 7 Gratt. 1.

C. Loans for Gaming Purposes.—Money lent to be bet on a presidential election cannot be recovered back. *Machir v. Moore*, 3 Gratt. 257.

Loans to Pay Losses.—A judgment was obtained against a surety on notes given as margins on grain and pork options. The surety borrowed money to pay the judgment, securing the lender by a deed of trust on land. The lender had no connection with the option transaction, nor was it shown that he had any knowledge of it. *Held*, on a creditor's bill to audit the liens on the lands of the surety, that the trust deed to the lender was not void as against the other creditors, as being based on a gambling consideration. *Krake v. Alexander*, 86 Va. 206, 9 S. E. Rep. 991.

D. Obligations and Securities for Gaming Considerations.—Where part of a bond is on a gaming consideration and the other part on a lawful consideration, a court of equity will relieve against the part which is vicious, and sustain that which is good. *Skipwith v. Strother*, 3 Rand. 214.

Sureties and Other Substituted Obligors.—M. won a certain sum of money at cards of W., and J. won the same sum of M. At the request of M., W. gave his bond for the amount to J. *Held*, that the bond was void. *Woodson v. Barrett*, 2 Hen. & M. 80, 3 Am. Dec. 612.

Where the acceptor of a bill founded on a gaming consideration is forced to pay the same to an innocent holder thereof for valuable consideration, he may recover the amount of the drawer. *Dade v. Madison*, 5 Leigh 401.

Where a father undertakes by a written agreement to become surety for the payment of a gaming debt by his son, recites this fact in his will, and devises land to his son charged with the payment of such debt, such charge is not a consideration pre-

cedent binding the son or his representatives to pay the debt, but he and they are entitled to hold the estate discharged thereof. *Carter v. Cutting*, 8 Munf. 223.

Bona Fide Holders.—Where an infant lost at gaming and, after coming of age, gave his bond for the amount of the debt and assured a prospective assignee that there was no defense to it and that it would be paid, the bond will be enforced in equity. *Beverly v. Smith*, 1 Wash. 206, 1 Am. Dec. 463.

Where a person, not knowing the circumstances, is induced by the obligor to purchase a bond given for a gaming consideration, equity will not relieve against a judgment obtained upon the bond. *Hoomes v. Smock*, 1 Wash. 390.

A bond founded on a gaming transaction is valid in the bonds of a *bona fide* assignee for value, especially where he was induced to purchase the same by the assurance of the obligor that there was no objection to it and that it would be paid. *Pettit v. Jennings*, 2 Rob. 676.

E. How Money or Property Lost at Gaming Recovered Back.—If a person lose to another, within twenty-four hours, ten dollars or more, or property of that value, and pay or deliver the same, such loser may recover it back from the winner by suit or warrant, according to the amount or value, brought within three months after such payment or delivery. *W. Va. Code 1890*, ch. 97, § 2, p. 763. See *O'Connor v. Dils*, 43 W. Va. 54, 26 S. E. Rep. 354; *Cramer v. Pomeroy* (W. Va.), 34 S. E. Rep. 762. For similar provision in Virginia, see *Va. Code 1887*, § 2837.

II. THE WAGER.

A. Necessity for a Wager.—Playing at cards in a tavern is unlawful gaming whether the party bets or not. *Com. v. Terry*, 2 Va. Cas. 77.

B. What Constitutes a Wager—Mutuality of Risk.—M. sold to S. a wagon to be paid for by S., who was a candidate for an office, if the latter should be elected to said office at the next ensuing election, and S. gave his check with this understanding, the wagon not to be paid for if S. should not be elected. *Held*, that this was a wager within the meaning of *Va. Code 1880*, ch. 198, § 10. *ROBERTSON, J.*, delivering the opinion of the court, said: "It is true, that a bet does imply risk, but it does not necessarily imply risk in both parties. There must be between them a chance of gain and a chance of loss, but it does not follow that each of the parties to the bet must have both these chances. If, from the terms of the engagement, one of the parties may gain but cannot lose, and the other may lose but cannot gain, and there must be either a gain by the one or a loss by the other, according to the happening of the contingency, it is as much a bet or wager as if the parties had shared equally the chances of gain and of loss. * * * One person alone cannot be guilty of the offense of betting. There must be always at least two parties engaged in it. It is a joint act; and when the chance of gain and the chance of loss are created, it matters not how those chances are distributed between the parties there exists all that is necessary to constitute a bet." *Shumate v. Com.*, 15 Gratt. 653.

A. agreed, in consideration of \$25,000, to be paid by B. in the years 1780 and 1781, to pay B. \$2,500 in specie in 1790. *Held*, that this agreement was not a wager. *Brachan v. Griffin*, 3 Call 433.

An agreement by a person with a broker to buy and sell gold for the latter on commission is not in any sense a wager. *Brown v. Speyers*, 20 Gratt. 206.

C. Amount Staked.—Where a prize exceeding \$20 in value is won at a raffle by two or more individuals in partnership, but the share of the gain won by each is less than \$20, they are not punishable under the gaming act. *Com. v. Garland*, 5 Rand. 652.

Taking a chance in a raffle at \$20, or any smaller sum where the property raffled for exceeds \$20 in value, and the raffling takes place in a private house, does not bring the person within the operation of the gaming act. *Com. v. Garland*, 5 Rand. 652.

A person who takes a chance for an article exceeding \$20 in value, and wins the article, is liable under the gaming act. *Com. v. Garland*, 5 Rand. 652.

D. Participation in Wager—Renting Room to Gamblers.—A person who keeps tables on which the game of poker or draw poker is played, but who is only interested in the game for compensation for the use of the tables, house and gas, is not guilty under the statute, *Va. Code 1873*, ch. 194, § 1, of being concerned in interest in the keeping of a table of the like kind with faro, keno, etc. *Nuckolls v. Com.*, 23 Gratt. 384.

E. The Contract of Wager—Where Made.—Where an offer to bet is telegraphed by a person in one city to a person in another and the latter accepts by telegraph, the betting is done in the city where accepted. *Lescallett v. Com.*, 30 Va. 378, 17 S. E. Rep. 546.

A person who keeps a house wherein he posts the names of horses running on a race track in another state, and who telegraphs orders of customers to bet money thereon, which bets are accepted at the track, does not violate Acts 1891-92, p. 626, § 1, making it an offense to keep any house for the purpose of "betting therein," since the betting is done at the race track. *Lescallett v. Com.*, 30 Va. 378, 17 S. E. Rep. 546.

III. GAMING IN PARTICULAR PLACES.

Playing cards in a tavern is unlawful gaming, whether the party bets or not. *Com. v. Terry*, 2 Va. Cas. 77.

If a party indicted for suffering an unlawful game to be played at his tavern, was keeper of the tavern at the time of such playing, his having a license at the time is not necessary to his conviction. *Com. v. Price*, 8 Leigh 757.

On a day when many persons were assembled at a tavern for the purpose of mustering, a party engaged in gaming in a barn 200 yards distant from the tavern house and in a separate enclosure, though on the same plantation, the barn being 60 or 70 yards in the rear of another barn in which spirits were sold by the tavern keeper. *Held*, that the first-mentioned barn was a public place, within the meaning of the act to prevent unlawful gaming. *Farmer v. Com.*, 8 Leigh 741.

Bedroom in Hotel.—Playing poker in a room in a hotel with the door locked is not a violation of the statute prohibiting gaming at a hotel or other public place. *State v. Brast*, 31 W. Va. 380, 7 S. E. Rep. 11.

Building Disconnected from Tavern.—To make a separate house an appurtenance of a tavern, within the meaning of the statute prohibiting gaming within a tavern or any building appurtenant thereto, such house must be used in connection with the tavern for the accommodation of guests. *Com. v. Sanders*, 5 Leigh 751.

The lessee and occupier of a tavern was also the occupier, under the same lease, of a storehouse, which, however, was not within the curtilage of the tavern, nor used in any way with the tavern. *Held*, that the storehouse was not a part or appurtenance of the tavern, within the meaning of the stat-

ute against unlawful gaming. 1 Rev. Code, ch. 147, § 16; Com. v. Sanders, 5 Leigh 751.

Room in Tavern Lot Not under Control of Landlord.—A room, in an outbuilding within the enclosure of a tavern lot, which at one time had been used in connection with the tavern, the room over which being still so used, having been rented by a third party and held, used and controlled by him, independently of the proprietor of the tavern, though the occupier boards at the tavern and the servants of the same attend to the room, is not a part of the ordinary, nor is it a public place, in the sense of Va. Code 1849, ch. 198, § 4, p. 743, imposing a fine for gaming "at any ordinary, race field, or other public place." Purcell v. Com., 14 Gratt. 679.

Licensed Eating House.—A licensed eating house in a town is a public place within the meaning of Va. Code 1860, ch. 198, § 4, prohibiting gaming. Neal v. Com., 23 Gratt. 917.

Storehouse after Business Hours.—If the playing is at a storehouse in the nighttime, after the business of the day is at an end, and the doors closed, the storehouse is not, *prima facie*, a public house, though it is so when it is open to the public in the daytime. Windsor v. Com., 4 Leigh 680.

A storehouse in a village, late at night, after persons cease to come to the store to purchase goods, and the door is locked, is not a public place, within the meaning of the statute against gaming. Com. v. Feazle, 8 Gratt. 585.

Church.—A church may be a public place while the people are assembled there for religious worship or other purpose or while so assembling or afterwards dispersing, yet at all other times it may be a strictly private place. Bishop v. Com., 18 Gratt. 785.

Disused Jail House.—An old house formerly used as a jail, located on the public square attached to a court house, and accessible to all citizens, is a public place within the meaning of the gaming act, though no public business of any kind is now transacted therein. Walker v. Com., 3 Va. Cas. 515.

A field between a river and an old highway, which is a suitable place for racing and is occasionally so used with the tacit permission of the owner, is a race field within the meaning of the statute forbidding gaming at a race field. Com. v. Wilson, 9 Leigh 648.

Secluded Outdoor Place.—Persons engaged in gaming in a place concealed by bushes and briars, on land owned by a county for supporting its poor, are not liable to indictment for gaming in a public place. Com. v. Vandine, 6 Gratt. 669.

IV. PARTICULAR GAMES PROHIBITED.

The distinctive feature in the character of the games called A. B. C. and E. O. and faro bank is that the chances of the games are unequal and in favor of the exhibitor of the games or tables. If other games resemble these standard games in this distinctive feature, they come within the terms of the 17th section of the Gaming Act, 1 Rev. Code, ch. 148, § 17 (see Va. Code 1887, § 3815), and are liable to the same penalties. Under this construction, the exhibitor of a gaming table called Haphazard, alias Blindhazard, alias Snickup, etc., is liable to the same punishment as the exhibitor of a faro bank. Com. v. Wyatt, 6 Rand. 694. See also, Huff v. Com., 14 Gratt.

Bagatelle.—The game of bagatelle is within the meaning of Va. Code 1860, ch. 198, § 4, p. 806 (Va. Code 1887, § 3818), making it unlawful for any person to bet at any game except bowls, etc., at any ordinary, race field or other public place. Neal v. Com., 23 Gratt. 917.

Horse Racing Not a Game.—Betting on a horse race is not within the meaning of the 5th section of the 10th chapter of the act of March 14, 1848, concerning crimes and punishments and proceedings in criminal cases. Com. v. Shelton, 8 Gratt. 592.

Pool-Selling—Construction of Statute against.—The object of the statute, Acts 1886-8, p. 576, to prevent "pool-selling and so forth" is the suppression of gambling in one of its most attractive forms, and not a regulation of commerce between the states, though it may incidentally affect it, and is within the police power reserved to the state; and neither is this act, or the act approved on the same day "to prevent gambling and selling or making books," etc., in conflict with U. S. Const., art. 1, § 8, clause 3; nor are the two acts in conflict with each other. The latter act is in full force and vigor. Lacey v. Palmer, 98 Va. 159, 24 S. E. Rep. 930, 2 Va. Law Reg. 82.

V. BETTING ON ELECTIONS.

M. sold to S. a wagon to be paid for by S., who was a candidate for an office, if the latter should be elected to said office at the next ensuing election, and S. gave his check with this understanding, the wagon not to be paid for if S. should not be elected. Held, that this was a wager within the meaning of Va. Code 1860, ch. 198, § 10. Shumate v. Com., 15 Gratt. 653.

Va. Code 1849, ch. 198, § 10 (see Va. Code 1887, § 3834), relating to betting on elections, is to be construed as a remedial, not as a penal statute, pursuant to section 20 of the same chapter, which enacts that rule of construction. Shumate v. Com., 15 Gratt. 653.

Betting after Polls Are Closed.—The statute prohibiting betting on elections includes a bet after the voting has closed, but before any legal declaration as to the result of the election. State v. Griggs, 34 W. Va. 78, 11 S. E. Rep. 740; State v. Snider, 34 W. Va. 83, 11 S. E. Rep. 742.

VI. PROSECUTION AND PUNISHMENT.

A. Jurisdiction.—The state of Virginia has authority, by statute, to forbid its citizens to bet on horse racing in another state, and this right is not affected by the fact that the money is to be placed in a third state. The act forbidden is the wager, and over it, and the actors in it, the state has complete jurisdiction. It is immaterial where the race takes place. Lacey v. Palmer, 98 Va. 159, 24 S. E. Rep. 930, 2 Va. Law Reg. 82.

B. Indictment and Information.

1. Sufficiency in General.—Under Va. Code 1887, § 4011, which provides that no exception shall be allowed for any defect or want of form in any indictment under the gaming act, objections that the record did not set forth the appointment and oath of the foreman of the grand jury, and that the names of the grand jurors and witnesses on whose information the indictment was found were not written at the foot of the indictment, were properly overruled. Lawrence v. Com., 86 Va. 573, 10 S. E. Rep. 840.

It is not necessary to the validity of a presentment by a grand jury that it should appear on the record *in extenso*. A record reciting that it is "a presentment for unlawful gaming" against the defendant is sufficient. Com. v. Tiernan, 4 Gratt. 545.

An indictment for gaming, under Va. Code 1873, ch. 194, § 1, is sufficient if it alleges that the game was kept in Richmond and within the jurisdiction of the court. Leath v. Com., 23 Gratt. 873.

Where an act declaring a forfeiture against a penal offence gives the forfeiture to any person who

will sue therefor, and gives no remedy to the commonwealth, the forfeiture cannot be recovered for the use of the commonwealth by information. *Com. v. Richards*, 1 Va. Cas. 183.

A tavern keeper who is presented for suffering faro and loo to be played at his house may be tried on the presentment alone, without any information; and, if he refuses to answer to the presentment, judgment by default may be rendered against him. *Com. v. Maddox*, 2 Va. Cas. 19.

Alternative Allegations.—A presentment for playing at cards "at or near" a place is objectionable for uncertainty. *Bishop v. Com.*, 18 Gratt. 785.

Keeping Gaming Table—Needless Allegations.—It is not necessary that the indictment should charge that the games or tables were kept or exhibited for gain. It is sufficient that it follows the language of the statute, and further charges that the accused did unlawfully keep and exhibit, etc. *Leath v. Com.*, 32 Gratt. 873.

Effect of Misnomer.—It was held in *Com. v. Adkinson*, 2 Va. Cas. 513, that a misnomer could not be pleaded to a presentment, indictment or information for unlawful gaming. See general statute curing misnomers, Va. Code 1887, § 3099.

2. Description of Game or Device.—An indictment, under Va. Code 1849, ch. 196, § 1, must charge the playing of one of the games specified, or it must show by averment that the gaming charged is of like kind as those specified, that is, that the chances of the game are unequal, all other things being equal. *Huff v. Com.*, 14 Gratt. 648.

Following Language of Statute—Statutory Name.—Where the offense charged is the exhibition of any of the gaming tables enumerated in the statute against gaming, it is sufficient to mention the same by name without further description. *Huff v. Com.*, 14 Gratt. 648.

An omission to describe any offense against the statute is not cured by a general allegation that the act was unlawful. *Huff v. Com.*, 14 Gratt. 648.

Where Device Not Specifically Named in Statute.—Where the offense charged is for keeping and exhibiting a game not enumerated, there must be some averment in the indictment showing it to be one of the unequal games belonging to the same class with the enumerated games. *Huff v. Com.*, 14 Gratt. 648.

3. Allegations as to Place.—An indictment which charges that unlawful gaming is carried on at a house of public resort is good under the gaming act. *Wortham v. Com.*, 5 Rand. 609.

A presentment for gaming charged the defendant with playing at an unlawful game "at the house of R. L. in B. in the county of P. W." *Held*, that the presentment was fatally defective in not charging that the house where, etc., was an ordinary or public place. *Hord v. Com.*, 4 Leigh 674.

An indictment charging the defendant with unlawful gaming at the house of J. M., the same being "a house of entertainment," is sufficient. *Linkous v. Com.*, 9 Leigh 608.

A presentment "for unlawfully playing cards at the grocery of D. and C." is defective in substance, for not alleging the grocery to be a public place, or a place of public resort. *Roberts v. Com.*, 10 Leigh 606.

A presentment for playing at cards must charge that the place at which the playing occurred was a public place at the time of such playing, where the name of the place does not of itself import that

it was at all times a public place. *Bishop v. Com.*, 18 Gratt. 785.

At or near Public Place.—The very place of the playing should be alleged to be a public place. A presentment for playing cards "at or near" a public place is not sufficient. *Bishop v. Com.*, 18 Gratt. 785.

4. Charging Several Offences in One Indictment.—Where an indictment for gaming under Va. Code 1873, ch. 194, § 1, pursued the language of the statute except that it used the word "and" in place of "or" thus charging the accused with all the games mentioned in said statute, it was held to charge but one offense, and to be supported by proof of the keeping or exhibiting of any one of the games or tables mentioned, and that on conviction there would be but one fine and one term of imprisonment. *Leath v. Com.*, 32 Gratt. 873. As to charging several offenses in one indictment, see also, *Morganstern v. Com.*, 94 Va. 787, 26 S. E. Rep. 408; *Com. v. Tiernan*, 4 Gratt. 545; *Rasnick v. Com.*, 2 Va. Cas. 356; *Angel v. Com.*, 2 Va. Cas. 231.

A presentment for unlawful gaming by playing at cards and betting on the sides and hands of those that then and there did play is not objectionable for duplicity. *Com. v. Tiernan*, 4 Gratt. 545.

On an indictment under the gaming act, several offenses may be charged against different persons, viz: one for exhibiting a faro bank, another for playing at faro, and a third for suffering faro to be played at his house. *Com. v. McGuire*, 1 Va. Cas. 121.

C. Appearance by Attorney.—A defendant, presented for unlawful gaming, may appear and plead by attorney without making his personal appearance. *Com. v. Lewis*, 1 Va. Cas. 334.

D. Right to Trial by Jury.—A defendant presented for unlawful gaming is entitled to a trial by jury. *Com. v. Horton*, 1 Va. Cas. 335; *Com. v. McGuire*, 1 Va. Cas. 119.

E. Evidence.—In a prosecution for unlawful gaming, a witness is not justified in refusing to testify before the grand jury on the ground that his answer will tend to criminate and disgrace him; for the statute, Acts 1877-78, ch. 10, p. 51 (Va. Code 1887, §§ 3899, 3901), gives full protection to a witness in such case. *Kendrick v. Com.*, 78 Va. 490; *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. Rep. 644. See note in 2 Va. Law Reg. 314.

Statute Protecting Witnesses in Gaming Cases Not Applicable to Lotteries.—The statute, Va. Code 1873, ch. 195, § 20; Va. Code 1887, § 3899, which provides that a witness giving evidence in a prosecution, for unlawful gaming shall never be proceeded against for any offense of unlawful gaming committed by him at the time and place indicated in such prosecution, does not apply to a prosecution for managing and conducting a lottery; and a witness cannot be required to testify in such a case if he will thereby criminate himself. *Temple v. Com.*, 75 Va. 892.

Expert Witness Need Not Be Professional Gambler.—A witness who has played "keno" twice, and has seen it played two or three times, is competent to tell what he knows of the manner of playing the game, although he says he is not an expert. *Nuckolls v. Com.*, 32 Gratt. 884.

F. Issues, Proof and Variance.—A presentment for gaming charged the defendant with the offense as committed at the booth of Price Skinner. The proof was of gaming at the booth of Clark, the said Skinner having no right, interest or agency in the booth. *Held*, that this proof was insufficient to support the charge. *Com. v. Butts*, 2 Va. Cas. 18.

An indictment for gaming charged the defendant with unlawful playing with cards, to wit, at the game of all fours, of loo and of whist, at a public place to wit, at the storehouse of G. H. & Co. *Held*, that to convict the defendant, it must be proved that he played at some one of the games specified in the indictment. *Windsor v. Com.*, 4 Leigh 680.

An indictment against a tavern keeper for suffering the game of loo to be played in his tavern by certain persons named will be supported by proof of his having suffered that game to be played therein, though by other persons than those named in the indictment. *Com. v. Price*, 8 Leigh 757.

An indictment for "unlawfully playing at cards" at a public place may be sustained by proof that the party bet at faro at the time and place stated in the indictment. *Gibboney v. Com.*, 14 Gratt. 583.

G. Sentence and Punishment.—Upon the conviction of a tavern keeper on an indictment for permitting unlawful gaming in his tavern, judgment cannot be rendered for revocation of defendant's license acquired since the commission of the offense. *Com. v. Price*, 8 Leigh 757.

The statute passed in the session of assembly of 1827-8, prescribing a new punishment for an offence committed after May 1, 1828, did not repeal former statutes, defining the offense and prescribing other punishment for the same, as to such offense committed before May 1, 1828. *Com. v. Pegram*, 1 Leigh 560.

The statute of March 26, 1842, enacting "that in all recoveries hereafter had for violations of the gaming laws, the fee recovered shall be ten dollars for the commonwealth's attorney, and the sum of thirty dollars shall be paid to the literary fund in lieu of the sum at present provided," had no application whatever to offenses committed before its passage, but such offenses remained liable to prosecution and punishment under the pre-existing law, in the same manner as if the said statute had never been passed. *Pitman v. Com.*, 2 Rob. 800.

Conviction upon Joint Indictment.—Upon the conviction of two persons jointly indicted under the statute, declaring that any person convicted of betting on an election shall forfeit the value of the money or thing wagered, each must be fined the value of the money wagered by him plus \$50. *State v. Griggs*, 34 W. Va. 78, 11 S. E. Rep. 740; *State v. Snider*, 34 W. Va. 83, 11 S. E. Rep. 742.

Equitable Relief against Judgments.—A court of equity has jurisdiction to relieve against a judgment founded on a gaming debt, although the party failed to defend at law, and gives no good reason for such failure. *Skipwith v. Strother*, 3 Rand. 214.

On a bill to enjoin a judgment on the ground that the debt on which it was founded was for money won at cards, it being doubtful on the evidence, whether such was the consideration, or if it was, whether the plaintiff in the judgment, who was a transferee of the debt, had not been induced to take the transfer of the debt under the belief, induced by the concealment or misrepresentation of the debtor, that the consideration of said debt was good and lawful; the court should continue the injunction and direct an issue to ascertain the facts. *Nelson v. Armstrong*, 5 Gratt. 354.

Where the defendant is surprised at the trial in an action at law on a promise founded on a gaming consideration, and there is a judgment against him, he may come into equity for relief, though he made no effort to obtain a new trial in the law court. *White v. Washington*, 5 Gratt. 645.

924 *Read v. The Commonwealth.

November Term, 1872, Richmond.

1. Bill of Exceptions—Certification of Facts—Evidence.*

—Though the bill of exceptions taken to the refusal of the court to grant a new trial, purports to certify the facts, yet it may appear from the bill of exceptions itself, that the evidence is certified. And this is shown when the facts certified are contradictory.

2. Same—Certification of Evidence—When Judgment

Reversed.—In such case where the evidence is certified, the appellate court will not reverse the judgment, unless after rejecting all the parol evidence of the exceptor, and giving full faith and credit to that of the adverse party, the decision of the court below shall appear to be wrong.

3. Criminal Law—Malicious Shooting—How Determined.

—Whether a prisoner on trial is guilty of malicious shooting with intent to kill, depends upon the question, whether if he had killed the person at whom he shot, instead of only wounding him with intent to kill him, the offence would have been murder.

4. Same—Same.—If the killing would not have been

murder, then he is not guilty of the offence of malicious shooting, however he may have been guilty of another offence: as of unlawful shooting with intent to kill.

5. Same—Unlawful Homicide.—Every unlawful homicide

must be either murder or manslaughter; and whether it be the one or the other depends alone upon, whether the party who perpetrated the act did it with malice or not—malice either expressed or implied.

6. Same—Previous Grudge—Immediate Provocation.—

Where there has been a previous grudge and also

*Bill of Exceptions—Certification.—The principal

case is cited as authority for the proposition laid down under the first headnote. *Proctor v. Spratley*, 78 Va. 265, and *Pruner v. Commonwealth*, 82 Va. 116. See also, monographic note VII, C., appended to *Stoneman v. Com.*, 25 Gratt. 887.

In *Black v. Thomas*, 21 W. Va. 712, the court citing the principal case as its authority, said: "Where it is practical the facts and not the evidence should be certified; but when there is a conflict or complication of the evidence so as to render it impractical to certify the facts, the court may certify the evidence."

†Same—Certification of Evidence—When Judgment

Reversed.—The rule laid down in the second head-

note has been followed by many subsequent cases citing the principal case as authority for the rule. See *Scott & Boyd v. Shelor*, 28 Gratt. 900; *Little's Case*, 25 Gratt. 934; *Richmond & D. R. Co. v. Morris*, 31 Gratt. 208; *Dean v. Commonwealth*, 33 Gratt. 916; *Daingerfield v. Thompson*, 33 Gratt. 141; *Baccigalupo v. Com.*, 33 Gratt. 811; *Taylor v. Com.*, 77 Va. 697; *Scott v. Com.*, 77 Va. 246; *Proctor v. Spratley*, 78 Va. 264; *N. & W. R. Co. v. Ferguson*, 79 Va. 244; *Town of Suffolk v. Parker*, 79 Va. 606; *Payne v. Grant*, 81 Va. 109; *Hanriot v. Sherwood*, 82 Va. 3; *Muse v. Stern*, 83 Va. 37; *Pruner & Clark v. Com.*, 82 Va. 116; *State v. Baker*, 33 W. Va. 337, 10 S. E. Rep. 646. See monographic note VII, E. 1. a. and b., appended to *Stoneman v. Com.*, 25 Gratt. 887. See also, Va. Code 1887, § 3484, where this rule is abolished.

‡*Manslaughter.*—In *Byrd v. Com.*, 60 Va. 538, 16 S. E. Rep. 737, the court, citing the principal case as authority, said: "If, upon a sudden quarrel, two persons fight, and one of them kills the other, this is manslaughter."

an immediate provocation, it is for the jury to determine whether the shooting was induced by the previous grudge or the immediate provocation; and it is not for an appellate court to reverse their judgment; which the judge who tried the case, declines to set aside.

7. Verdict Contrary to Weight of Evidence—Reversal of Judgment.*—For the principles by which an appellate court will be governed in considering the question of reversing the judgment of the court below refusing to grant a new trial, on the ground that the verdict is contrary to the evidence, see opinion of *Moncure, P.*

925 *8. New Trial—After-Discovered Evidence—What Four Things Must Concur.—To authorize the granting a new trial on the ground of after-discovered evidence, four things are necessary: 1st. The evidence must have been discovered since the former trial. 2d. It must be such as reason-

***Verdict Contrary to the Weight of Evidence.**—Many courts lay down the rule that a new trial will not be granted merely because the court, if upon the jury would have given a different verdict. To warrant a new trial, the evidence should be plainly insufficient to warrant the finding of the jury. And this restriction applies *a fortiori* to an appellate court. They cite as their authority, the principal case, *Thornton v. Com.*, 24 Gratt. 676; *Lawrence v. Com.*, 30 Gratt. 864.

"The question of his guilt or innocence, depending, as it did, upon the tendency and weight of the evidence, was determined by the jury, whom the law has appointed the triers, and the judge who presided at the trial, and who, like the jury, saw and heard the witnesses, approved the verdict. It is only when there has been a palpable deviation from the evidence, that a verdict fairly rendered ought to be set aside, and especially in an appellate court." *Coleman v. Com.*, 84 Va. 8, 8 S. E. Rep. 878, citing the principal case as authority. See also, *Howell v. Com.*, 26 Gratt. 1007; *Great Falls Manfg. Co. v. Henry*, 22 Gratt. 471; *Danville Bank v. Waddill*, 81 Gratt. 475; *Blair & Hoge v. Wilson*, 28 Gratt. 175; *Cluervius v. Com.*, 81 Va. 816; *So. W. Imp. Co. v. Smith*, 85 Va. 519, 7 S. E. Rep. 365; *Hill v. Com.*, 88 Va. 640, 14 S. E. Rep. 330; *Jones v. Rixey*, 79 Va. 657; *Kimball v. Friend*, 95 Va. 144, 27 S. E. Rep. 901; *Gravely v. Com.*, 86 Va. 400, 10 S. E. Rep. 431; *Clark v. Com.*, 90 Va. 365, 18 S. E. Rep. 440; *State v. Donohoo*, 22 W. Va. 766. See also, *foot-note* to *Hill v. Peyton*, 23 Gratt. 550.

Objection to Instructions.—In *Stoneman's Case*, 25 Gratt. 904, the court, citing the principal case, said: "If no objection be made to an instruction at the time it is given, and no exception taken nor the point saved, but objection be made for the first time after verdict, and in the form of a motion to set it aside, the court will consider whether, under all the circumstances, the party has been prejudiced by the instruction; and if of opinion that a just verdict has been rendered according to the law and the evidence, will not set it aside on account of that objection." See also, *Price v. Com.*, 77 Va. 303.

***New Trial—After-Discovered Evidence—What Four Things Must Concur.**—The statement made in the eighth headnote has been followed by many subsequent cases citing the principal case as authority for the point. See *Adams v. Hubbard*, 25 Gratt. 135; *Baccigalupo v. Com.*, 83 Gratt. 815; *Cody v. Conly*, 27 Gratt. 234, and *foot-note*; *Grayson v. Buchanan*, 88 Va. 256, 18 S. E. Rep. 457; *Field v. Com.*, 89 Va. 604, 16 S. E. Rep. 865; *Carder v. Bank of W. Va.*, 34 W. Va. 41, 11

able diligence on the part of the party asking it, could not have secured at the former trial. 3d. It must be material in its object, and not merely cumulative and corroborative, or collateral. 4th. It must be such as ought to produce, on another trial, an opposite result on the merits.

9. Jurors—Evidence—Impeachment of Verdict.—As a general rule the evidence of jurors is not admissible to impeach their verdict.

10. Deputy Sheriff a Witness.—On the trial of a prisoner for a felony, which lasts several days, the sheriffs are sworn to keep the jury and not allow them to be spoken to, or to speak to them themselves in relation to the case. In the progress of the trial one of the deputies is called by the Commonwealth, and gives evidence of a fact which had occurred in his presence; and the same fact had been proved by other witnesses. This is not sufficient grounds for setting aside the verdict.

11. Term of Court—Sunday.—Sunday is not to be counted as one of the days of the term of a court.

At the August term 1872, of the County court of Bedford county, Harold P. Read was indicted for feloniously and with malice aforethought shooting George S. Merriman, with intent to maim, disfigure, disable and kill him. The prisoner was tried at the September term of the court, and the trial lasting for three days, on each day, when the court was about to adjourn, the sheriff and his two deputies were sworn to keep the jury and neither speak to them themselves nor suffer any other person to speak to them touching any matter relative to the trial, until they return into court. On the third day the jury found the prisoner guilty, as charged in the indictment, and fixed the term of his imprisonment in the penitentiary at two years.

After the verdict was rendered the prisoner moved the court for a new trial, on the grounds, first, that the verdict was contrary to the evidence; second, because of after-discovered evidence; third, because the jury were influenced in making 926 up their verdict by improper *considerations, not admissible under the evidence, and not warranted by it; and, fourth, because the jury were committed to the custody of a deputy sheriff who had testified to material facts on behalf of the Commonwealth on the trial. But the court overruled the motion; and the prisoner excepted.

The bill of exceptions purports in its commencement, to state the facts proved on the trial. It names each witness for the Commonwealth and sets out what he proves;

S. E. Rep. 717; St. John v. Alderson, 32 Gratt. 141, and *foot-note*; *State v. Betsall*, 11 W. Va. 731; *Hall v. Lyons*, 29 W. Va. 422, 1 S. E. Rep. 592; *Zickefoose v. Kuykendall*, 13 W. Va. 30.

†Jurors.—The rule laid down in the ninth headnote has been followed by many cases. See *Stephoe v. Flood*, 31 Gratt. 246, and *foot-note*; *Danville Bank v. Waddill*, 81 Gratt. 483; *Moses v. Cromwell*, 78 Va. 676; *Taylor v. Com.*, 90 Va. 117, 17 S. E. Rep. 812; *State of W. Va. v. Cartright*, 20 W. Va. 43; *Probst v. Braeunlich*, 24 W. Va. 359.

§Sunday.—See *Bowles v. Brauer*, 89 Va. 467, 16 S. E. Rep. 356.

and at the end of these statements, it says the foregoing being all the facts proved in chief on behalf of the Commonwealth, it was then proved on behalf of the prisoner; and then it names each witness for the prisoner and sets out what he states, and after giving them, says, the foregoing being all the facts proved on behalf of the prisoner, &c. But the statements of the witnesses are in some respects contradictory. The testimony is sufficiently set out in the opinions of Judges Moncure and Anderson.

The prisoner was brought into court on the 11th of September to receive his sentence, when he moved the court in arrest of judgment, on the ground that the term of the court at which the prisoner was tried had ended, and it was not competent for the court to enter up judgment on the verdict. But the court overruled the motion, and sentenced the prisoner in accordance with the verdict; and the prisoner excepted. It appeared that the term of the County court of Bedford, at which the prisoner was tried, and the verdict found against him, commenced on Tuesday the 27th of August 1872, and had continued thence up to the 11th of September, and still continued. That the court was held every day during the term except Sundays, and except Saturday the 31st of August and Tuesday the 10th of September, on which days the court was not held. The court adjourned from Friday the 30th of August to the next day thereafter, and did not sit until Monday 927 the 2d of September. *It adjourned on Monday the 9th of September and did not sit again until the 11th.

The prisoner obtained a writ of error to the Circuit court of Bedford county; but that court affirmed the judgment of the County court. And the prisoner thereupon applied to this court for a writ of error; which was allowed.

T. N. Williams and Wm. & J. Daniel, for the prisoner.

The Attorney General, for the Commonwealth.

MONCURE, P. This is a writ of error to a judgment of the Circuit court of Bedford county, affirming a judgment of the County court of said county, convicting the plaintiff in error, Harold P. Read, of maliciously shooting one George S. Merri-man, with intent to maim, disfigure, disable and kill him. The questions arising in the case are presented by two bills of exceptions, taken by the plaintiff in error in the course of the proceedings in the County court; one of them to the opinion of said court overruling the motion of the prisoner to set aside the verdict of the jury and grant him a new trial, upon various grounds set out in the first bill of exceptions; and the other, to the opinion of said court overruling the motion of the prisoner to arrest judgment on said verdict, upon the ground set out in the second bill of exceptions. I will consider these questions

in their order; and first those which arise on the first bill of exceptions.

The motion to set aside the verdict and grant a new trial was based upon four grounds, viz: 1st. That the verdict of the jury was against the law and the evidence in the cause.

2nd. Because, since the rendering of said verdict the prisoner had discovered important evidence, which he could not have before discovered by reasonable diligence, material to his defence on said trial; 928 and which, *if given in before the jury, ought, and would, have produced a different verdict from the one found.

3rd. Because the jury were influenced in making up their verdict by improper considerations, not admissible under the evidence, and not warranted by it.

4th. Because of the improper and irregular treatment of the jury during the trial, by being committed, after they were sworn and during the trial, to the custody, and exposed to the influence, of a deputy sheriff, who was a witness, and had testified to material facts on behalf of the Commonwealth on said trial.

Ought the verdict to have been set aside and a new trial granted on either of these four grounds; and,

1st. That the verdict was against the law and the evidence.

In considering this ground it may be material, first, to enquire whether the facts proved, or only the evidence introduced, on the trial, are certified in the bill of exceptions. While it is well settled that an appellate court may revise a judgment of the court below, refusing a new trial on the ground that the verdict is contrary to evidence, even in a criminal case, in behalf of the accused; yet it is also well settled that the bill of exceptions must so present the case as that the appellate court may be able to see whether the jury has correctly applied the law to the facts of the case, and to correct any error which the jury may have committed in that respect. Regularly, the facts, instead of the evidence, ought to be certified in the bill of exceptions; and where there is a conflict or complication of evidence, the court may, on that ground, be unable or unwilling, and, therefore, refuse, to certify the facts; and then the appellate court cannot revise the judgment, unless the evidence be certified, and then only on certain conditions. That is, the court will not in that case reverse the judgment, unless, after rejecting all the 929 *adverse party, the decision of the court below still appears to be wrong. As to the rule to be observed where evidence only is certified, see *Ewing v. Ewing*, 2 Leigh, 337; *Green v. Ashby*, 6 Id. 135; *Rohr v. Davis*, 9 Id. 30; *Pasley v. English*, 5 Gratt. 141; *Bull's case*, 14 Id. 613.

Whether the court of trial intended to certify the facts, or the evidence only, is sometimes a doubted question. In form, it sometimes appears that the certificate is

one of facts: whereas, in substance, it is a certificate of evidence only; and so, on the other hand, it may, in form, appear to be one of evidence only, when it was intended to be one of facts. Each case must depend upon its own circumstances, and the appellate court must determine, as well as it can, what is the character of the certificate in that respect. On this subject see *Bennett v. Hardaway*, 6 Munf. 125; *Jackson's adm'r v. Henderson*, 3 Leigh, 196; *Patterson v. Ford*, 2 Gratt. 18; *Vaiden's case*, 12 Id. 717. Where the matters certified in form as facts are in any respect conflicting, it is evident that the certificate, in that respect at least, is of evidence and not of facts, because facts cannot be conflicting, but must be consistent with each other.

The certificate in this case may be said to be in form a certificate of facts. It commences by saying: "The court doth certify that the following are the facts, and all of the facts, proved before the jury on said trial." It then proceeds to state what each witness on behalf of the Commonwealth and on behalf of the prisoner "proved," in detail; and it concludes each statement by saying, that the foregoing are all the facts proved "on behalf of the Commonwealth," and "on behalf of the prisoner," respectively.

But when we come to examine the "facts proved," as stated by the several witnesses, we find such a conflict between them in most material respects as to show that the certificate, though, in form, one of
930 facts, is "really one of evidence only.

For example, in regard to the nature and degree of violence of the blow given by Merriman to the prisoner immediately preceding the act of shooting by the latter—a vitally important fact in the case, if that blow was the provocation which induced and caused the said act—there is a very decided conflict in the testimony, and most of the witnesses on both sides differ among themselves as to the character of that blow. Jordan Martin, a witness for the prisoner, says that "Merriman struck prisoner a violent blow in the pit of the stomach, knocking him back eight or ten feet, prisoner falling and catching on his hands." "The blow struck by Merriman was a very heavy one—like the kick of a mule."

Now if this be a true account of the blow, and it, and not a previous grudge or provocation, was the cause of the shooting, such shooting could hardly be considered as malicious—at least, without satisfactory evidence that the act was done deliberately, and not in heat of blood. But all the other evidence on both sides represents the blow as not having been near so violent, while it varies materially in itself as to the nature of the blow. Merriman himself says he "struck" the prisoner, who "staggered back several feet, and drew his pistol and fired at witness." Hogan's evidence is to the same effect. Kearns says "he saw prisoner put his hand on Merriman's shoulder, seemingly in a gentle manner; then Merri-

man gave prisoner a lick or a shove, saying 'go away from me and let me alone; I don't want to have anything more to do with you;' then firing commenced." From this account, taken by itself, it would appear that the blow, if blow it could be called, was slight, and that the shooting, even though caused by the blow alone, was malicious. Franklin says he "saw Merriman strike or shove the prisoner. It was between a shove and a blow; prisoner fell back about ten feet; seemed to be getting back to get his
pistol;" "thinks blow not sufficient

931 "to have forced him back." "The blow was not a heavy one." Craig says "prisoner struck M. with his open hand; M. then hit prisoner with his doubled fist. Prisoner fell back, drew his pistol, and after he recovered himself enough, shot M."

Other witnesses besides Martin, examined in behalf of the prisoner, testified as to the nature of the blow. One of them, Lee, the prisoner's brother-in-law, says that "M. struck the prisoner and knocked him back some ten feet. It was a heavy blow. Then prisoner drew his pistol and fired." This testimony rather tends to confirm that of Martin. But another of the prisoner's witnesses, Douglass, gives testimony tending the other way. He says he "saw M. strike or shove prisoner off several paces, and then prisoner commenced firing." Thus describing the blow in almost the same language in which it is described by two of the witnesses for the Commonwealth, to wit: Kearns and Franklin, and concurring with them in representing the blow to have been a slight and not a heavy one.

There are other material facts about which there is a conflict in the evidence; but enough has been stated to show that the County court really certified in the bill of exceptions the testimony in full of the witnesses, and not the facts only, which the court considered to be proved by them.

Regarding the certificate, then, to be one of evidence, and not of the facts which the court considered to be proved by the evidence, we must reject the evidence in behalf of the prisoner, and consider the case upon the evidence on the part of the Commonwealth, according to the rule established by cases before referred to. See *Vaiden's case*, 12 Gratt. 726, and the cases there cited. Applying that rule to the case, it will be found, I think, to be a very plain one. We have only to take the testimony of the witness, Merriman, who states the whole case from the beginning to the end; 932 examine, in connection "with it, some few circumstances omitted by him but stated by other witnesses for the Commonwealth, and enquire whether, upon the case thus presented, this court would be warranted in reversing the judgment upon the ground that the verdict was contrary to law and the evidence.

Before I review Merriman's testimony, I will remark in regard to it, that it seems to be in conflict with none of the other testimony, either that in behalf of the Com-

monwealth, or that in behalf of the prisoner. He omits, perhaps from inadvertence, a few particulars stated by other witnesses, but those particulars are consistent with what he states. Even the testimony of the prisoner's witness, Martin, in regard to the severity of the blow given by Merriman to the prisoner, is not in conflict with the testimony of Merriman, who, while he gives no particular description of the severity of the blow, admits that he "struck" the prisoner, who "staggered back several feet, and drew his pistol and fired at witness." The testimony of this witness is, therefore, no doubt substantially true. But whether so or not, it must be so considered in disposing of the question now before us.

Merriman states that he had played at cards with prisoner and others, at the November term, 1871, of Bedford County court, and had then lost a twenty dollar note, which he believes had been stolen from him. At January term, 1872, of said court, at Liberty, and in the morning of said day, witness went to prisoner and mentioned the loss of the note to him, and prisoner said he was innocent in the matter, and if witness would give him time he would show his innocence. Witness then told prisoner he would give him time. In the afternoon of the same day witness went again to prisoner and asked him about the note. Prisoner again said that if witness would give him time he would show his innocence; and

witness again told him he would give him *time. At the following February term of said court witness again went to prisoner about said note, and prisoner again asked for time, which witness again agreed to give. At the following June term of said court witness again called on prisoner about said note, when prisoner gave witness an account of said note, which witness said he knew was false; and, therefore, witness told the prisoner that he had stolen the note. Prisoner then said to witness that witness must take back that charge, or he would shoot him. Witness replied to prisoner, "Shoot, then, if you choose; I will not take it back."

On the 11th day of July following, in the nighttime, prisoner was passing along the public road near the residence of the mother of witness, with whom witness lived, and called witness out in the road where prisoner was sitting on his horse, and had a conversation with witness about the note, and told witness he must take back the charge he had made against prisoner about the note. Witness said to prisoner that he would not take it back. Prisoner then said to witness that if he did not take it back he would shoot him. Witness replied, "Shoot then." And prisoner rode off home, saying, I will see you again at court. On the 23d day of July (same month) witness came to Liberty court day. About 10 or 11 o'clock in the morning he saw prisoner in the courthouse yard, near the door of the office of James F. Johnson, engaged in conversation with Preston Burton. Witness went to where prisoner was engaged in this

conversation and found it was in regard to the bank note. After some conversation had about the matter between Burton and the prisoner, prisoner said to witness that he, witness, had told the prisoner that Burton had said that he, Burton, had seen the prisoner take the note from the pocket of witness, and that Burton denied that he had ever said so. Witness then said that

he had never said to prisoner that 934 Burton made that statement. *Prisoner insisted that witness had said so; whereupon witness told the prisoner that he was "a damned liar; that he had stolen his money, and he could prove it on him." Witness and prisoner after this went to a bar room in Liberty, and were seated together alone on some barrels. The note was again made subject of conversation by prisoner, when the prisoner said to witness that witness must take back what he had said to him about the note, or he would shoot him. Witness replied, shoot then; that he would not take back anything he had said; and that if he, the prisoner, did shoot, he had better put in a good one. Afterwards, about 12 o'clock of the same day, prisoner and witness again met at the grocery store of John Caddle, in Liberty. After they had been there, Mr. Caddle gave them each a glass of liquor. Witness drank a little and was about leaving, when prisoner was drinking his liquor, and called to him and said that he must take back what he had said, or he would shoot him. Witness replied that he, prisoner, might shoot as much as he pleased; that he, witness, would not take back anything he had said.

After the interview spoken of between prisoner and witness at the bar room, witness went to his sister (Mrs. Lucy Dennis), who resides in Liberty, and borrowed from her the pistol which he subsequently used in the fight with prisoner in front of Ferguson's hotel. It was a five shooter, similar to the one used by prisoner in the fight, and every chamber was loaded. In the afternoon of said day, between the hours of 3 and 6 o'clock, the prisoner called witness to him and asked him to take a walk; that they walked across the street, and when they reached the front of the door of Ferguson's hotel facing the courthouse lot, witness said to prisoner that he would go no further; that he intended to go into Ferguson's and get a drink; prisoner then said this matter must be settled right now;

witness then said let *it be settled 935 then; prisoner then said "you must take back what you have said, or I will shoot you;" witness replied, shoot, damn you, shoot; I am tired of this talk; and used a vulgar expression to prisoner. Prisoner then pushed witness off, and witness struck him, and prisoner staggered back several feet and drew his pistol and fired at witness, and struck him on the shoulder; witness then attempted to draw his pistol, and found some difficulty in getting it out; after witness got his pistol out he presented it at prisoner, and before he fired, prisoner fired his second shot,

which struck witness on his right arm as it was extended, and caused witness to lower his arm, and witness fired his ball from his pistol, he thinks, into the ground. Prisoner fired some three or four shots in all. Witness fired only one shot, and snapped his pistol several times at prisoner, but could not get it to go off but once. After prisoner had ceased firing, he ran into Ferguson's hotel, and witness pursued him to the door.

Witness was shot in two places—on the top of the right shoulder, and on the front of the right arm, between the elbow and the top of the shoulder. The ball that struck the shoulder went out in rear of the shoulder, and the one that struck the arm ranged upwards along the arm, and lodged in the muscles over the right chest. Immediately after the shooting, Dr. Bowyer dressed the wounds and cut out the ball that was lodged as aforesaid. Witness was in bed about two days from his wounds; was lying about the house about two weeks, and they were well at the time of the trial. When the difficulty occurred in front of Ferguson's hotel witness did not think, as he stated, that prisoner intended to shoot until he saw him draw his pistol. Witness and prisoner had both been drinking during the day on which the shooting occurred, and both were under the influence of liquor when the shooting took place.

Wingfield, another witness for the 936 Commonwealth, *states that he was at the livery stable of John W. Scott, in Liberty, a short time before the difficulty occurred; saw prisoner there; prisoner asked him if he, prisoner, got into a difficulty, whether witness would stand by him; further enquired if he, prisoner, needed bail, whether witness would go his bail. Merri-man's name was not mentioned by prisoner in this conversation; prisoner was drunk; was very much under the influence of liquor.

Scott, another witness for the Commonwealth, states that prisoner put up his horse at the livery stable of witness in Liberty, on the morning of the 23d of July. Saw him again about 2 o'clock of that day; was talking a heap of foolishness, and said something about that money; said George must take that back; if he didn't take it back there would be some shooting. Witness thought it was liquor talking. Prisoner was drunk—so drunk that he staggered; had to hold to a peg in the stable in order to be able to stand. This was an hour or more before the shooting occurred. Prisoner and Merri-man seemed always to be friendly; saw them walking the street together a short time before the difficulty.

In regard to the conduct and manner of the prisoner at the time of the shooting, Franklin, a witness for the Commonwealth, says "prisoner seemed to handle himself well and very cool;" and Martin, a witness for the prisoner, says "prisoner rose and drew his pistol from under his coat tail, and shot at Merri-man two fair and deliberate fires, as if he had a post planted; did not seem to be excited or alarmed."

I have stated the evidence (or so much of it as seems to be material to be stated in the view I am now taking of the case) thus fully, because it is necessary to make such a statement in order to determine the question now before us, whether the verdict of the jury was contrary to law and the evidence, and whether, on that ground, 937 *the judgment ought to be reversed.

And now, with the case before us as it appears upon the record, I will proceed to consider that question.

There is certainly no good ground for dispute about the law which is to govern us in the decision of the question. The conviction was of malicious shooting with intent to kill. Whether the prisoner was guilty of malicious shooting with intent to kill or not, depends entirely upon the question whether, if the prisoner had killed Merri-man, instead of only wounding him (with intent to kill, &c.,) the offence would have been murder, either in the first or second degree—it matters not which—or would have been only manslaughter, or homicide in self-defence. If it would have been murder, then the prisoner was guilty of the offence of malicious shooting with intent to kill, of which he was convicted. If it would not, then he was not guilty of that offence, however guilty he might have been of another offence, as of unlawful shooting with intent to kill, &c. That it would have been homicide in self-defence, is not pretended, and there is certainly no ground for pretending. The only question, therefore, is whether it would have been murder or manslaughter.

The distinctions between murder and manslaughter, at least so far as concerns this case, have been settled for centuries, and can admit of no question; and I will not take time to repeat what has already been repeated more than a thousand times, the definitions of these two offences. I will only say on this subject that every unlawful homicide must be either murder or manslaughter; and whether it be one or the other depends alone upon whether the party who perpetrated the act did it with malice or not—malice either express or implied. That one word malice is the touchstone by which the grade of the offence must be determined. When a homicide is committed in the course of a sudden quarrel or broil,

or mutual combat, or upon a sudden 938 provocation, and *without any previous grudge, the offence may be murder or manslaughter, according to the circumstances of the case. Of which circumstances the most important generally, are the nature and degree of the provocation; the manner in which it was resented; the character of the weapon used for the purpose, and whether it was casually or accidentally at hand, or was prepared for the purpose of doing such an act and carried secretly about the person. A reasonable provocation is always necessary to reduce a felonious homicide, committed upon sudden provocation, from the degree of murder (which is its presumed degree), to that of

manslaughter; and especially where the offence is committed with a deadly weapon. Words alone, however insulting or contemptuous, are never a sufficient provocation to have that effect, at least where a deadly weapon is used, so tender is the law of human life, and so much opposed is it to the use of such a weapon.

It is not only necessary in such a case and for such an effect that a reasonable provocation should be received, but it is also necessary that the provocation should have the effect of producing sudden passion under the influence of which alone the offence is committed. It must be a sudden transport of passion, which the law calls *furor brevis*. If a person on receiving the gravest provocation, is unmoved by passion, but wantonly and wilfully and wickedly kills his adversary otherwise than in self-defence, he is guilty of murder. The law mitigates the offence to manslaughter, only as an indulgence to the infirmity of human nature. Provocation without passion or passion without provocation will not do; both must concur to reduce the offence to the grade of manslaughter.

Again, if an unlawful homicide be committed in pursuance of a preconceived purpose, the offence will be murder, no matter how great sudden provocation may have immediately preceded the act. The
939 provocation *may have been brought about or sought by the perpetrator; or he may have availed himself of it to give color of justification or excuse to his act, done in execution of his deliberate purpose. It is true that where there is both an old grudge and fresh provocation, the jury ought rather to presume, in the absence of sufficient evidence to the contrary, that the homicide was induced by the fresh provocation, and not by the old grudge. But then this is a matter for the jury on all the evidence before it, and there is generally sufficient evidence in every such case to satisfy the jury beyond a doubt which one of these two concurring motives induced the act.

In this case, if there had been no evidence of an antecedent grudge, or of previous threats and preparation for the commission of the act; in other words, if it had been the case of a homicide committed alone on sudden provocation; and the jury had found the accused guilty of murder, it would have been difficult, consistently with the rules of law, even for the court of trial to set aside the verdict, much less for an appellate court to reverse the judgment on the ground that the verdict was contrary to law and evidence. It would have been a question for the jury to decide upon all the evidence; and, looking to the nature of the provocation, being between a shove and a blow, according to some of the evidence; to the deadly nature of the weapon used by the offender, which was carried secretly about his person, perhaps for the very purpose; to the cool and deliberate manner in which he used it, thus indicating an

absence of sudden passion, and the presence of a malicious purpose; even the court of trial could not well have said that the evidence did not warrant the jury in finding such a verdict. But that court being satisfied with the verdict, and refusing to set it aside, surely an appellate court would not have reversed the judgment.

But in this case there was abundant evidence of an antecedent grudge and
940 previous threats, and preparation *for the commission of the act. Merriman had lost a twenty-dollar note, and suspected the prisoner of stealing it. The prisoner asked for time to show his innocence, and repeated the request from time to time, which Merriman as often granted him. At length the prisoner having given an account which was not satisfactory to Merriman, but which, on the contrary, confirmed his suspicion, he charged the prisoner with the theft. Witness then said that Merriman must take back the charge or he would shoot him. Merriman replied "shoot then, if you choose; I will not take it back." Without repeating the evidence on this subject again, it is enough to say that this threat of the prisoner and this reply of Merriman were repeated as many as five different times, and at different places, almost in the same words, down to the time of the commission of the act, immediately preceding which the prisoner said, for the last time, "you must take back what you have said, or I will shoot you." Merriman replied, "shoot, damn you, shoot; I am tired of this talk," and used a vulgar expression to prisoner. Now, although both the prisoner and Merriman drank freely on the day of the commission of the act, and were under the influence of spirit at that time, yet it does not appear, and it is not probable, that they were under such influence on the former occasions when the threat was made. The prisoner prepared himself with a deadly weapon, to wit: a five-shooter, in good order for shooting, which he carried secretly about his person. It does not appear that he had been in the habit of carrying such a weapon secretly about his person, and as it is unlawful to do so habitually (Code ch. 195, § 7, p. 803), the jury might well have presumed that he provided himself with this weapon for the special purpose of executing his threat whenever he could find a favorable occasion for doing so, unless he could intimidate Merriman to retract the charge he had made against him. These acts, con-
941 nected with the actual shooting *which followed as aforesaid, and the circumstances under which it was done, strongly tend to show that the act was deliberately done in execution of his prior threats that he would do precisely what he did do. And this is greatly confirmed by what he said to Wingfield about being his bail if necessary.

Now, could the judge who presides at the trial of this case say that the jury were not warranted in finding that the shooting was malicious, even if he could have said

that, if upon the jury, he would have found a different verdict from that which was found? Could he have said that the evidence was plainly insufficient to sustain the verdict? It was a case peculiarly proper for the determination of the jury upon all its facts and circumstances. The judge who presided at the trial, and who, like the jury, saw the witnesses and heard them give their testimony, was satisfied with the verdict, and refused to set it aside. And the judge of the Circuit court has affirmed the judgment of the County court, giving his reasons for so doing in an able opinion, which is inserted in the record. Can this court, which has not the great advantages that the jury and the court of trial had, in seeing and hearing the witnesses, but must look at the case in the necessarily imperfect manner in which it is presented in the record, undertake to reverse the judgments of two courts, and to set aside the verdict of the jury, in a case which it was their peculiar province to decide, and which they had so much better means of deciding than this court can possibly have? This court, though it has the power to reverse the judgments of the courts below, and set aside the verdict, has no power to decide the cause; all it can do in that way is to remand the cause for a new trial by another jury. But it has already been tried by one jury, and there is no good reason for believing that another jury would come to a different result. But whether they would, or might, or not,

942 I think this is *clearly a case in which we ought not to reverse the judgement on the ground we have been considering. For the rules which govern this court in such a case, I refer to the following decisions: In civil cases, *Ross v. Overton*, 3 Call, 309; *Brugh v. Shanks*, 5 Leigh, 598; *Mays v. Callison*, 6 Id. 230; *Brown v. Handley*, 7 Id. 119; *Mohan v. Johnston*, Id. 317; *Bell v. Alexander*, 21 Gratt. 1; and *Blosser v. Harshbarger*, Id. 214; and in criminal cases, *Slaughter's case*, 11 Leigh, 681; *McCune's case*, 2 Rob. R. 771; *Hill's case*, 2 Gratt. 594; *McWhirt's case*, 3 Id. 594; *Grayson's case*, 6 Id. 712; *Vaiden's case*, 12 Id. 717; and *Bull's case*, 14 Id. 613. In *Ross v. Overton*, Judge Roane, delivering the resolution of the whole court, laid down the principle (in language which has since been cited and approved in many cases) thus: a new trial, on the ground that the verdict is contrary to evidence, "ought to be granted only in case of a plain deviation, and not in a doubtful one, merely because the court, if on the jury, would have given a different verdict; since that would be to assume the province of the jury, whom the law has appointed the triers." In *Brugh v. Shanks*, Judge Carr, after quoting the above language of Judge Roane, says: "These remarks are applied to the court which presides at the trial, and has all the advantages (possessed by the jury) of seeing and hearing the witnesses: how much more strongly do they apply to an appellate court, deprived of these all

important aids in eviscerating truth? But here they apply a multo fortiori; for not only have the triers appointed by law found the verdict, but the court which heard the witnesses has refused the new trial. In such a case the 'deviation' must be gross and palpable indeed, before I could agree to interfere with the verdict." "Perhaps, as a juror, I might have hesitated to find the verdict this jury found; but, assuredly, I should not, as the presiding court, have set aside its verdict as against evidence; and much less, as an appellate court, can I agree to disturb it."

943 "In *Mays v. Callison*, Judge Carr's opinion, in which the whole court concurred, was to the same effect; and so also in *Brown v. Handley*, and in *Mahon v. Johnson*. In *Slaughter's case*, in regard to the question whether a homicide was committed in consequence of present provocation or a previous grudge, the court quote the following appropriate language from the case of *Regina v. Kirkham*, 8 Carr & Payne 115, 34 Eng. C. L. R. 318: "If a person has received a blow, and in the consequent irritation immediately inflicts a wound that occasions death, that will be manslaughter. But he shall not be allowed to make this blow a cloak for what he does; and therefore, though there have been an actual quarrel and the deceased shall have given a great number of blows, yet if the party inflict the wound, not in consequence of these blows, but in consequence of previous malice, all the blows would go for nothing." "And so in the case before us," said the court in *Slaughter's case*, "we may say the deceased committed a violent assault upon the prisoner in throwing the brick at him; but did the prisoner shoot him in consequence of the ungovernable passion excited by that assault? or did he seize upon it as an opportunity of gratifying his previous malice, and carrying into effect a preconceived design to take the life of the deceased? Those were questions that belong to the jury to decide; and if the record contains testimony from which the jury might reasonably conclude, as they did, that the killing was the result of malice aforethought, then it would be an invasion of their province for this court to interfere and set aside their verdict." In *McClune's case* the language of the court is very strong on the same subject. In *Hill's case* the court say: "Has the Commonwealth made out a case of wilful, deliberate and premeditated killing? And here it should be premised that this was a question resting upon the tendency and weight of the evidence, and proper for the jury to determine. And where the

944 jury and the *judge who tried the cause concur in the weight and influence to be given to the evidence, it is an abuse of the appellate powers of this court, remote as it is from the scene of the transaction, having the evidence only on paper, divested of many elements which enter into every jury trial, and which, from their nature, cannot be presented on paper, to

set aside the verdict and judgment, because the judges of this court, from the evidence as written down, would not have concurred in the verdict. Although we have, contrary to the rule of the English courts, decided that it is within the appellate powers of this court to set aside a verdict because it was not authorized by the evidence; yet it is only in a case where the jury have plainly decided against the evidence, or without evidence, that this appellate power will be exercised. *McCune's case*, 2 Rob. R. 771." To the same effect is *McWhirt's case*. In *Grayson's case*, 6 Gratt. 723, Judge Scott lays down the principles which have been settled in regard to new trials, motions for which, he says, are governed by the same rules in criminal as in civil cases. I think this case falls under the fourth rule stated by him (if under any) supposing the evidence to be contradictory and the verdict to have been against the weight of evidence; in which case, he says, "a new trial may be granted by the court which presides at the trial; but its decision is not the subject of a writ of error or supersedeas, or examinable by the appellate court." In *Vaiden's case* it was held that a bill of exceptions in a criminal case, upon the refusal of the court to grant a new trial on the ground that the verdict is contrary to the evidence, is to be framed in the same way as the bill of exceptions in civil cases to the like refusal is framed; and that in reviewing the judgment of the court below, the appellate court will not reverse the judgment on the ground that there is a doubt of its correctness; but it must be satisfied that the evidence is plainly

945 insufficient to warrant *the verdict.

See also *Kate's case*, 17 Gratt. 561.

In the last case decided by this court on the subject, *Blosser v. Harshbarger*, supra, decided in 1871, my brother Christian, in whose opinion the other judges concurred, declared that "the rules of law under which a court is warranted in setting aside the verdict of a jury and granting a new trial are too well settled and firmly established by the decisions of this court to admit of doubt, or even serious discussion"—and he then repeated and re-affirmed them.

I have thus far been considering the case as upon a certificate of evidence only, and according to the rule which applies to such a case, have disregarded the parol evidence in favor of the prisoner. "But the result will not be varied," as was said in *Bull's case*, 14 Gratt. 613, 622, "even if the objection to the form of the bill of exceptions be disregarded, and all the evidence therein set forth as well for as against the prisoner be considered. In pursuing that mode of deciding the case, it would, of course, be necessary to disregard all the evidence of the prisoner in conflict with the evidence against him. Nor, indeed, will it be varied if we consider the certificate as a certificate of facts, if it be possible so to consider it; nor even if we regard the evidence of the prisoner as true where it is in conflict with the evidence of the Commonwealth, and to

that extent reject the latter evidence, thus reversing the rule which properly applies to such a case. In any view which can be taken of the case, the question was a proper one for the jury to decide upon all the evidence before them. And the jury having so decided it, and the judge who presided at the trial having been satisfied with the verdict and refused to set it aside, this court cannot properly reverse the judgment, on the ground that it was contrary to the evidence.

I will now consider the other grounds of the motion to set it aside; and,
946 *2ndly. As to the ground of after-discovered evidence.

It is admitted that the rules on this subject are correctly laid down in 3 Wharton's Am. Cr. Law, § 3161, and Thompson's case, 8 Gratt. 641; and that after-discovered evidence, in order to afford a proper ground for the granting of a new trial, must: 1st, have been discovered since the former trial; 2ndly, be such as reasonable diligence on the part of the defendant could not have secured at the former trial; 3dly, be material in its object, and not merely cumulative and corroborative or collateral; and, 4thly, must be such as ought to produce, on another trial, an opposite result on the merits. Without saying anything in regard to whether the first and second of these four requisitions are complied with in this case, I think it very clear that the third and fourth are not. To say the most of it, the alleged after-discovered evidence is merely cumulative and corroborative, and is not such as ought to produce on another trial, an opposite result on the merits. It does not tend to discredit Merriman; and if it did, the general rule is that a new trial will not be granted, where the object is to discredit a witness on the opposite side. 3 Whart. § 3184; Thompson's case, supra. In regard to "the remarkable statement of John W. Scott, that he knew that the twenty dollar bank note spoken of was not stolen by the prisoner, but was won in gaming by him from Merriman," I agree with the learned judge of the Circuit court in saying, that said statement, "if true, would not be relevant or material testimony on the trial of the prisoner for malicious shooting. But it does seem very strange that this person who was examined as a witness on the trial, and who knew of the difficulty between Merriman and the prisoner, and that the latter was threatening to shoot the former for charging him with stealing the note, should never have spoken of it until after the trial, when one word from him would have settled all difficulties between them." I am of
947 *opinion that the alleged after-discovered evidence afforded no good ground for a new trial.

3dly. As to the ground that the jury were influenced in their verdict by improper considerations.

The only support offered to sustain this ground was the affidavit of Scott, that he heard two of the jury say, that they had

rendered their verdict in part on account of the defendant's failure to explain before them the matter of the twenty dollar note which he was charged to have stolen. To say nothing of the doubtful character of this witness for veracity, for reasons before stated, it is enough to say, that even the affidavits of the two jurors themselves to the same effect would have been an insufficient ground for setting aside the verdict of the jury. "Though the former practice was different," says Wharton, "it is now settled in England that a juror is inadmissible to impeach the verdict of his fellows. 'It would open each juror,' declared Mansfield, C. J., 'to great temptation, and would unsettle every verdict in which there could be found upon the jury a man who could be induced to throw discredit on their common deliberations.' " 3 Whart. § 3155. In this country the English rule has generally been adopted. *Id.* In Thompson's case, 8 Gratt. 641, 650, Thompson, J., in delivering the opinion of the court, admitted the well settled English rule, and the great preponderance of American authority in the same way, and he quoted the strong language of Chief Justice Hosmer, in 5 Conn. R. 348, that "the opinion of almost the whole legal world is adverse to the reception of such testimony, and in my opinion, on invincible foundations." In Bull's case, 14 Gratt. 613, 626, 632, most of the authorities, English and American, including those of our own State, on this subject, were referred to; and this court concluded that, "in view of all the authorities, and of the reason on which they are founded, we think, as a general rule, the testimony of jurors ought not to be received to impeach their verdict, especially on the ground of their own misconduct."

But in this case we have not the affidavit of the two jurors themselves, but only the affidavit of a third person, as to what he says he heard them say; and it is laid down that "the affidavit of third persons as to what they have heard jurors say respecting their verdict, is inadmissible to impeach it." 3 Wharton, § 3156. In this case, too, we have counter affidavits of two others of the jury, that in deciding the case and rendering their verdict, the question of the guilt or innocence of the prisoner in taking the twenty dollar note which Merriman charged the prisoner with having taken, was not discussed or considered by the jury—at least, so far as the affiants heard or believed. I am of opinion that the ground thirdly relied on as aforesaid for setting aside the verdict was insufficient for that purpose.

4thly. As to the ground that the jury, after they were sworn and during the trial, were committed to the custody and exposed to the influence of a deputy sheriff, who was a witness and had testified to material facts in behalf of the Commonwealth on said trial.

I do not think I can answer this objection in stronger or more appropriate language than that which was used by the learned

judge of the Circuit court on the same subject, and which, therefore, I adopt as mine.

"The counsel for the prisoner argue that this was improper, and liken it to a case of a separation of the jury, or their improper intercourse with persons not of the jury. If it had even been shown that the deputy sheriff was an important witness, or had any feeling against the prisoner, it seems to me that it would be going a great length to presume that he had violated his duty and his oath, by speaking to the jury on the subject of the trial. He took an oath that he would not speak to them himself on the subject of the trial, nor suffer any other person to speak to them. The sheriff

949 is obliged to speak *to the jury as relates to their comfort or wants, and under the law, he is obliged to take care of and provide for them, and have the custody of them during the recess of the court; and because he happened to be called upon as a witness to prove a fact in the case, however immaterial or unimportant, it seems to me that it ought not to be presumed that he violated his duty and his oath, without any motive for so doing.

In this case it does not appear that the deputy was summoned as a witness. He was not examined in chief, but was called on as rebutting evidence to prove a single fact, viz: that the prisoner did not fall when he was stricken by Merriman—a fact not very material, and which was proved by a number of other witnesses who testified in the cause—indeed, by every one who testified on the subject, except Jordan Martin. The sheriffs who had custody of the jury were sworn in court every evening in the presence of the prisoner and his counsel; and if there was any objection to any of them having charge of the jury, it ought to have been made then; and if there was any reason for it, the court would doubtless have prevented any improper person from having charge of it. That the deputy sheriff, Kaesey, should have been casually called on in the progress of the trial, to prove a single fact which transpired in his presence, and had been already proved by several witnesses, certainly did not show that he had any feeling about the result of the prosecution, or legally disqualify him from keeping the jury. It did not tend to show that he was an unfit person to perform that office, and he might, notwithstanding that fact, have been a very fit person for that purpose. The prisoner may have had perfect confidence in his integrity, and may have preferred that he should continue to keep the jury after he had given evidence. That he was sworn for that purpose in the presence of the prisoner, without any objection being made on his part, shows

950 that he had no objection to *make; and it is now too late to make such an objection, for the first time, in the appellate court, even if it could have been made successfully at any time. It will be presumed that the officer performed his duty and his oath, in the absence of any evidence to the contrary.

My attention has been called to the case of *McElrath v. The State*, 2 Swan R. 378, which is supposed to have a material bearing on the question I am now considering. I always regard with respect a decision of the highest court of a sister State, especially when it is supported by good reasons, although it is not a binding authority in this State. But in my opinion, and with all respect for the opinions of those who differ from me, that case is not at all in point. There a new trial was awarded a prisoner convicted of manslaughter, because it appeared that during the progress of the trial the prosecutor spent a night in the room with the jury, who had been committed by the court to the care of a constable, though the prosecutor was the sheriff of the county, and all exceptions to the competency of the panel of jurors summoned by him were waived by the prisoner, and though the prosecutor stated in an affidavit, that he "made use of no means of any sort to influence the jury."

Of all persons concerned in a prosecution, the prosecutor himself is the most interested, and the most unfit to have charge of the jury; and accordingly, in that case, the jury was placed in the care of a constable, who took an oath to keep them separate from all other persons, and suffer no one to have any communication with them. Under these circumstances, it was an act of great misbehavior in the prosecutor (though he was sheriff) to obtrude himself into the room with the jury and stay with them all night, and it was an act from which the prisoner might have sustained great detriment, notwithstanding the affidavit of the sheriff that he made use of no means

951 to influence them. It is true *that the court, in its opinion in that case, makes use of an expression which, taken by itself, might seem to imply that a witness is in no case a proper person to have charge of a jury. But we must construe this expression with the context. "The simple inquiry, then, is (say the court): Can it be tolerated that the prosecutor may, at his pleasure, associate and hold communication with the jury during the progress of the trial? And this inquiry, it seems to us, admits of no discussion, if the purity of the trial by jury be deemed worthy of preservation. If the prosecutor may do so, who may not? May not any stranger to the prosecution, or any witness in the case, or any relative of the deceased, thus intrude himself upon the jury?" The responsibilities of a prosecutor, further say the court, "are of a nature to inspire him with a feeling of personal interest in the result of the prosecution. He may be, and frequently is, a witness; his reputation is, in some degree, not unfrequently involved in the issue; he is liable to be subjected to costs, in the event that the court should be satisfied that the prosecution was either frivolous or malicious; and likewise to an action for damages at the suit of the injured party." How unlike in its circumstances is that case to this? If, in this case, Mer-

riman had intruded himself into the same room with the jury and staid all night, and conversed freely with them, the cases would have been more alike. Here, after the testimony in chief was closed on both sides, a deputy sheriff was called on by the attorney for the Commonwealth and testified to a single fact of little importance, which happened to be within his observation, and which had already been proved by nearly all the witnesses on both sides. After this the deputy was sworn, as on former occasions, in the presence and without any objection of the prisoner or his counsel, to keep the jury; and the only question is, whether, as matter of law, the ver-

952 dict *is invalid for such a cause and under such circumstances? I say, clearly not.

I am of opinion that this fourth and last ground relied on for setting aside the verdict was insufficient for that purpose.

And now I have but one remaining point to consider, which is the point presented by the second bill of exceptions, to wit: that on the 11th day of September 1872, when the prisoner was brought into court to hear judgment on the verdict, the term of the court at which he was tried had ended, and it was not competent for the court to enter up judgment on said verdict: and, therefore, that the court ought to have sustained, and not overruled, his motion to arrest said judgment on that ground.

By the Code, ch. 157, § 15, it is provided, that "every such term of said courts (to wit: the county courts) may continue, if it be a monthly term, not exceeding six days, and if it be a quarterly term, not exceeding twelve days." By the act of April 27, 1867, acts of Assembly 1866-'67, ch. 118, § 3, p. 944, the 15th section of ch. 157 of the Code is amended and re-enacted, the amendment providing that "every such term of said courts may continue, not exceeding fifteen days, and may adjourn from day to day, or to any day within the fifteen days." By the act of April 2, 1870, acts of Assembly 1869-'70, ch. 38, p. 35, passed after the adoption of the present constitution, chapter 157 of the Code of 1860, was amended and re-enacted. The chapter as amended consisted of 11 sections, while the original chapter consisted of 18. The amended chapter, § 2 provides, that "there shall be held in each county of this Commonwealth, monthly, a term of the County court, to be held at the times prescribed by law, and with the jurisdiction hereinafter provided." But neither in that section nor any where else in the chapter, is any thing said about the duration of the term; while § 10

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repeals "all acts and parts of acts inconsistent with the provisions of this act." If this act repeals the provision of the act of 1867, fixing the duration of the term at fifteen days, then there is now no other limitation of the term than that which is implied in the declaration contained in the act of 1870, that there shall be held in each county, monthly, a term of

the County court, to be held at the times prescribed by law—the effect of which would be, that the term must commence at the time prescribed by law, but might continue as long as the business of the court required; not longer, however, than until the day fixed for the commencement of the next succeeding term. If this be the true construction of the act of 1870, then certainly the term of the court at which the prisoner was tried had not ended when the judgment against him was pronounced.

But it is contended that the provision in the act of 1867, fixing the duration of the term, not being inconsistent with any provision of the act of 1870, is not repealed by that act, but yet remains in full force; that the term of the court at which the prisoner was tried could not be continued longer than fifteen days, counting the Sundays which happened during that period in the number of days fixed for the duration of the court; and that the judgment having been pronounced on the 11th day of September 1872, which was the sixteenth day from the commencement of the term, counting the two Sundays which intervened (though only the fourteenth day from said commencement, not counting those Sundays), the said judgment was pronounced after the end of the term, and therefore was void.

The question whether the aforesaid provision of the act of 1867 was repealed by the act of 1870, is an interesting question, but not necessary to be decided in this case in my view of it. As I am clearly of opinion that, if the said provision was not so repealed, but yet remains in full

force, and the duration of the term of 954 *the County court is still limited by law to fifteen days, Sundays are not by our laws judicial days, and are not to be counted in the number of the fifteen days during which the County court is authorized by law to sit in a term. The term "may continue not exceeding fifteen days," that is juridical days on which the court may lawfully sit, and not including Sundays, which are dies non, on which the court cannot sit. That such is the construction of every such law in this State, unless where a contrary intention is clearly indicated in the law, is expressly decided by this court in the recent case of *Michie, &c., v. Michie's adm'r, &c.*, 17 Gratt. 109, in which it was held that Sunday, being dies non juridicus, is not one of the days of the term of a court. See also the Code, ch. 16, § 17, 8th clause, p. 115; and *Hill's case*, 2 Gratt. 594, 612-13. A contrary intention is not indicated in the act of 1867. The counsel for the prisoner seemed to think that it was by the provision that the court may adjourn "to any day within the fifteen days." But that means "any juridical day within the fifteen judicial days, during which the court is authorized to be continued." It is much more important that the law should be settled than that it should be settled in any particular way (which indeed is a matter of little importance), and it has accordingly been settled with us.

I am, therefore, of opinion that the County court did not err in overruling the prisoner's motion to arrest the judgment.

I have now considered and disposed of all the questions arising in this case. I regret that my opinion should have been extended to so great length, but felt that it was proper to examine fully the arguments made by the very able counsel of the prisoner, both in this court and in the court below. I think there is no error in the judgment, and am for affirming it.

ANDERSON, J. "When fresh pro- 955 vocation occurs between *preconceived malice and death, it ought clearly to appear that the killing was upon the antecedent malice, which may be difficult in some cases to show satisfactorily, if the new provocation be a grievous one. In such cases, says Hawkins, it should not be presumed that they fought on the old grudge, unless it appear by the whole circumstances of the fact." Wharton's Crim. Law, 6 Ed., § 955; 1 Russell 484. I do not think it appears from the evidence in this case that the prisoner had preconceived malice. It is true that he threatened the prosecutor that if he did not withdraw a grievous charge he had made against him, he would shoot him. But such threat does not seem to have been made in malice. The prisoner did not so regard it; for their relations, which were of the most friendly character, were not affected by it. They seemed to have met and parted as friendly as before, associated together, drank together, and talked with each other in the most friendly manner. And the prosecutor evidently did not regard his threats as serious. The prisoner does not appear to be a malicious man, as he is exhibited in this record. His conduct was not that of a man who had a murderous purpose. He was doubtless grieved by the imputation made upon his character, and his threat of shooting was evidently made, not with a malicious or murderous purpose, but as a means of relieving his character from the imputation, by inducing Merriman, the prosecutor, to withdraw it. I do not think from the evidence that he had formed a fixed resolution to put his threats in execution; but he had serious thoughts of it on the day the shooting took place, as is shown by the inquiry he made of the witness Wingfield, will you back me if I get into any difficulty; will you go my bail? He was evidently considering the consequences of such an act, if he was not too drunk then for reflection. But it does not show that he had made up his mind to it.

But whatever may have been his 956 intention or purpose *then, if it was to shoot the prisoner, I think the evidence shows plainly that he abandoned it.

If there was preconceived malice, it appears from the evidence that he received grievous fresh provocation; and it does not clearly appear from the evidence, in my opinion, that the shooting was upon the antecedent malice, which, as we have seen, it was incumbent on the Commonwealth to

make clear. On the contrary, I think it does plainly appear that it was caused by the fresh provocation. I am convinced from the evidence, that the prisoner would not have shot if he had not been struck by Merriman. And there is no evidence that he did any thing to provoke him to strike him. On the contrary, the evidence shows that he endeavored to appease him; that he put his hand gently upon him and begged him to desist, and let the matter drop, when he was struck a blow by Merriman, as to the force and violence of which there is a difference of opinion among the witnesses; but which was of sufficient violence, according to the testimony of Merriman himself, to stagger him back two or three feet; according to the testimony of other witnesses eight or ten feet, and according to the testimony of one to fell him to the ground, he catching on his hands. No other witness saw him fall. The prisoner then drew his pistol, and about the same time Merriman attempted to draw his, but it hung in his coat, and the prisoner shot first, evidently, according to the testimony of the physician who dressed Merriman's wounds and extracted the ball, while he (Merriman) was in the act of drawing his pistol.

I concur with the president in his exposition of the law, and only differ from him in inference from the facts proved. I regard the certificate of the judge of the court of trial as a certificate of facts, upon the authority of our decision in *McClung's adm'r v. Ervin*, recently decided and not yet reported, in which the cases on the subject of new trials are reviewed. But if it is a certificate of evidence, as was said by Judge Brockenbrough in *Green v. Ashby*, 6 Leigh, p. 135, I can perceive no difference between evidence admitted to be true and facts proved. In this case I do not think there is any material or substantial conflict in the evidence, or facts certified as proved. Some of the witnesses saw what others did not, as is universally the case among the witnesses of such conflicts. And the difference as to the force of the blow struck is only a difference of opinion. The effect of the blow, according to all the testimony, shows that it was a violent one; as, indeed, it is most likely it would have been from a man who exhibited the indecent rage and violence that Merriman did at the time.

I am of opinion, therefore, that the fresh provocation which there is no evidence to show was incited by the prisoner, is sufficient to account for the shooting, and that the jury were not justified by the evidence in ascribing it to preconceived malice—if, indeed, any ever existed. I think the evi-

dence shows that the prosecutor was to blame from the beginning to the end of the controversy. He charged the prisoner with stealing his money, and instead of prosecuting him for it, and discarding him as a thief, he was cheek by jole with him whenever they met; his social and friendly intercourse with him were unaffected by the belief of Merriman that he was a felon. But on the occasion of the fight, conscious of being armed himself with a revolver, he goaded the prisoner to make an assault on him, by hectoring and bullying over him, and belching in his teeth the most abusive and insulting language, and assuming towards him the most offensive attitudes, all of which was unavailing to provoke the prisoner to an attack, until he, without provocation, struck the blow which sent him reeling from him; and then the prisoner drew his pistol (the prosecutor drawing his almost simultaneously) and fired on him, and slightly wounded him.

958 *Some little time elapsed before the second fire, when they both fired nearly simultaneously, and Merriman was again slightly wounded. They had one or two more rounds, Merriman's pistol snapping every time, when the prisoner retreated into the tavern near by, one barrel of his revolver being still loaded, and Merriman pursued him to the door, apparently anxious to continue the fight.

I am of opinion, from the best view I can take of the evidence, that the fresh provocation, which there is no evidence to show was incited by the prisoner, is sufficient to account for the shooting; and that the jury were not justified by the evidence in ascribing it to preconceived malice.

I deem it unnecessary to notice the other grounds on which the reversal of the judgment is asked, this being, in my opinion, sufficient. But I will only add that I think it a bad practice, during the pendency of a criminal trial, to commit the custody of prisoner to a sheriff, who is examined as a witness for the Commonwealth, whether he had been regularly subpoenaed as a witness or not. In order to preserve the purity of trial by jury, I am not prepared to say that public policy does not require that the judgment in this case should be reversed upon that ground alone, if there was no other.

Upon the whole, I am of opinion that the judgment should be reversed, and a new trial awarded the prisoner.

CHRISTIAN and STAPLES, Js., concurred in the opinion of Moncure, P.

BOULDIN, J., concurred in the opinion of Anderson, J.

Judgment affirmed.

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Hale v. Wall & al., 424

Wall v. Slusher, 424

3. An agent is appointed before the war to collect debts; his authority is not suspended because it is illegal to remit to his principal who is living outside of the Confederacy; but it is the duty of the agent to receive, and the duty of the debtor to pay.

Idem, 424

4. The receipt of the payments of the debts in bank notes and Confederate currency in 1862, in the absence of instructions from his principal not to receive such money, was not improper.

Idem, 424

5. The agent never used the money, but at once deposited it in bank, he having no money of his own deposited there; and though the deposit was in his own name, he intending it for the benefit of his principal. This was not a conversion of the money to his own use, so as to make him debtor for the amount; but was, under the circumstances, not improper; and he is not responsible for the loss.

Idem, 424

6. Bonds are given to S, secretary, &c., a voluntary association, and a deed of trust

executed to secure them. And S is directed by the association to proceed to collect all the debts belonging to them. Though by the by-laws the secretary was to be elected annually, yet as S continued to act as such, and was so recognized by the association, it was competent for him to direct the enforcement of the deed of trust.

Sangston, cor. sec., &c., v. Gordon & Riely, 755

7. It is not competent for the grantors in the deed of trust to question the authority of S to take the deed as security for the bonds; that will be presumed until his principals disavow the act.

Idem, 755

ALIEN ENEMY.

1. An alien enemy may have an agent in the enemy's country to collect debts due to him and preserve his property.

Hale v. Wall & al., 424

Wall v. Slusher, 424

2. See *Agents*, No. 3, 4, 5, and *Idem,* 424

3. Money received by an executor during the war belonging to a citizen of Indiana, was confiscated by the Confederate government. **Held:** The Confederate government, in the exercise of her belligerent rights, had authority to confiscate the property of alien enemies; and the executor is not responsible for the amount confiscated.

Newton's ex'or v. Bushong & al., 628

APPEALS.

1. See *Appellate Court*, No. 1, 2, and *Burton v. Brown's ex'ors & als.,* 1

2. In a suit by R against H for specific performance of a contract for the sale of one hundred and fifty acres of land, part of a large tract of two thousand six hundred acres, sold by W to C, under whom both B and H claim, the court holding that B was entitled to recover, directed a surveyor, named, to go on the land and lay off the one hundred and fifty acres by metes and bounds, and report to the court. Before the survey is made, H obtains an appeal from the decree. **Held:** The appeal should not have been allowed until the report was made; and therefore dismissed.

Higginbotham v. Brown, 323

3. An appeal from the decree of the court refusing to allow a bill of review to be filed, if the decree was final, brings up for consideration the correctness of the first decree; and if the first decree was interlocutory, brings up the whole case.

Ambrouse's heirs v. Keller, 769

4. If the petition for an appeal is presented within the period for the limitation of appeals, it is sufficient. *Idem,* 769

APPELLATE COURT.

1. A party may be concluded by his acquiescence in a decree affecting his rights, made in the progress of the cause; under which decree he takes a part of the fund affected by it, and makes no objection to it until after the final decree in the cause made twenty years after it.

Burton v. Brown's ex'ors & als., 1

2. An appeal by one party from a decree overruling some exceptions to a commissioner's report, and sustaining others, and re-committing the report, brings up the whole cause; and the decree of the court of Appeals affirming the decree of the court below, concludes all questions previously decided, whether in favor of the appellants or appellees.

Idem, 1

3. In a case in which a jury is dispensed with, and the case is submitted for trial to the court, upon a bill of exceptions to the judgment, all the evidence is to be inserted in the bill; and in the appellate court it will be considered as on a demurrer to the evidence.

Hodge's ex'or v. First Nat. Bank

Richmond, 51

4. In such a case when the judgment is for the plaintiff, and the defendant excepts, if it appears that a witness for the defendant, on his examination in chief makes a statement of a fact one way, and upon his cross-examination makes it in a materially different way, the first statement is to be rejected, and the last is to be taken as correct.

Idem, 51

5. When depositions are taken and filed in a cause, both parties having been present when they were taken, and the decree is obviously based upon them, the omission to refer to them in the decree will be considered a clerical mistake, and the cause will be considered as heard upon them as well as upon the other papers.

Day v. Hale & als., 146

Hale v. Hale & als., 146

6. Upon a motion for a new trial of an issue out of chancery, on the ground that the verdict is contrary to the law and the evidence, the judge, overruling the motion, refuses to certify the facts proved, because the testimony was conflicting, but all the oral testimony is certified. The appellate court will consider not merely whether the evidence adduced before the jury warrants the verdict, but also whether having regard to the whole case, further investigation is necessary to attain the ends of justice.

Powell & wife v. Manson, 177

7. In such a case, although there may have been a misdirection by the court, or evidence may have been improperly
961 *rejected, a new trial will not be granted if the verdict appears to be right upon a consideration of all the evidence, including that which was rejected.

Idem, 177

8. A creditor extending the land of his debtor under an *elegit*, stands in judgment of law as if he had taken a lease for years in

satisfaction of his debt; and by virtue of such extent he acquires a title to the premises which may be the subject of adjudication in this court as a controversy concerning the title to land.

Lyons v. McGuire, 202

9. The record stating that by consent of parties the cause is revived against the persons therein named, heirs at law of the defendant who had died, and no objection having been made on this ground, in the circuit court, the appellate court must presume the revival regularly entered, with the consent of the proper parties.

Buchanan & als. v. King's heirs, 414

10. Plaintiffs sue as heirs at law of K. The defendant answers, and does not question their right to sue in that character, and no question is made or suggested in the court below of their right to sue as such heirs; and throughout the proceedings it is implied, if not expressly conceded, that they are properly before the court as such heirs. It is too late to object in the appellate court, to the decree, for the want of the proof of the fact.

Idem, 414

11. H brings two actions of debt against E, and the plea in both is payment. The parties agree that the suits shall be tried together, and there is one verdict and judgment for the amount of the debts in both actions. The court might have made an order to consolidate the actions; and the agreement was in effect a consolidation of the causes; and there was no error which can be set up for the first time in the appellate court.

Eagles v. Hook, 510

12. The note sued on in one of the actions was payable in good Virginia currency. There having been no objection to the form of the action in the court below, it cannot be made in the appellate court. *Idem*, 510

13. Upon a bill for a new trial of an action at law, on the ground of after-discovered evidence, the record of the case at law not showing what evidence was before the jury, or what facts were proved on the trial, and the chancery record not giving that information; and the same judge who tried the cause at law, having dissolved the injunction and dismissed the bill, the appellate court has not the materials to enable them to review the decree; but must presume it is correct.

Markham v. Boyd, 544

14. When appellate court will not disturb a verdict approved by the court below, scaling a debt. See *Confederate Contracts* No. 6, and

Hilb, for, &c. v. Peyton & als., 550

Calbreath v. Va. Porcelain and Earthenware Co., 697

15. On the trial of an action for slander, in the progress of the trial, the defendant takes several exceptions to the rulings of the court. The jury find a verdict for \$500; and the plaintiff by counsel, releases upon the record, five dollars of the damages assessed by the jury, and the court renders a judgment for \$495: to all of which the defendant objected at the time. The release was in fraud of the jurisdiction of the Supreme Court of Appeals,

and is void; and this court has jurisdiction to hear and decide the cause upon appeal.

Hansbrough & wife v. Stinnett, 593

16. The decree of the court of Appeals upon a question decided by the court below, is final and irreversible, and upon a second appeal in the cause the question decided upon the first appeal cannot be reversed.

J. B. Campbell's ex'ors v. A. C.

Campbell's ex'or, 649

17. In such a case the conclusiveness of the decree of the court of Appeals is the same, whether the first appeal was from a final or interlocutory decree of the court below. All the decrees of the appellate court are in their nature final: except possibly where that court disposes only of a part of the case at one term, and reserves it for further and final action at another. *Idem*, 649

18. When the Court of Appeals makes a decree, and sends the cause back for further proceedings, there cannot be a bill of review to correct the decree of the Court of Appeals for errors apparent on the face of the record. But there may be such a bill to correct the decree on the ground of after-discovered evidence. *Idem*, 649

19. But to sustain a bill of review in such a case, the greatest caution should be observed; and the new matters to be sufficient ground for reversal of the decree, ought to be very material, and newly discovered, and unknown to the party seeking relief at the time the decree was rendered, and such as could not have been discovered by the use of reasonable diligence. *Idem*, 649

20. Just before the death of C., he assigns his bonds and notes to his brother for himself and his brothers. The wife of C. survives him only two months. In a suit by her executors against the executors and legatees of C. for a settlement of the executorial accounts, the validity of the assignment by C. of his bonds and notes, as against his wife, is in question, and the Court of Appeals decides it is invalid, and sends the cause back for an account, with authority to the plaintiffs to propound to the defendants such interrogatories as may be pertinent and material to take the account according to the principles of the decree. The plaintiffs inquire what notes and bonds were assigned, and the amount, and when and how they had been distributed among the parties, which had and which had not been collected, and the present condition of them. The defendants have no right to avail themselves of these questions for the purpose of making such answers as might tend to show the validity of such assignment; and then rely upon these answers as ground for reversing the decree of the Court of Appeals. Such answers are impertinent and immaterial, and not according to the principles of the decree; and afford no ground for reversing it. *Idem*, 649

21. In debt on a bond given in March, 1864, for property, payable with interest in three years, the court below, to whom the case was submitted for trial, having scaled the debt as of the value of the property at the

time of the contract, and this appearing to be according to the justice of the case, the appellate court will not disturb the judgment.

Calbreath v. Va. Porcelain and Earthenware Co., 697

22. Though the bill of exceptions to the refusal of the court to grant a new trial, purports to certify the facts, yet it may appear from the bill of exceptions itself, that the evidence is certified. And this is shown when the facts certified are contradictory. *Read's case*, 924

23. In such a case where the evidence is certified, the appellate court will not reverse the judgment, unless after rejecting all the parol evidence of the exceptor and giving full faith and credit to that of the adverse party, the decision of the court below shall appear to be wrong. *Idem*, 924

24. For the principles by which an appellate court will be governed in considering the question of reversing the judgment of the court below refusing to grant a new trial on the ground that the verdict is contrary to the evidence. See opinion of Moncure, P. *Idem*, 924

25. In a case of a prosecution for malicious shooting with intent to kill, where there has been a previous grudge and also an immediate provocation, it is for the jury to determine whether the shooting was induced by the previous grudge, or the immediate provocation; and it is not for an appellate court to reverse their judgment, which the judge who tried the case declines to set aside. *Idem*, 924

ARDENT SPIRITS.

1. A County court has a discretion to grant or refuse a certificate for obtaining a license to retail ardent spirits to a person who has obtained a license to keep an eating house; and the action of the County court is final and conclusive on the question. *French v. Noel*, 454

2. In such a case, if the judge of the Circuit court allows an appeal from the order of the County court granting the certificate, and reverses and annuls the order, with costs; the said action of the judge and the court is *coram non jndice*, and of no effect. *Idem*, 454

3. After the judgment of the Circuit court has been rendered, as well as before, the person injured by the judgment may apply to the Court of Appeals for a writ of prohibition, to restrain the appellant and the judge from proceeding to enforce the said judgment. *Idem*, 454

963 *ASSIGNOR AND ASSIGNEE.

1. The negligence of an assignee in the prosecution of a suit, whereby interest on the prior debts was accumulated, and the property deteriorated, bars him or his administrator from any recovery against the estate of the assignor. *Wilson's adm'r v. Barclay's ex'or & als.*, 534

2. Negligence in enforcing a deed of trust on personal property, given to the assignor

to secure the debt, by which it was allowed to be lost to the trust, bars the assignee's recovery against the estate of the assignor.

Idem, 534

3. In 1843 W assigns bonds on D to B. B not having done anything to recover the debt until 1848, and his administrator not having brought his suit against W's adm'r until 1860, it is upon the plaintiff to show clearly that the money could not have been made out of D's property.

Idem, 534

4. If D was insolvent at the time of the assignment of the bonds, or when he became so afterwards, if B relied on D's insolvency as excusing B's prosecution of his suit against D, B should, as soon as he ascertained the fact, have given notice to his assignor, and should have offered to return the bonds; and not having done this, he cannot recover against him.

Idem, 534

5. See *Bankruptcy*, No. 1, 2, 3, 4, and

Cannon & al. v. Wellford, judge, 195

ASSUMPSIT.

1. In assumpsit by the contractor against a county, for the price contracted to be paid for building a jail, it is not necessary to set out the dimensions, or a description of the building in the declaration.

Carroll County v. Collier, 302

2. In such a case, the contract set out in the count fixes a time within which the jail is to be completed, but there is no averment that it was completed within the time. The count is defective.

Idem, 302

ATTORNEY AT LAW.

1. Where a defendant at law has been prevented from making his defence, by the assurances or promises of the counsel for the plaintiff, a court of equity will relieve him.

Holland & Wife v. Trotter, 136

2. For the authority of counsel in a cause, see opinion.

Idem, 136

Wilson & Wife, &c., v. Smith, 493

BANKRUPTCY.

1. B and S were partners in Richmond, and failed. On the 30th of May 1868, B applied to the bankrupt court in Richmond, for the benefit of the bankrupt law, and on the same day was adjudicated a bankrupt; and subsequently C was appointed his assignee. On the day previous S instituted proceedings in bankruptcy in New York, where they had also carried on business, against B, to have B and S as partners declared bankrupts; and on the 21st of July they were both regular adjudicated bankrupts, and D was appointed assignee. B & S, as partners, had brought suits in Richmond, which were pending when they were declared bankrupts. **Held:**

1. That not C alone, nor C and D jointly, are entitled to be entered as plaintiff or plaintiffs in said suits; but D alone should be plaintiff. And it seems that the law is the same, though the proceedings in bankruptcy were commenced by both on the same day.

Cannon & al. v. Wellford, judge, 195

2. The bankruptcy of B and S having been suggested on the record in the pending suits, no further proceedings in these suits can be taken in their names.

Idem, 195

3. If C had been regularly appointed assignee of B, it would have been proper to allow him to become a party on the record, as holding rights in common with the other partner and his assignee; such being the regular and proper mode of collecting the outstanding social assets.

Idem, 195

4. But C was not the proper assignee of B. The New York court having first taken cognizance of the matter as to both partners, acquired complete and exclusive jurisdiction of the whole case; the assignee appointed by that court was the regular assignee of both partners; and it was not competent to the Virginia tribunal, by subsequent proceedings, to oust the

964 jurisdiction and appoint other and different assignees.

Idem, 195

5. The fact that there were assets in different districts and different States, does not, in any degree, affect the rights of the assignee. He represents the bankrupts and their estate in every State, and collects the assets wherever found.

Idem, 195

BANKS.

1. The president of a bank has no authority, *virtute officii*, to make any admissions which will release the maker of a note to the bank from his legal responsibility created by the note.

Hodge's ex'or v. First Nat. Bank

Richmond, 21

2. See *Checks on Banks*, and

Purcell v. Allemon & Son, 739

BILL OF REVIEW.

1. Bill to review a decision of the Court of Appeals, will only lie on the ground of after-discovered evidence. For the rules governing it in such case, see *Appellate Court*, No. 18, 19, and

J. B. Campbell's ex'ors v. A. C.

Campbell's ex'or, 649

BONDS.

1. How county bonds may be made available as a security to satisfy a debt.

See *Securities*, No. 1, 2, and

Alex., Loud. & Hamp. R. R. Co. v.

Burke & als., 254

2. Twelve months after date I bind myself, &c., to pay C twenty-five hundred dollars in currency at its specie value, with interest from date, June 23rd, 1865. Two judges hold the word "dollars" to mean specie dollars; two that it is a contract to pay currency at its specie value; and one that it is a contract to pay currency at its specie value at the time of payment.

Caldwell v. Craig, 340

3. A bond given in October 1863, for the price of slaves purchased at a judicial sale, is valid and binding; and may be enforced after the war, and after the adoption of the

13th amendment of the constitution of the United States.

Henderlite Thurman, 466

4. Though judgments have been recovered on bonds given at a judicial sale made in October 1863, without any question as to the scaling of them, yet the cause being still pending, the claim to have them scaled may be made and adjudicated in that cause.

Idem, 466

5. See *Confederate Contracts*, No. 7, and *Bowman v. McChesney*, 609

6. There is no legal difference between a bond payable "when demanded," or "on demand," and one payable "on call" or "at any time called for." In each case the debt is payable immediately. *Idem*, 609

7. See *Mistake*, No. 1, and *Peyton v. Harman*, 643

8. P executes his bond to H for \$5,000, payable with interest one year after date. On the bond there is an endorsement that one twenty-fifth of the principal of the bond with the interest due at the end of the year, and so on from year to year; the credit not exceeding twenty-five years. H brings debt upon the bond against P, and declares upon the bond, omitting the endorsement. P craves oyer of the bond and endorsement, and demurs. **Held:**

1. The words "to be paid" have been obviously omitted from the endorsement by mistake, and they will be supplied.

Peyton v. Harman, 643

2 The endorsement changes the contract from a contract to pay in one year, to a contract to pay the same amount in twenty-five annual payments; and the demurrer should be sustained. *Idem*, 643

3. Debt cannot be maintained upon the bond until the whole is due; and therefore the demurrer should be sustained.

Idem, 643

9. V executes to C a bond for the purchase of property, dated March 30th, 1864, to be paid, with interest, three years from the date. "in the currency used in the common business of the country at the date of maturity." Parol evidence is admissible to show what was the true understanding of the parties in respect to the kind of currency in which the same was to be performed, or with reference to which, as a standard of value, it was made and entered into.

Calbreath v. Va. Porcelain and Earthenware Co., 697

BUILDING FUND ASSOCIATIONS.

1. W, a shareholder in a Building Fund Association, having obtained an advance of money on his shares, the association thereby acquired the right of property therein; and the assignment of the shares to the association for the advance he received, was not a hypothecation for a loan, but an absolute surrender of them to the association, whereby they were sunk and extinguished, and cannot entitle the said W to participate in the final division and distribution of the funds of the association.

White v. Mech. Building Fund Association, 233

2. Such final division and distribution is required to be made when the accumulated fund is sufficient to pay to each of the unredeemed shares the par value of the shares, after the payment of all the debts and liabilities of the association. *Idem*, 233

3. The assignment of his shares by W to the association, does not release him from his covenant, as a party to the articles of the association, to make his regular monthly payments on shares, and on account of fines; and the enforcement of his said obligations is secured by his bond and deed of trust, by which he obligates himself to pay six per cent. interest on the sum received, as authorized by § 8, of the statute, until the termination of the association; and the transaction between the parties is not usurious. *Idem*, 233

4. For any default in payment of monthly dues or fines, the trustees in the deed of W are authorized and required to sell, when requested by the board of directors of the association, the property conveyed to them in trust by W, not only to satisfy the arrearages of monthly dues and fines due, but also such sum as may be due and payable by him on account, or in lieu, of the principal sum advanced or paid to him for his shares; to be ascertained and determined by the referees appointed by the articles of association for that purpose, according to the rate at which the shares may be redeeming at the time the sale is advertised to take place. But such sale should not be made until such indebtedness is ascertained. *Idem*, 233

5. If W obtains an injunction to a sale under the deed of trust, on grounds that are insufficient or unsustained, the injunction, nevertheless, should not be dissolved until indebtedness is ascertained by a commissioner of the court. *Idem*, 233

6. A court of equity has jurisdiction, at the suit of the holders of unredeemed shares in a building fund association, to call the redeemed shareholders to account, enforce payment of what they respectively owe, distribute the fund among the unredeemed shareholders, and wind up the institution.

Edelin & als. v. Pascoe & als., 826

7. In taking the accounts of the redeemed shareholders, interest is not to be charged upon the interest and premiums charged against them on the books of the association. *Idem*, 826

CHECKS ON BANKS.

1. A check upon a bank must be presented for payment in a reasonable time, in order to charge the drawer.

Purcell v. Allemon & Son, 739

2. If a check is presented for payment, and payment refused, and notice is given to the holder at any time before the bank fails, the drawer is not discharged, if it is shown that he is not prejudiced by the delay; and if prejudiced he is only discharged *pro tanto*. *Idem*, 739

3. If the holder of a check fails to present it for payment, when he might do it, until

after the bank fails, the drawer is not responsible, if he had funds in the bank for its payment. *Idem*, 739

4. If the holder of a check is not able to present it by reason of the removal of the bank and the condition of the country, he should give notice of the fact to the drawer, and offer to return it. And if he fails to do so, the drawer is not liable. *Idem*, 739

5. Though the holder of a check is disabled, so that he cannot go in person to present the check for payment, yet if he might have sent it by mail, he will not be excused for not presenting it. *Idem*, 739

COMMISSIONS.

1. When executor entitled to commissions on fund, see *Executors*, No. 5, and

J. B. Campbell's ex'ors v. A. C. Campbell's ex'or, 649

966 *CONCILIATION—COURT OF.

The decision of the court of Conciliation established by the military authorities after the war, is not obligatory upon a party who did not consent to its hearing of the case.

Myers v. Whitfield, 786

CONFEDERATE CONTRACTS.

1. In August 1862, S sold land to B for \$4,000, which was worth before the war \$3,000, and took his notes for a part of the purchase money, one payable on the 1st of January 1863, and the other on the 1st of January 1864. In October 1864, B tendered the money to S, who refused to receive it. S having after the war recovered a judgment upon the notes without defense, B. filed a bill in equity under § 4, of the act of March 3, 1866, to set up his tender of the money, and he asked for general relief. *Held*:

1. This was a contract with reference to Confederate States treasury notes as the standard value.

Sanders v. Branson, 364

2. Though the tender not having been made in time, B is not entitled to be entirely relieved, yet under the prayer for general relief he may have relief in this suit. *Idem*, 364

3. The just measure of relief is not the gold value of the money at the time of payment, but the value of the land at the time of the sale in good money. *Idem*, 364

2. See *Scaling debts, passim*.

3. The § 1, of the act of March 3, 1866, known as the adjustment act, Sess. Acts 1865-66, p. 184, applies to all contracts made between the 1st of January 1862, and the 10th of April 1865; though the written contract on its face specifies the medium in which it is to be paid.

Hilb for, &c., v. Peyton & als., 550

4. In June 1863, P. borrows of H. \$5,000 of Confederate treasury notes, for which P gives his bond payable two years after date without interest, in such funds as the banks receive and pay out. In action by H against P on this bond, the jury scale the debt as of the date of the bond, and render a verdict for

that amount with interest from that day; and this verdict is approved by the court. The appellate court will not disturb it. *Idem*, 550

5. In October 1863, M executes his bond by which he promises to pay to B \$4,000, at any time called for, after three months notice, said money to bear no interest. It was given for a loan of Confederate treasury notes, and the provision for three months notice was inserted at the instance of M. Nothing was said as to the kind of money in which it was to be paid. It was not called for until after the war. *Held*:

1. The bond according to the true understanding and agreement of the parties, was to be paid in Confederate currency, and therefore should be scaled as of the date of the bond.

Bowman v. McChesney, 609

2. There is no legal difference between a bond payable "when demanded" or "on demand," and one payable "on call" or "at any time called for." In each case the debt is payable immediately. *Idem*, 609

3. The provision for three months notice having been inserted at the instance and for the benefit of M, he may waive it. *Idem*, 609

6. What purchase at a judicial sale is for Confederate currency. See *Judicial Sales*, No. 7, and

Pogue v. Greenlee's adm'r & als., 724

7. A surety paying the debt with Confederate money, can only recover the value of the money he paid, with interest.

Kendrick & al. v. Forney, 748

8. A contract for the sale and purchase of land, made in January 1864, for Confederate money, both parties being *sui juris*, and the price being fair at the time, and then paid, and possession delivered, will be enforced at the suit of the heirs of the vendee.

Ambrose's heirs v. Keller, 769

9. On the 5th of November 1862, W sold at auction to M, two lots in the city of Richmond, at \$143 per front foot, worth before the war \$90 per foot, one-fourth cash, and the balance in one, two and three years. Nothing was said as to the kind of money to be received, though the impression seems to have been that currency would be taken. M paid the cash and the first and second notes in currency, and he tendered payment of the third on the day it fell due, in Confederate money, which W refused to receive. After the war M sues in equity to enjoin the sale and set up his tender. *Held*:

It was a contract for currency; but M will not be discharged by having made the tender in Confederate money; but the debt will be scaled as of its date.

Myers v. Whitfield, 780

10. In September 1864, R sells land to T for Confederate money, which is paid, but the deed is not made. After the war T sues R for specific execution of the contract. If there be no other objection but inadequacy of price, the contract will be enforced.

Talley v. Robinson's ass'nee, 888

11. Though the contract was not stamped until it had been filed as an exhibit with the bill, it was admissible in evidence; and it would have been admissible though not stamped at the time it was offered in evidence. *Idem*, 888

CONFEDERATE CURRENCY.

1. How a guardian who received good money of his wards before the war, which he uses for himself, and pays out money during the war for his wards, and pays the balance in his hands to another guardian in Confederate currency, is to be charged in settlement of his account. See *Guardian and Ward*, No. 2, and

Jennings v. Jennings, 313

2. The second guardian is to be charged with the scaled value of the money at the time he received it, with interest. *Idem*, 313

3. What contracts are embraced in the act of March 3, 1866, called the adjustment act. See opinion of *Christian, J.* *Idem*, 313
Hilb for, &c. v. Peyton & als., 550

CONSOLIDATION OF CAUSES.

1. See *Appellate Court*, No. 11, and *Eagles v. Hook*, 510

CONSTITUTIONAL LAW.

1. The Article xi, § 1, of the Constitution of Virginia, and the act of June 27th, 1870, chapter 157, passed in pursuance thereof, in relation to homestead exemptions, are in conflict with Article 8, § 10, of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts, so far as the Virginia Constitution and act apply to debts contracted before the Constitution went into operation.

The Homestead cases, 266

2. A State court has jurisdiction to decide that a provision of the Constitution of the State is in violation of the Constitution of the United States. *Idem*, 266

3. The Governor of Virginia has authority under the Constitution, to grant a conditional pardon to a prisoner convicted of a felony.

Lee, sergeant, v. Murphy, 789

4. The act of March 30, 1871, entitled "an act to provide for the funding and payment of the public debt," provides that the coupons attached to the bonds to be issued under that act, "shall be payable semi-annually, and be receivable at maturity, for all taxes, debts, dues and demands due the State; which shall be expressed on their face." The act constitutes a contract on the part of the State, which cannot be repealed by the General Assembly; and the contract follows the coupons in the hands of the holders thereof, though purchased after an act repealing the said act.

Antoni v. Wright, sheriff, 833

Wright, sheriff, v. Smith, 833

5. The act is not repugnant to § 7 of Article 8, nor § 9 of Article 10, of the Constitution of Virginia. *Idem*, 833

6. The act of March 7, 1872, which directs what shall be received in payment of taxes, dues, &c., to the State, and repeals all acts inconsistent with it, so far as it respects the provision of the act of March 30, 1871, in relation to the coupon bonds issued under this last act, is repugnant to the provision of the Constitution of the United States, which forbids a State to pass any law impairing the obligation of contracts. *Idem*, 833

CONVEYANCES.

1. A conveyance made under a decree which though voidable is not void, passes the title to the purchaser; which is good until the decree is reversed.

Cline's heirs v. Catron, 378

2. The possession which would, under the former law, render a conveyance by a party out of possession, inoperative, must have been an adversary possession.

Idem, 378

3. What kind of possession which *will sustain the defense of adversary possession, against a plaintiff claiming under a patent. *Idem*, 378

4. See *Estates*, No. 1, and

Elys v. Wynne & als., 224

CONVEYANCES—FRAUDULENT.

1. A conveys to U a tract of land, with the intent to defraud his creditors; and U to carry out the purpose of A, conveys the land without consideration, to C and others, infant children of A. The land is liable to satisfy the creditors of A, whether such at the date of A's deed or becoming such subsequently.

Pratt & al. v. Cox & als., 330

2. S a creditor of A, files a bill to set aside said deeds, and subject the land to the payment of his debt. The evidence in that case establishes the fraud, and the deeds are declared fraudulent and void as to the creditors of A, and the land is rented out to B to pay the debt. B rents it to A on the same terms; and A conveys the land to secure the payment of the amount of the rent to B. The trustee sells a part of the land to P. HELD:

B is a *bona fide* creditor of A, entitled to subject the land for the payment of the debt: And P is a *bona fide* purchaser, and has a valid title to the land.

Idem, 330

3. After the decree in the case of S v. A and others, C &c., the children of A, file a bill setting out the deeds, the said suit and the deed from A, to secure B, insisting that said deed was invalid, and that P acquired no title to the land by his purchase. They say there are other creditors of A who are seeking to subject the land; and they ask that it may be sold under a decree of the court, that an account may be taken of the debts of creditors entitled to subject the land; that these may be paid; and the balance of the purchase money paid to them. The court holding that the sale to P is valid, should not have decreed that A should convey the residue of the land to C &c., subject to the debts of A; but should direct an ac-

count of the debts; the land to be sold, the said debts paid, and the surplus paid to C, &c.

Idem, 330

COUPONS.

See *Constitutional Law*, No. 4, 5, 6, and

Antoni v. Wright, sheriff, 833

Wright, sheriff, v. Smith, 833

COURTS.

See *Jurisdiction of State Courts*;

See *Criminal Jurisdiction and Proceedings*, No. 2, and

Thomas' case, 912

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. C is indicted for feloniously and maliciously cutting, striking, wounding, &c., H, with intent to maim, disfigure, disable and kill. The indictment charges that C made an assault upon H, and feloniously, and maliciously, &c. The jury find "the prisoner not guilty of the malicious cutting and wounding as charged in the within indictment; but guilty of an assault and battery as charged in the within indictment, and assess his fine at \$500." **Held**:

1. This is an acquittal of the prisoner of the felony charged, whether of the "malicious" or "unlawful" cutting, &c., with intent to maim, &c.; and it is a conviction for the misdemeanor of assault and battery.

Canada's case, 899

2. Though the indictment only uses the word "malicious," the jury might have found the prisoner guilty of the "unlawful" cutting, &c., with intent, &c.

Idem, 899

3. Though the indictment is for a felony, the assault and battery being charged in it, the prisoner may be acquitted of the felony, and convicted of the misdemeanor; and the jury may assess a pecuniary fine upon him; but not imprisonment.

Idem, 899

4. Upon such a conviction the court may sentence the prisoner to be imprisoned in the county jail, in addition to the pecuniary fine.

Idem, 899

2. T is indicted in the Corporation court of Lynchburg, for petit larceny, and the indictment states he had been previously convicted and sentenced for a like offence, before C, the mayor of the city. On the trial the warrant of the mayor for the arrest of T, and the endorsement thereon by the mayor, of the conviction and sentence to imprisonment of T, is introduced in evidence; 969 *and there is proof of its genuineness, and that T is the same person. There is a verdict of guilty as charged in the indictment; and T is sentenced to imprisonment in the penitentiary. **Held**:

1. The mayor, by § 1, of the act of March 30, 1871, has concurrent jurisdiction with the Corporation court, of all petit larcenies; and his sentence of T was legal.

Thomas' case, 912

2. The warrant and endorsement, with

proof of the genuineness of the paper and the identity of the party, are proper evidence in the cause. *Idem*, 912

3. The plea of "not guilty" does not put in issue the allegation of the previous conviction and sentence of T, and the verdict of "guilty," simply, does not respond to that allegation. It must be admitted by the prisoner or found by the jury, to warrant the sentence of confinement in the penitentiary. *Idem*, 912

3. See *Appellate Court*, No. 22, 23, 24, 25, and

Reads' case, 924

4. What necessary to authorize a new trial, on the ground of after-discovered evidence. See *New Trials*, No. 3, and

Idem, 924

5. As a general rule, the evidence of jurors is not admissible to impeach their verdict.

Idem, 924

6. On the trial of a prisoner for a felony, which lasts several days, the sheriffs are sworn to keep the jury and not allow them to be spoken to, or to speak to them themselves, in relation to the case. In the progress of the trial one of the deputies is called by the Commonwealth, and gives evidence of a fact which had occurred in his presence; and the same fact had been proved by other witnesses. This is not sufficient grounds for setting aside the verdict. *Idem*, 924

DAMAGES.

On a bill by vendor for specific performance of a contract, how damages sustained by the defendant by the acts of the vendor, may be ascertained.

See *Equity Jurisdiction and Relief*, No. 6, and

Nagle v. Newton, 814

DEBT.

1. P executes his bond to H for \$5,000, payable with interest one year after date; on the bond is an endorsement, that one twenty-fifth of the principal of the bond with the interest due at the end of the year, and so on from year to year, the credit not to exceed twenty-five years in all. H brings debt upon the bond against P, and declares upon the bond, omitting the endorsement. P craves oyer of the bond and endorsement, and demurs. **Held**:

1. The words "to be paid" have been obviously omitted from the endorsement by mistake, and they will be supplied.

Peyton v. Harman, 643

2. The endorsement changes the contract, from a contract to pay in a year, to a contract to pay the same amount in twenty-five annual payments; and the demurrer should be sustained. *Idem*, 643

3. Debt cannot be maintained upon the bond, until the whole is due; and therefore the demurrer should be sustained.

Idem, 643

DECREES.

1. A party may be concluded by his acquiescence in a decree affecting his rights made in the progress of the cause; under which decree

he takes a part of the fund affected by it, and makes no objection to it until after the final decree in the cause, made twenty-two years after it.

Burton v. Brown's ex'ors & als., 1

2. An appeal by one party from a decree overruling some exceptions to a commissioner's report and sustaining others, and recommitting the report, brings up the whole cause; and the decree of the Court of Appeals affirming the decree of the court below, concludes all questions previously decided, whether in favor of the appellants or appellees.

Idem, 1

J. B. Campbell's ex'ors v. A. C. Campbell's ex'or, 649

3. A bill is filed by S, a committee of two idiots, for the sale of their land, and there is a decree for a sale, and a sale; and the report of the marshal of the court shows that the land was purchased by S, the committee. This report is confirmed, and the marshal is directed to convey the land to S; which is done. S afterwards sells the land to 970 *C; who sues to recover the land.

Though the decree confirming the sale to S was erroneous, and S is forbid by the statute to purchase or own the land during the incompetency of the idiots, yet the decree is not void but voidable, and cannot be impeached collaterally; and until it is reversed, must be held to be valid, and as passing a good title to S.

Cline's heirs v. Catron, 378

4. A decree of a court of competent jurisdiction, in a suit between proper parties, is valid and conclusive until reversed on some proper proceeding in the same suit and same court, or on appeal to an appellate court, unless there be some sufficient ground of fraud or surprise to entitle the injured party to relief in some other suit.

Wilson and wife v. Smith, 493

5. In a suit for partition of land by joint tenants, tenants in common or parceners, whether partition can be conveniently made in kind or not, and whether the interests of the parties who are entitled to its proceeds, will be promoted by the sale of the entire subject or not, are questions for the court in which the suit is pending to decide, and its decision cannot be questioned in any collateral suit, except on the ground of fraud or surprise.

Idem, 493

6. In such a case, a sale made pending the suit by agreement of the parties, in person, or by counsel, which sale is afterwards confirmed by the court, is as valid as if made under a previous decree of the court in the suit, and can no more be impeached collaterally than if so made.

Idem, 493

7. What irregularities in the reviving of the suit and prosecuting it will be disregarded. See *Revival of Suits*, No. 4, 5, and

Idem, 493

8. Though a decree denies to the plaintiffs the specific execution of the contract they seek to enforce, yet if it authorizes them to amend their bill, if they so elect, and ask for

other relief, and continues the cause to give them time to amend their bill: it is not a final decree.

Ambrouse's heirs v. Keller, 769

DIVORCE.

1. The construction of § 7, ch. 109, Code of 1860, in relation to divorce *a mensa et thoro*, given in *Bailey v. Bailey*, 21 Gratt. 43, approved and acted on.

Carr v. Carr, 168

2. That a husband is rude and dictatorial in his speech to his wife, exacting in his demands upon her, and sometimes unkind and negligent in his treatment of her, even when she was sick, and worn and weary, in nursing their sick child, is no legal grounds for her leaving him.

Idem, 168

3. A wife having left her husband without legal grounds, is not entitled to alimony.

Idem, 168

4. A wife having left her husband without good legal grounds, and taken their child with her, though there is no other imputation upon her conduct, upon a decree for a divorce *a mensa et thoro*, at the suit of the husband, on the ground of desertion, the child will be restored to the husband, though it is a female, and but three years old; and though the husband's treatment of his wife has been coarse, rude, petulant, close, exacting and penurious, leaving her to bear alone burdens and trials which it should have been his highest pleasure to share and relieve.

Idem, 168

DURESS.

To a bill by T against R, for specific execution of a contract, R sets up the defence, that the contract was made under duress; that he had been severely whipped by a mob and driven from the county. But it appears that T was in no way implicated in that outrage, though he had heard of it; and he gave R the price he asked for the land. The contract is valid.

Talley v. Robinson's ass'nee, 888

EJECTMENT.

1. In 1833 W made his will and died. By clause 6 he gives to his daughter D a designated tract of land, to her and the heirs of her body; but should D die without heir as above mentioned, my wish is that said land shall return to my other heirs, and be sold, and the moneys arising from the sale to be equally divided among all my heirs. D sells and conveys the land with general warranty; and then dies without ever having had a child.

Held:

971 *1. Upon the death of D without leaving a child, the title vested in the heirs of W, and not in his executor; and they are the proper parties to maintain ejectment for the land.

Elys v. Wynne & als., 224

2. The action is against two holding different parts of the land; the judgment may be separate against each for the land in his possession, and joint for the costs.

Idem, 224

ELEGIT.

1. A creditor extending the land of his debtor under an *elegit*, stands, in judgment of law, as if he had taken a lease for years in satisfaction of his debt; and by virtue of such extent he acquires a title to the premises, which may be the subject of adjudication in this court, as a controversy concerning the title to land. *Lyons v. McGuire*, 202

2. The officer executing a writ of *elegit* does not deliver to the creditor actual possession of the premises, but only the legal possession; which may be enforced by ejectment, or by writ of unlawful detainer when the cause of action has accrued within three years. *Idem*, 202

3. If after such extent, the possession of the premises is withheld by the debtor, or some one claiming under him, the tenant by *elegit* may recover the same by action and hold over even after his term has expired; and this though the term has expired before the trial of the cause. *Idem*, 202

EQUITY JURISDICTION AND RELIEF.

1. For the grounds on which a court of equity will or will not relieve against a judgment at law, see opinion of the court in *Holland and wife v. Trotter*, 136

2. When the defendant at law has been prevented from making his defense, by assurances or promises of the counsel for the plaintiff, a court of equity will relieve him. *Idem*, 136

3. A purchaser of land comes into equity to set up a tender of the money under § 4 of the adjustment act of March 3, 1866, and he prays for general relief. Though he fails to sustain the tender, he will be relieved by his paying the value of the land at the time of the sale. *Sanders v. Branson*, 364

4. What the extent and mode of relief to a purchaser at a judicial sale in 1864. See *Judicial Sales*, No. 7, and

Pogue v. Greenlee's adm'r & als., 724

5. See *Confederate Contracts*, No. 11 and *Myers v. Whitfield*, 780

6. N sues J in equity to rescind or enforce a specific execution of a contract for the sale of land by N to J. J answers, not objecting to specific execution, but insisting that he shall be compensated for injuries to which he has been subjected by the failure of N to comply with his contract, and by the intermeddling of N and his agents with J's possession of the property upon it. **Held:**

1. The case being a proper case for specific execution of the contract, the court has jurisdiction, as ancillary thereto, to decree compensation to J for the damages he has sustained by the improper acts of N and his agents.

Nagle v. Newton, 814

2. The damages may be ascertained either by a commissioner, or by an issue of *quantum damnificatus*, to be tried at the bar of the court. *Idem*, 814

7. A court of equity has jurisdiction, at the suit of shareholders of unredeemed shares in a building fund association, to call the

redeemed shareholders to account, enforce payment of what they respectively owe, distribute the fund among the unredeemed shareholders, and wind up the institution.

Edelin & als. v. Pascoe & als., 826

ESTATES.

1. In 1833 W made his will and died. By clause 6, he gives to his daughter D, a designated tract of land, to her and the heirs of her body; but should D "die without heir, as above mentioned, my wish is that said land shall return to my other heirs, and be sold, and the money arising from the sale, to be equally divided among all my heirs." D sells the land, and conveys it with general warranty; and then dies without ever having had a child. **Held:**

1. D took under the statute a fee simple estate in the land, defeasible "upon her dying without a child living at her death."

Elys v. Wynne & als., 224

2. The limitation over to testator's other heirs is valid, and took effect upon the death of D without leaving a child.

Idem, 224

3. Though the deed of D purported to convey the fee, it only conveyed, and did convey, her interest in the land; and the purchaser could not hold an adversary possession thereof before the death of D without leaving a child. *Idem*, 224

4. Upon the death of D without leaving a child, the title vested in the heirs of W, and not in his executor; and they are the proper parties to maintain ejectment for the land. *Idem*, 224

2. P by her will devised to T certain real estate, in trust for her daughter S, the wife of F, with instructions to T "to permit her said daughter to occupy and enjoy said property, should she prefer to do so;" and should she survive her husband, T "shall convey the property in fee simple to her and her heirs." S was put into possession of the property, and in the lifetime of her husband, conveyed the property to H, the husband not joining in the deed; and after his death she re-acknowledged the deed, and H received possession of the property. H afterwards conveyed to C. And then T brings ejectment against C to recover the property. **Held:**

By the will of P, S acquired at once on the death of P, an equitable estate in fee simple in the property, with the absolute right of possession for her own use; and on the death of her husband, to an absolute conveyance thereof to herself in fee simple, which it was a breach of trust in the trustee to withhold; and she could have enforced this right at any moment after the death of her husband. That her rights passed by her deed to H, and by the deed of H to C, who stood thereafter in her shoes; and he could no more be ejected at the suit of T, the trustee, than S could before her conveyance.

Campbell v. Prestons, 396

ESTOPPEL.

1. In assumpsit by a contractor against a county for the price contracted to be paid for building a jail, the defendant pleads specially, that the building was not completed in time, and that the material used, and the work, was defective, so that it is not fit for use as a jail; and the plaintiff takes issue on the plea. Upon the trial the defendant offers a witness to sustain the defence; when the plaintiff objects to the evidence, and offers in evidence an order of the court showing that the court had appointed commissioners to examine the building, and upon their report that it had been done according to contract, had received it. HELD:

1. The plaintiff having taken issue upon the plea, the order could not operate as an estoppel when offered in evidence, even if it would have been such if set up by replication to the plea, or if the trial had been on the general issue.

Carroll County v. Collier, 302

2. The order was not an estoppel, it not being a judgment, and the report of the commissioners not being an award.

Idem, 302

2. See *Decrees*, No. 4, 5, and

Wilson & wife v. Smith, 493

3. When a party is estopped by his concurrence in an act done, see *Vendor and Purchaser*, No. 6, and

Phelps v. Seely & als., 573

EVICTION.

See *Landlord and Tenant*.

EVIDENCE.

1. As to evidence upon the trial of issues out of chancery, see *Practice in Chancery*, No. 3, 4, 5, 6, 7, and

Powell & wife v. Manson, 177

2. What not a material variance between an order of court set out in the declaration and the order offered in evidence by the plaintiff, see *Variance*, No. 1, and

Carroll County v. Collier, 302

3. When a record in an ended suit will be considered evidence in another arising out of it, see *Pratt & al. v. Cox & al.*, 330

4. In an action to try the title to land, an order is made directing the surveyor to go upon it, and make a survey and report. 973 This he does; but he dies before the cause comes on for trial. His report is competent evidence.

Cline's heirs v. Catron, 378

5. Though family traditions are admissible in evidence upon questions of boundary, they are not admissible to prove or disprove a title. *Idem*, 378

6. When a resulting trust may be set up by parol evidence, see *Trusts and Trustees*, No. 2, and

Phelps v. Seely & als., 573

7. V executes a bond for the purchase of property, dated March 30th, 1864, to be paid,

with interest, three years from the date, "in the currency used in the common business of the country at the date of the maturity." Parol evidence is admissible to show what was the true understanding of the parties in respect to the kind of currency in which the same is to be performed, or with reference to which, as a standard of value, it was made and entered into.

Calbreath v. Va. Porcelain and Earthenware Co., 697

8. What knowledge of handwriting will render a witness competent to testify in relation to it. See *Witnesses*, No. 1, and

Pepper v. Barnett, 405

9. Parol evidence inadmissible to prove bonds and deed of trust were not to be paid and executed according to their terms; but were only to be paid out of profits of the property, for which they were given.

Sangston, cor. sec., &c., v. Gordon & Riely, 755

10. When the record of conviction and sentence by the mayor for a petit larceny, is evidence on a prosecution of the same person for another offence, to prove a former conviction. See *Criminal Jurisdiction and Proceedings*, No. 2, and

Thomas' case, 912

11. A written contract for the sale and purchase of land, made in September 1864, is admissible as evidence though not stamped.

Talley v. Robinson's assignee, 888

EXCEPTIONS—BILL OF.

1. In a case in which a jury is dispensed with, and the case is submitted for trial to the court, upon a bill of exceptions to the judgment, all the evidence is to be inserted in the bill; and in the appellate court it will be considered as on a demurrer to the evidence.

Hodge's ex'or v. First Nat. Bank Richmond, 51

2. A bill of exceptions to the refusal of the court to grant a new trial of a cause, on the ground that the verdict was contrary to the evidence, sets out the testimony of the witnesses, saying as to each, A proved, &c.; and at the conclusion says, and these being all the facts proved; there being no conflict in the testimony the bill of exceptions is well taken.

McClung's adm'r v. Erwin, 519

3. Though the bill of exceptions taken to the refusal of the court to grant a new trial, purports to certify the facts, yet it may appear from the bill of exceptions itself, that the evidence is certified. And this is shown when the facts certified are contradictory.

Read's case, 924

EXECUTORS AND ADMINISTRATORS.

1. Testator dies in 1863, and by his will directs his executors to sell his property, and to hold the money in their hands or loan it out as they think best, and to pay

the children as they come of age. The executors with the concurrence of the adult children, sell for Confederate money; and they pay over to all the legatees who are of age. Two, however, are infants having no guardians, and the executors, under an order of the court, invest \$5,000 in Confederate bonds, which are lost. The executors are not liable for the loss.

Fugate v. Honaker's ex'ors & als., 409

2. Money received by an executor during the war, belonging to a citizen of Indiana, was confiscated by the Confederate government. **Held**: The Confederate government, in the exercise of her belligerent rights, had authority to confiscate property of alien enemies; and the executor is not responsible for the money confiscated.

Newton's ex'or v. Bushong & al., 628

3. What enquiries should be made in order to ascertain the liability of an executor for money which perished in his hands during the war. See *Decree*. *Idem*, 628

4. What Confederate money is received *by an executor for a good ante-war debt, that he may invest it under the order of a judge, he has not received it in the due exercise of his trust; and therefore he is not protected by such order.

J. B. Campbell's ex'ors v. A. C. Campbell's ex'or, 649

5. There being a controversy whether testator had assigned his bonds in his lifetime, until that question was decided, they could not be considered assets in the hands of the executors; and if within twelve months from that decision they lay before the commissioner directed to settle the account, a statement of the receipts, they should be allowed commissions upon that fund. *Idem*, 649

FOREIGN ATTACHMENT.

1. In February 1867, B, administrator *de bonis non* of J, filed his bill in which he sets out a money decree of an Alabama court, against S; that S is a nonresident of the State; that he owns land here, which he describes, and asks that it may be sold for payment of his debt; but he does not pray for an attachment, nor is an attachment sued out, or an endorsement on the process of the object of the suit. In May 1867, there is an affidavit that S is not an inhabitant of the State, and an order of publication setting out the object of the suit. In July 1868, S is declared a bankrupt in Tennessee, and his assignee, C, makes himself a party to the suit, and claims the land or its proceeds, it having been sold. **Held**:

1. The bill stating a good case for an attachment suit, the affidavit required by the statute may be made at any time before another person obtains a right, and the endorsement on the subpoena is not necessary to render his attachment valid.

Cirde v. Buchanan, adm'r, 205

2. If an endorsement was necessary, the order of publication was in the nature of process; and B is entitled to the proceeds

of the property as against C, the assignee in bankruptcy. *Idem*, 205

GAMING.

1. A licensed eating house in a town is a public place, in the meaning of the Code, ch. 198, § 4, p. 806.

Neal's case, 917

2. Betting on the game of bagatelle at a public place is a violation of the statute, Code, ch. 198, § 4, p. 806; and it is equally so if the person plays as well as bets. *Idem*, 917

3. It is unlawful to bet at any game at a public place. *Idem*, 917

GOVERNOR.

See *Constitutional Law*, No. 3, and

Lee, sergeant, v. Murphy, 798

GUARDIAN AND WARD.

1. G, who was guardian of two of his children, maintained and educated them at his own expense, and made no charge against them. He died in February 1861, up to which time his estate was ample to pay his debts; but, by losses incurred since his death, it is not sufficient to pay them. In a question between creditors of G, his two children, for whom he was guardian, are not to be charged in the guardianship account, with the expense of their maintenance and education.

Griffith & al. v. Bird & als., 73

2. J is appointed guardian of infants in 1857, and then receives from the administrator of their father, \$791, in money, which he does not invest for his wards, but purchases a slave for himself. In February 1863, on the motion of one of his sureties, he is required to give a new bond as guardian, which he declines to do; and he is hereupon removed, and H is appointed guardian in his stead. J never having settled his account as guardian, directly H is appointed, pays to him \$690, in Confederate treasury notes, and transfers to him receipts for moneys he had paid for the wards; it not appearing that H knew what kind of money J had received. **Held**:

1. J not having invested the money he received for the benefit of his wards, but having used it for his own purposes, and not having settled his account as guardian, he is to be charged with the amount received, in good money, with compound interest, and to be credited with the payments made for the wards, and to H, at the scaled value thereof at the time of *payment.

And he is not to be allowed compensation for his services as guardian.

Jennings v. Jennings, 313

2. H is to be charged with the scaled value of the money received from J, at the time he received it, and interest. *Idem*, 313

HOMESTEAD EXEMPTIONS.

1. The article XI, § 1, of the Constitution of Virginia, and the act of June 27th, 1870, ch. 157, passed in pursuance thereof, in relation to homestead exemptions, are in conflict with Article 8, § 10, of the Constitution of the United States, which provides that no State

shall pass any law impairing the obligation of contracts, so far as the Virginia Constitution and act apply to debts contracted before that constitution went into operation.

The Homestead cases, 266

HOMICIDE.

1. Every unlawful homicide must be either murder or manslaughter; and whether it be the one or the other depends alone upon, whether the party who perpetrated the act did it with malice or not—malice either expressed or implied. *Read's case*, 914

HUSBAND AND WIFE.

1. A husband who by his will gives property, real and personal, to his wife absolutely, if she survive him, may by his will authorize her to make a will in his lifetime, disposing of said property. And the wife having made a will in the lifetime of her husband, disposing of the property, and afterwards surviving her husband, and dying without re-executing or revoking her will, the same is valid to pass the property to her devisees and legatees.

Thorndike & als. v. Reynolds & als., 21

2. Though the will of the wife does not say in terms, that it is made in pursuance of the power vested in her by her husband's will; yet as his will was shown to her by his directions, and she has no property of her own at the time, and the provisions of her will have obvious reference to his will, it will be held that her will was made in pursuance of the power. *Idem*, 21

3. The clause in the will of the husband giving the power to the wife, must have been intended to take effect from its date; and so the will of the wife, as an execution of the power, will be intended to take effect from its date: though not to divest and pass the title in the lifetime of her husband and herself. *Idem*, 21

4. The will of the wife was not revoked by the death of the husband, leaving the wife surviving him, and therefore it was not necessary for her to re-execute her will after his death. *Idem*, 21

5. Though the wife survives the husband, and thereupon becomes absolutely entitled to the property, this does not extinguish the power; but the will of the wife executed under the power, in the lifetime of the husband, not having been revoked by her, or re-executed, passes the property at her death to her devisees and legatees. *Idem*, 21

6. H dies leaving a will and three codicils, in each of which he gives valuable property to his wife, if she survives him; and in some of these bequests he authorizes her to make a will in his lifetime to dispose of it. By the third codicil he gives her one-half of his residuary estate, and then adds: "And for all the purposes contemplated in my will and codicils thereto, I authorize and empower my wife to make a will in my lifetime which shall be good and effectual in law and equity." This is a valid power to the wife to make a will in the lifetime of the husband, to dispose of the property bequeathed to her; and looking to the language employed, all the provisions of the will and the surrounding circum-

stances, the intention of the testator was held to be that the power was not confined to the bequest of the residue, but to all the bequests to her in the will and codicils.

Idem, 21

7. The construction of § 7, ch. 109, Code of 1860, in relation to divorces *a mensa et thoro*, given in *Bailey v. Bailey*, 21 Gratt. 43, approved and acted on.

Carr v. Carr, 168

8. That a husband is rude and dictatorial in his speech to his wife, exacting in his demands upon her, and sometimes unkind and negligent in his treatment of her even when she was sick, and weary and worn 976 in watching and nursing their sick child, is no legal grounds for her leaving him. *Idem*, 168

9. A wife having left her husband without good legal grounds, is not entitled to alimony. *Idem*, 168

10. A wife having left her husband without good legal grounds, and taken their child with her, though there is no other imputation upon her conduct, upon a decree for divorce *a mensa et thoro*, at the suit of the husband, on the ground of desertion, the child will be restored to the husband, though it is a female and but three years old; and though the husband's treatment of his wife has been coarse, rude, petulant, close, exacting and penurious, leaving her to bear alone burdens and trials which it should have been his highest pleasure to share and to relieve. *Idem*, 168

11. Pending a suit in equity against a female defendant, to recover a debt alleged to be due by her, she marries, and her husband is made a party defendant. There was an ante-nuptial settlement, by which all the wife's property was conveyed in trust for her separate use, and she renounced all interest in that of the husband. The husband is still liable for the debts of the wife contracted before marriage, and the decree may be against both of them.

Powell & wife v. Manson, 177

IDIOTS.

1. A purchase by the committee of the idiot's land, under a decree of the court, is illegal, and the decree confirming the sale is voidable; but the deed to the purchaser passes the title, and is valid until the decree is reversed.

Cline's heirs v. Catron, 378

INADEQUACY OF CONSIDERATION.

See

Specific Performance, No. 2, 4, and

Ambrose's heirs v. Keller, 769

Talley v. Robinson's ass'nee, 888

INFANTS.

See

Revival of Suits, No. 3, 4, 5, and

Wilson & wife, &c., v. Smith, 493

INJUNCTIONS.

1. When a court of equity will enjoin a judgment. See

Holland & wife v. Trotter, 136

2. See *Practice in Chancery*, No. 10, and

White v. Mech. Building Fund Association, 233

INTERNAL IMPROVEMENT COMPANIES.

1. Under the act ch. 174, § 1, Code of 1860, the case of a railroad company asking the County court to ascertain the compensation to a land owner for the land proposed to be taken for its purposes, which has remained in the court more than one year without being determined, may be removed to the Circuit court.

Va. & Ten. R. R. Co. v. Campbell's ex'or, 437

2. In such a case, if the Circuit court sets aside the report of the commissioners, that court should not send the case back to the County court, but should take jurisdiction of the case, and proceed in it with the same powers that are vested in the County court by the statute. *Idem,* 437

3. The land owner or his executor, whose land has been taken by a railroad company for its purposes, cannot apply to the County court for the appointment of commissioners to ascertain the compensation of the land owners for the land taken. *Idem,* 437

4. After the company has made a motion for commissioners to ascertain the compensation due to a land owner, and the commissioners have reported, and the court has allowed the money to be received by the clerk, and directed him to pay it to the land owner, or hold it until the further order of the court, the executor of the land owner applies to the same court for commissioners to ascertain such compensation; and this case is removed to the Circuit court. The removal of this case does not bring up the first, and neither the Circuit court nor the Court of Appeals can enquire whether there is error in the action of the court in the first case. *Idem,* 437

5. The record in the first case may be used by the company in their defense upon the second motion. *Idem,* 437

INTERROGATORIES.

See

Appellate Court, No. 20, and J. B. Campbell's ex'ors v. A. C. Campbell's ex'or, 649

977

*INVESTMENTS.

1. When an investment made under an order of the court, will be null and of no effect. See *Vendor and Purchaser, No. 7,* and *Beery & als. v. Irick & als.,* 614

2. To authorize the order of a judge in vacation for the investment of Confederate money by a fiduciary, under the act of March 5, 1863, Sess. Acts 1862-63, ch. 46, p. 81, three things are necessary: 1st. The money must be in the hands of the fiduciary; 2d. It must have been received in the due execution of his trust; 3d. For some cause he must be unable to pay it over to the parties entitled. If they do not all exist the order of the judge is null, and the fiduciary is responsible for the money.

J. B. Campbell's ex'ors v. A. C. Campbell's ex'or, 649

3. When Confederate money is received by an executor for a good ante-war debt, that he

may invest it under the order of a judge, he has not received it in the due exercise of his trust; and therefore he is not protected by such order. *Idem,* 649

ISSUES.

1. For the principles governing the trial of issues out of chancery, see *Practice in Chancery, No. 3, 4, 5, 6, 7,* and

Powell & wife v. Manson, 177

2. When an issue *quantum damnificatus* may be ordered, see *Equity Jurisdiction and Relief, No. 6,* and

Nagle v. Newton, 814

JOINT-TENANTS.

1. As a general rule, a joint-tenant or tenant in common is not to purchase in an outstanding adverse title to the common property for his own benefit, to the exclusion of his co-tenant. But the co-tenant must, within a reasonable time, make his election to claim the benefit, and to contribute to the expense incurred in the purchase of such title. If he unreasonably delays until there is a change in the condition of the property, or in the circumstances of the parties, he will be held to have abandoned all benefit arising from the new acquisition.

Buchanan & als. v. King's heirs, 414

2. In such case, before the co-tenant can be held to have abandoned his claim to the benefit of the purchase of the outstanding title, it should appear, not only that he has been apprised of the purchase, but of the claim set up by his co-tenant. He may reasonably presume the acquisition was made in support of the common title, and may act on that presumption. *Idem,* 414

3. In such a case the burden is upon the purchasing tenant to show that his co-tenant had notice of the purchase, and of the exclusive claim asserted by him. *Idem,* 414

4. C and K are joint-tenants of land. C purchases a large tract, which includes the land held jointly, and takes the conveyance to himself; and he sells and conveys part of the large tract including the land held jointly. The grantee in this deed is tenant in common with the co-tenant of his grantor; and his possession is, in presumption of law, the possession of both, and is to be deemed in support of, and not in derogation of, the common title. *Idem,* 414

5. The acts of C in taking the conveyance to himself, and conveying to his grantee, are not such acts as are equivalent to an actual ouster, under Code of 1860, ch. 135, § 15. *Idem,* 414

JUDGMENTS.

1. For the grounds on which a court of equity will or will not relieve against a judgment at law, see the opinion of the court in

Holland and wife v. Trotter, 136

2. Where the defendant at law has been prevented from making his defense, by the assurances or promises of the counsel of the plaintiff, a court of equity will relieve him.

Idem, 136

JUDICIAL SALES.

1. In a suit for partition of land by joint-tenants, tenants in common or parceners, whether partition can be conveniently made in kind or not, and whether the interests of those who are entitled to the subject or its proceeds, will be promoted by a sale of the entire-subject or not, are questions for the court in which the suit is pending to decide; and its decision cannot be questioned in any collateral suit, except on the ground of fraud or surprise.

Wilson and wife v. Smith, 493

978 *2. In such a case, a sale made pending the suit, by agreement of the parties in person or by counsel, which sale is afterwards confirmed by the court, is as valid as if made under a previous decree of the court in the suit; and can no more be impeached collaterally than if so made.

Idem, 493

3. What sufficient order of revival of suit in the name of infant heir and widow of plaintiff, who dies before decree; and when it will be presumed a next friend was appointed to conduct the suit for the infant, or whether the failure to do so will affect the proceedings. See *Revival of Suits*, No. 3, 4 and

Idem, 493

4. But if there were any irregularities in the appointment, or the failure to appoint, a next friend of the infant plaintiff, objection on that account could only be made, if at all, in that suit, or on appeal from the decree therein; and such objection cannot be made in an independent suit.

Idem, 493

5. In a suit for partition of real estate by W against L, W dies, and the suit is revived in the name of his widow and infant son. The counsel employed by W will be presumed, in the absence of evidence to the contrary, to be continued as counsel in the cause; and a decree for a sale of the property entered upon the consent of the counsel, is a valid decree, and a sale under the decree will be sustained.

Idem, 493

6. See *Vendor and Purchaser*, No. 17, and *Beery & als. v. Irick & als.,* 614

7. On the 15th April 1863, there is a decree for the sale of land, for cash as to expenses, and for the balance, on a credit of six, twelve and eighteen months. On the day of sale it is proposed to the commissioners to sell for Confederate money; but they decline it, and say they sell according to the decree. Four of the heirs proclaim that they will take the money. The land worth \$15,000 in good money, sells to P for \$50,301. The cash is paid, bonds given, sale reported and confirmed; and S, receiver of the court, is directed to collect the money when due. S receives Confederate money in payment of the first bond, upon P's agreeing to take it back if the parties entitled refuse to receive it. When the second bond comes due P offers S to give him a check upon the bank of R, for the amount, which S declines to receive; and so when the third bond fell due. There was no proof that P had the money in bank, though S did not doubt it. HELD:

1. The sale was a sale with reference to Confederate treasury notes as the standard of value.

Poague v. Greenlee's adm'r & als., 724

2. The offer of P to give S a check for the money, was not a good and valid tender: 1st. Because there was no evidence that P had the money in the bank at the time. 2d. Because a good and valid tender could not be made to the receiver of the court.

Idem, 724

3. P allowed his option, to take the land at its value in good money, to be credited with the true value of the money he has paid; or to surrender the land and account for rents and profits, and be credited for the value of the money paid. *Idem,* 724

JURISDICTION OF STATE COURTS.

1. See *Bankruptcy*, and *Cannon & al. v. Wellford, judge,* 195

2. C, trustee of a bank in liquidation, transfers to B the note of A, due to the bank, and certain county bonds, which had been deposited with the bank by A as security for his note, to be applied first to pay the debt due B, and then for the trustee. After this transfer, an order was made in a suit in the Circuit court of the United States, in which C, as trustee of the bank, was a defendant, appointing C receiver in the cause. A's note not having been paid at maturity, B gives him notice that unless the note was paid by a certain day, he would sell the bonds. A enjoins the sale in a State court. HELD: The transfer of the note and bonds having been made before the appointment of C as receiver, the State court has jurisdiction of the case.

Alex., Loud. & Hamp. R. R. Co. v. Burke & als., 254

3. A State court has jurisdiction to decide that a provision of the constitution of the State is in violation of the constitution of the United States.

The Homestead cases, 266

4. When a case of an application by an internal improvement company to the County court to condemn land for its purposes, 979 is removed to the Circuit *court, if the Circuit court sets aside the report of the commissioners made to the County court, it must proceed in the cause, and should not send it back to the County court.

Va. & Ten. R. R. Co. v. Campbell's ex'or, 437

5. In a suit in equity brought in February 1869, against an absent and home defendant, the bill is taken for confessed at the May rules, and at the July term of the court, the home defendant answers. At a special term of the court, held in December 1869, a decree is made in the cause, the decree reciting that publication had been made as to the absent defendant. As the regular term of the court was on the Wednesday after the 3d Monday in October, the cause might have been heard then, and therefore might be heard at the special term. Code, ch. 158, § 33.

Patton v. Hoge, 443

6. A County court has a discretion to grant or refuse a certificate for obtaining a license to retail ardent spirits to a person who has obtained a license to keep an eating house; and the action of the County court is final and conclusive on the question.

French v. Noel, 454

7. In such a case if the judge of the Circuit court allows an appeal from the order of the County court granting the certificate, and reverses and annuls the order, with costs; the said action is *coram non judge*, and of no effect.

Idem, 454

8. After the judgment of the Circuit court has been rendered, as well as before, the person injured by the judgment, may apply to the Court of Appeals for a writ of prohibition, to restrain the appellant and judge from proceeding to enforce the judgment.

Idem, 454

9. When in pursuance of the act of 1869-70, ch. 171, § 5, p. 277, the Court of Appeals sent a cause which had been pending in a District court of Appeals to the Circuit court, that was a decision, that the act was constitutional, and that the Circuit court had jurisdiction to rehear and decide the same.

Cowan v. Doddridge, 458

10. See *Conciliation—court of*, and

Myers v. Whitfield, 786

11. The release of a part of a verdict to bring it below the jurisdiction of the Court of Appeals, is in fraud of the jurisdiction of that court; and the court has jurisdiction to hear and decide the cause upon appeal. See *Appellate Court*, No. 15, and

Hansbrough & wife v. Stinnett, 593

12. The title of tenant by *elegit* is such an interest in land as may be the subject of adjudication in the Court of Appeals as a controversy concerning the title to land.

Lyons v. McGuire, 202

13. By § 1 of the act of March 30, 1871, the mayor of Lynchburg has concurrent jurisdiction with the Corporation court, of all petit larcenies.

Thomas' case, 912

JURORS.

1. As a general rule the evidence of jurors is not admissible to impeach their verdict.

Read's case, 924

LAND—HOW TO ACQUIRE AND DEFEND TITLE.

C is in possession of land under a settlement in 1771, the settlement right confirmed to him by the commissioners of the district, in September 1782, and which was surveyed in April 1783; and he lives upon and cultivates a part of the land, and obtains a patent for it in March 1799. In July 1796, W obtains a patent for a tract of land which covers a part of the tract held by C; but C's cleared land is outside the interlock, which is in forest; W not knowing that his patent covers any part of the land held by C under his settlement right. **Held:**

1. That C not having prevented the issue of the patent by *caveat*, and W not having

known that his patent covered any part of the land so claimed by C, the patent of W is valid, and vests in him the legal title.

Cline's heirs v. Catron, 378

2. The actual possession of C outside the interlock, does not constitute an adversary possession by C of the land within the interlock, so as to require W to enter upon and take actual possession of it, in order to give him possession under his patent.

Idem, 378

3. If C on obtaining his patent in March 1799, entered on the land and ousted W, it was not necessary for W to enter upon and dispossess C before he could maintain an action to recover the land.

Idem, 378

4. By an order of council of the 12th of June 1749, confirmed by a decree of the Court of Appeals in 1783, *800,000 acres of land was granted to the Loyal Company, and was surveyed in 1774. The rights under this grant, acquired by entry and survey, stand upon no higher footing than rights acquired by entry and survey under a land office treasury warrant; and in both cases, until patented, the lands are wasted and unappropriated, and liable to location by other parties.

Idem, 378

5. Though family traditions are admissible in evidence upon questions of boundary, they are not admissible to prove or disprove a title.

Idem, 378

6. The possession which would, under the former law, render a conveyance by a party out of possession, inoperative, must have been an adversary possession.

Idem, 378

7. What the kind of possession which will sustain the defense of adversary possession, against a plaintiff claiming under a patent.

Idem, 379

LANDLORD AND TENANT.

T owns a warehouse, and also a lumber yard, with office and shed attached, adjoining the warehouse, both fronting on a wharf owned by her, which runs the whole length between them and Elizabeth river, at Norfolk. In December 1865, she leases to H for five years, the lumber yard, office and shed, together with the use of the wharf in front of the lumber yard, for the purposes required in carrying on the lumber business, &c. But H is not to have the privilege of collecting wharfage either on vessels or goods landing or shipping for other purposes. In September 1867, T, by deed, demises to G the warehouse, with the appurtenances thereto belonging, for the year 1868, for a rent of \$1,525, payable quarterly; and in a separate clause it is agreed that G is to have the entire privilege and control of the entire wharf to said warehouse and lumber yard, except that H shall have permission to use the wharf in front of the lumber yard in carrying on his business in landing and loading with lumber, &c.; but on no account shall H be allowed to let anything whatever

remain on the wharf; but it is to be taken away as soon as put upon it; otherwise G will charge the usual wharfage on all such merchandise, lumber, &c. G is put into possession of the warehouse and wharf; but H uses the wharf in front of the lumber yard for his business, sometimes piling his lumber thereon, so that G cannot make much use of it, and H refuses to pay wharfage; but G gives no notice of this to T, and when three-quarters rent is due refuses to pay anything, on the ground that he has been ousted of a part of the demised premises by H's use of the wharf. **Held:**

1. If a tenant be at any time deprived of the leased premises by the landlord's agency, the obligation to pay rent ceases.

Tunis v. Grandy & al., 109

2. If the land be recovered by a third person, by a title superior to that of the lessor, the tenant is discharged from the payment of rent after eviction by such recovery. *Idem*, 109

3. If part only of the land is recovered, such an eviction is a discharge of so much of the rent as is in proportion to the value of the part evicted. But if the lessor himself wrongfully deprives the tenant of the whole or any part of the premises, the tenant is discharged from the payment of the whole rent until such possession is restored. *Idem*, 109

4. Under the demise to G of the warehouse and appurtenances thereto belonging, the wharf did not pass.

Idem, 109

5. The provision in the lease to G in relation to the wharf, is not a demise of the wharf, but a covenant. *Idem*, 109

6. If the provision as to the wharf makes it a demise of the wharf to G, the interest thus vested in G is in entire accord with the previous lease to H; and the interest previously vested in H was not demised to G. *Idem*, 109

7. If T intended to make a covenant only with G in regard to the extent to which the wharf might be used by H, then a breach of that covenant, supposing it to have been broken, would not amount to an eviction. *Idem*, 109

8. What constitutes an eviction? See the *opinion*. 109

9. If a tenant under a second lease is put into possession of the whole of the demised premises, and is afterwards

981 *evicted from a part thereof, by the lessee under the first lease, then the rent will be apportioned, and the lessor may distrain for it; but if the lessee under the first lease is in possession, so that the lessee under the second lease cannot get possession of a part of the premises demised to him, then the second lease, as to this part is void, and the lessor cannot distrain for a proportion of the rent; though he may recover the fair value of the balance of the premises, in an action for use and occupation. *Idem*, 109

10. The abandonment of the use of the wharf by G cannot amount to an eviction, whatever may have been the extent of H's right to the use of the wharf under his lease, or however that right may have conflicted with the right of G to its use under his. *Idem*, 109

LEASES.

1. See *Landlord and Tenant*, and *Tunis v. Grandy & al.*, 109

LIENS.

1. When vendor of lands having only an equitable title, has a lien upon the land for the purchase money in the hands of a subsequent vendee, who has acquired the legal title. See *Vendor and Purchaser*, No. 1, and

Day v. Hale & al., 146

Hale v. Hare & al., 146

2. W, Z and Y are partners, and joint tenants of real estate. W and Z sell their two-thirds interest in the real estate to Y, W receiving \$400 in cash for his interest, and Y executing to Z three notes, payable at different dates, amounting to \$700, for his interest. The deed from W and Z to Y, which conveys two-thirds of the property, reserves a lien as follows: "And the said Z hereby retains a lien on the property hereby conveyed as security for the payment of the above recited notes received in payment of his interest; the said W has been paid up in full for his interest." The lien is reserved on the two-thirds of the real estate conveyed in the deed. *Patton v. Hoge*, 443

3. See *Vendor and Purchaser*, No. 3, and *Higginbotham v. Brown*, 323

MALICIOUS SHOOTING.

1. See *Criminal Jurisdiction and Proceedings*, No. 1, and

Canada's case, 899

2. Whether a prisoner on trial is guilty of malicious shooting, with intent to kill, depends upon the question, whether if he had killed the person at whom he shot, instead of only wounding him with intent to kill him, the offence would have been murder.

Read's case, 924

3. If the killing would not have been murder, then he is not guilty of the offence of malicious shooting, however he may have been guilty of another offence; as of unlawful shooting with intent to kill.

Idem, 924

MANDAMUS.

1. If the judge of a Circuit court refuses to re-hear and decide a case sent to his court by the Court of Appeals under the act of 1869-70, ch. 171, § 5, p. 227, and directs it to be struck from his docket, an appeal cannot be taken from his judgment. The remedy is by application to the Court of Appeals for a *mandamus* to the circuit judge, to compel him to re-hear and decide the case.

Cowan v. Doddridge, 458

2. In such case the Court of Appeals will make an order for a writ of *mandamus nisi* to the judge, and direct that the service of a copy of the order shall be equivalent to the service of the writ. *Idem*, 458

MAYOR.

See *Criminal Jurisdiction and Proceedings*,
No. 2, and
Thomas's case, 912

MISDEMEANOR.

See *Criminal Jurisdiction and Proceedings*,
No. 1, and
Canada's case, 899

MISTAKE.

1. When it is obvious on the face of the paper, that a word or phrase has been omitted by mistake or inadvertence, and such words are naturally and obviously suggested upon a mere inspection of the paper, as the words which the parties must have intended to use to express their meaning, such words, 982 or *words of like import, may be supplied. *Peyton v. Harman*, 643

NEGLIGENCE.

1. See *Assignor and Assignee*, No. 1, 2, 3, 4, and
Wilson's adm'r v. Barclay's ex'or & als., 534

NEGOTIABLE INSTRUMENTS.

See *Checks on Banks*, and
Purcell v. Allemon & Son, 739

NEW TRIALS.

1. For the principles governing the granting of new trials upon an issue out of chancery. See *Appellate Court*, No. 6, 7, and
Powell & wife v. Manson, 177

2. For the principles upon which a new trial in an action at law will or will not be awarded. See opinions of *Staples* and *Ander-son, Jr.*, in
Hilb, for, &c. v. Peyton & als., 550

3. To authorize the granting a new trial on the ground of after-discovered evidence four things are necessary. 1st. The evidence must have been discovered since the former trial. 2d. It must be such as reasonable diligence on the part of the party asking it, could not have secured at the former trial. 3d. It must be material in its object, and not merely cumulative and corroborative or collateral. 4th. It must be such as ought to produce on another trial, an opposite result on the merits.

Read's case, 924

4. As a general rule, the evidence of jurors is not admissible to impeach their verdict. *Idem*, 924

5. On the trial of a prisoner for a felony, which lasts several days, the sheriffs are sworn to keep the jury, and not allow them to be spoken to, or to speak to them themselves in relation to the case. In the progress of the trial one of the deputies is called by the Commonwealth, and gives evidence of a fact which had occurred in his presence; and the same fact had been proved by other witnesses. This is not sufficient ground for setting aside the verdict. *Idem*, 924

OFFICERS.

See *Banks*, No. 1, and
Hodge's ex'or v. First Nat. Bank,
Richmond, 921

PARDONS.

1. The Governor of Virginia has authority under the Constitution, to grant a conditional pardon to a prisoner convicted of a felony.

Lee, sergeant, v. Murphy, 789

2. The condition annexed to a pardon must not be impossible, immoral or illegal; but it may, with the consent of the prisoner, be any punishment recognized by statute, or by the common law as enforced in this State.

Idem, 789

3. Though the warrant of the Governor speaks as commuting the punishment, yet as it substitutes a less for a greater punishment, and is intended to be done, and is done with the consent of the prisoner, it will be considered a pardon, and not a commutation of punishment. *Idem*, 789

PARENT AND CHILD.

1. G who was the guardian of two of his children, maintained and educated them at his own expense, and made no charge against them. He died in February 1861; up to which time his estate was ample to pay his debts; but by losses incurred since his death, it is not sufficient to pay them. In a question between creditors of G, his two children for whom he was guardian, are not to be charged in his guardianship account, with the expense of their maintenance and education.

Griffith & al. v. Bird & als., 73

2. When upon a divorce *a mensa et thoro* at the suit of the husband, the child of the marriage will be restored to the husband.

See *Divorce*, No. 4, and
Carr v. Carr, 168

PAROL EVIDENCE.

1. See *Trusts & Trustees*, No. 2, and
Phelps v. Seely & als., 573

2. See *Evidence*, No. 7, 9, and
Calbreath v. Va. Porcelain and Earth-ware Co., 697

Sangston, cor. sec., &c. v. Gordon & Reily, 755

PARTIES.

1. The bankruptcy of a plaintiff in a suit at law, being suggested on the record, no further proceedings in the suit can be taken in his name; but his assignee 983 *must enter himself as plaintiff, though the suit may be in one State and his appointment made in another.

Cannon & al. v. Wellford, judge, 195

2. As to the rights of assignees where appointed in different courts, see

Idem, 195

3. See *Ejectment*, No. 1, and
Elys v. Wynne & als., 224

PATENTS.

1. See *Land*, No. 1, 2, and
Cline's heirs v. Catron, 378

PAYMENTS.

1. What does not amount to a payment of a judgment.

Moore v. Tale, 351

2. When payments made during the war to the agent of a non-resident creditor are valid. See

Hale v. Wall & al., 424

Wall v. Slusher, 424

3. L sends to C, through B, a check upon a bank in W, to pay a debt L owes C. B hands the check to C's son who takes it to W, and finds the bank has been removed from W to F, and he returns the check to B, who receives it, but does not inform L of its return. It is not a payment.

Larue v. Cloud, 513

4. A promise by a son of C upon a precedent condition which cannot be performed, to take the check to F and apply for the money, is null, and L is still bound to pay C.

Idem, 513

PLEADINGS—AT LAW.

1. In assumpsit by the contractor against a county, for the price contracted to be paid for building a jail, it is not necessary to set out the dimensions or a description of the building in the declaration.

Carroll county v. Collier, 302

2. In such a case, the contract set out in the count fixes a time within which the jail is to be completed, but there is no averment that it was completed within the time. The count is defective.

Idem, 302

3. See *Debt*, and

Peyton v. Harman, 643

POWERS.

1. A husband who by his will gives property, real and personal, to his wife absolutely, if she survives him, may by his will authorize her to make a will in his lifetime, disposing of said property. And the wife having made a will in the lifetime of her husband, disposing of the property, and afterwards surviving her husband, and dying without re-executing or revoking her will, the same is valid to pass the property to her devisees and legatees.

Thorndike & als. v. Reynolds & als., 21

2. Though the wife does not say, in terms, that it is made in pursuance of the power vested in her by her husband's will: yet as his will was shown to her by his directions, and she had no property of her own at the time, and the provisions of her will have obvious reference to his will, it will be held that her will was made in pursuance of the power.

Idem, 21

3. The clause in the husband's will giving the power to the wife, must have been intended to take effect from its date; and so the will of the wife as an execution of the power will be intended to take effect from its date; though not to divest and pass the title in the lifetime of her husband and herself.

Idem, 21

4. The will of the wife was not revoked by the death of the husband, leaving the wife surviving him, and therefore it was not necessary for her to re-execute the will after his death.

Idem, 21

5. Though the wife survives the husband, and thereupon becomes absolutely entitled to the property, this does not extinguish the power; but the will of the wife executed under the power, in the lifetime of the husband, not having been revoked by her or re-executed, passes the property at her death to her devisees and legatees.

Idem, 21

6. H dies leaving a will and three codicils, in each of which he gives valuable property to his wife, if she survives him; and in some of these bequests he authorizes her to make a will in his lifetime, to dispose of it. By the third codicil he gives her one-half of his residuary estate, and then adds: "And for all the purposes contemplated in my will and the codicils thereto, I authorize

984 "and empower my wife to make a will in my lifetime, which shall be good and effectual in law and equity." This is a valid power to the wife to make a will in the lifetime of the husband to dispose of the property bequeathed to her; and looking to the language employed, all the provisions of the will, and the surrounding circumstances, the intention of the testator was held to be that the power was not confined to the bequest of the residue, but extended to all the bequests to her in the will and codicils.

Idem, 21

PRACTICE—AT COMMON LAW.

1. In ejectment against two holding different parts of a tract of land, the judgment may be separate against each, for the land in his possession, and joint for the costs.

Elys v. Wynne & als., 224

2. See *Internal Improvement Cos.*, and *Va. & Ten. R. R. Co. v. Campbell's ex'or*, 437

3. H brings two actions of debt against E, and the plea in both is payment. The parties agree that the suits shall be tried together, and there is one verdict and judgment for the amount of the debts in both actions. The court might have made an order consolidating the action; and the agreement was in effect a consolidation of the causes; and there was no error which can be set up, for the first time, in the appellate court.

Eagles v. Hook, 510

PRACTICE IN CHANCERY.

1. When depositions are taken and filed in a cause, both parties being present when they were taken, and the decree is obviously based upon them, the omission to refer to them in the decree will be considered a clerical mistake, and the cause will be considered as having been heard upon them as well as upon the other papers.

Day v. Hale & als., 146

Hale v. Hare & als., 146

2. As a general rule, the court will at any time before the hearing, grant leave to

amend where the bill is defective as to parties, or in the mistake or omission of any fact or circumstance connected with the substance of the bill, or not repugnant thereto. The amendment may be made by common order before answer or demurrer, and afterwards by leave of the court.

Holland & wife v. Trotter, 136

3. Upon the trial of an issue out of chancery, depositions taken in the Chancery court are not to be read to the jury unless proof be given that the witnesses are dead, or abroad, or otherwise unable to attend the trial.

Powell & wife v. Manson, 177

4. The positive denials or statements of an answer responsive to the bill, cannot be overthrown by the admissions, evasions and contradictions, if any, which may be found in the answer.

Idem, 177

5. The plaintiff cannot destroy the weight of the whole answer by proving that the defendant is unworthy of credit; nor can he do so by proving, directly or indirectly, that the answer is false in one respect or several respects. The only effect of such proof being to destroy the weight of the answer to the extent to which it is disproved by that amount of evidence which is required by the rule in chancery.

Idem, 177

6. Upon the trial of an issue out of chancery, the bill is not proof of its allegations, except so far as these allegations are admitted to be true by the answer. And the answer is not proof of the allegations therein contained, unless the allegations in the answer as to facts, be positive and responsive to some allegation of the bill. And to be responsive, such allegations of the answer must not be either evasive or contradictory.

Idem, 177

7. On the trial of an issue out of chancery, the rule of evidence is the same as on the hearing in the Chancery court; and the allegations of the answer responsive to the bill must be taken as true, unless contradicted by two witnesses, or one witness and corroborating circumstances.

Idem, 177

8. Upon a motion for a new trial of an issue out of chancery, on the ground that the verdict is contrary to the evidence, the judge, overruling the motion, refuses to certify the facts proved, because the testimony was conflicting; but all the oral testimony is certified. The appellate court will consider not merely whether the evidence adduced before the jury warrants the verdict,

but also whether, having regard to the whole *case, further investigation is necessary to attain the ends of justice.

Idem, 177

9. In such a case, although there may have been a misdirection by the court, or evidence may have been improperly rejected, a new trial will not be granted if the verdict appears to be right upon a consideration of all the evidence, including that which was rejected.

Idem, 177

10. If a debtor obtains an injunction to a sale of his property under a deed of trust, on

grounds that are insufficient and unsustainable, the injunction, nevertheless, should not be dissolved, if the amount of the debt is not certain, until his indebtedness is ascertained by a commissioner of the court.

White v. Mech. Building Fund Association, 223

11. What accounts and proceedings should be directed in a suit by donee in a fraudulent deed brought after a decree setting the deed aside at the suit of one creditor of the donor. See *Conveyances—Fraudulent*, No. 3, and

Pratt & al. v. Cox & als., 330

12. When evidence in a suit in which there has been a decree will be regarded in an appellate court, as evidence in a second suit in equity arising out of the first. See

Pratt & al. v. Cox & als., 330

13. B files his bill under § 4, of the act of March 3d, 1866, to set up a tender of payment of a Confederate debt, and ask for general relief. Though, his tender not being in time, he will not be wholly relieved, under the prayer for general relief, the debt may be scaled.

Sanders v. Branson, 364

14. It is the duty of the clerk to dismiss a suit, when the process is served, and the bill is not filed in the time prescribed by the statute. But if the bill is filed before an order of dismissal is entered, and the defendant answers without insisting upon the dismissal of the suit, and consents to a hearing of the cause, he thereby waives the objection.

Buchanan & als. v. King's heirs, 414

15. Though judgments have been recovered upon bonds given for purchases at a judicial sale made in October 1863, without any question of scaling them, yet the cause being still pending, the claim to have them scaled may be made and adjudicated in that cause.

Henderlite v. Thurman, 466

16. See *Revival of Suits*, No. 3, 4, 5, and *Wilson & Wife, &c., v. Smith*, 493

17. In what case two parties defendants may litigate the question of their liability to each other, one of them being liable to the plaintiffs. See *Vendor and Purchaser*, No. 7, and

Berry & als. v. Irick & als., 614

18. When an order made in a cause, on the motion of a purchaser, without notice to the parties, authorizing him to pay money to the receiver, is null and of no effect. See *Vendor and Purchaser*, No. 7, and

Idem, 614

19. When court will decree against one defendant without waiting until the equities between him and another defendant are decided.

Idem, 614

20. There cannot be a bill of review to correct a decree of the Court of Appeals; except on the ground of after-discovered evidence. And for the rules governing such a bill in such a case, see *Appellate Court*, No. 18, 19, and

J. B. Campbell's ex'ors v. A. C. Campbell's ex'or, 649

21. When a cause is decided in the Court of Appeals, and sent back for further proceedings, what answers to interrogatories will be impertinent and immaterial. See *Appellate Court*, No. 20, and *Idem*, 649

22. What is not a final decree. See *Decrees*, No. 8, and

Ambrouse's heirs v. Keller, 769

23. There is a decree in a cause denying the relief the plaintiffs seek, but authorizing them to amend their bill, and ask other relief. If the plaintiffs present their bill of review verified by oath, and ask leave to file it, if the decree was interlocutory, the court should treat the bill as a petition for a re-hearing of the cause, and if the decree was erroneous, should rehear and reverse it. *Idem*, 769

24. How damages to a purchaser of land may be ascertained. See *Equity Jurisdiction and Relief*, No. 6, and *Nagle v. Newton*, 814

PRINCIPAL AND AGENT.

See *Agent*.

986 *PRINCIPAL AND SURETY.

1. In March 1862, K sold personal property at auction on nine months credit, amounting to about \$2,000. F purchased some of it, and gave his bonds for \$501.57 with R as his surety. On the 10th of April 1863, K sold all the bonds to R, including that of F, for Confederate money. HELD: R can only recover of F the value of the Confederate money he paid K for the bond, with interest from the date of the purchase. *Kendrick & al. v. Forney*, 748

PROHIBITION.

1. County court grants a certificate to F for obtaining a license to sell ardent spirits. N applies to the Circuit court for an appeal from this order, which is allowed; and the Circuit court reverses and annuls the order with costs. After the judgment of the Circuit court has been rendered, as well as before, F may apply to the Court of Appeals for a writ of prohibition, to restrain N and the judge from proceeding to enforce the judgment; the action of the county court being final and conclusive in the case. *French v. Noel*, 454

RAILROAD COMPANIES.

1. See *Internal Improvement Co's.*, and *Va. & Ten. R. R. Co. v. Campbell's ex'or*, 437

REMOVAL OF CAUSES.

1. The act, ch. 174, § 1, Code of 1860, in relation to removal of causes, applies to proceedings by an internal improvement company to condemn land for its purposes. *Va. & Ten. R. R. Co. v. Campbell's ex'or*, 437

2. A suit in a State court cannot be removed to a U. S. court, unless the suit might have been brought originally in the last court.

Beery & als. v. Irick & als., 484
Newton's ex'or v. Bushong, 484

3. There are several plaintiffs in a suit in a State court, some of whom live out of the State, and others live in it, and the interests of all are so connected that the rights and interests of one cannot be adjudicated separately; the defendants live in the State. The non-resident plaintiffs are not entitled to have the cause removed to a U. S. court, under the act of Congress of March 2, 1867, for the removal of causes. *Idem*, 484

4. After a decree upon the merits has been made in a suit in a State court, and an appeal has been taken to the Supreme court of Appeals, and the case is pending in that court, no party has the right to have the cause removed to a U. S. court. *Idem*, 484

REVIVAL OF SUITS.

1. See *Judicial Sales*, No. 1, 2, and *Wilson & wife, &c. v. Smith*, 493

2. In a suit by W against L for partition of land, before any decree in the cause W dies, leaving a widow and child. The suit may be revived in their name; and neither a bill nor a *scire facias* is necessary, but it may be revived upon their motion without notice. Code, ch. 173, § 4, p. 718. *Idem*, 493

3. The order of revival suggests the death of W, and that the suit be revived and proceeded in, in the name of I and L administrators with the will annexed, — Wilson, infant son and sole heir, and — Wilson, widow and devisee of said John W. Wilson, deceased. Though the administrators with the will annexed were not necessary parties, yet it does no harm; and though the christian names of the infant child and the widow are omitted, they are sufficiently described to identify them. *Idem*, 493

4. It would have been out of place to have revived the suit in the name of the next friend of the infant; and an order authorizing some person to prosecute the suit for the infant, might as well have been made in a subsequent order as in the order reviving the suit; and in an original suit to set aside the proceedings in the partition suit, *quare* if it may not be presumed to have been made. *Idem*, 493

5. Even if there was not a formal assignment of a next friend by an order of the court in the partition suit, it may well be questioned whether such a mere informality would of itself avoid the proceedings in the suit, and the sale made under them: the infant being joined with his mother and the administrators, **quare* if they may not be considered, in the absence of evidence to the contrary, and for the purpose of giving effect to the proceedings, as his next friend. *Idem*, 493

SCALING DEBTS.

1. What contracts are embraced in the act of March 3, 1866, called the adjustment act, see opinion of *Christian, J.* in *Jennings v. Jennings*, 313
Hilbfor, &c. v. Peyton & als., 550

2. Within six months after the act for scaling debts was passed, S recovered a judg-

ment by default against P. Afterwards P being about to move the court to scale the debt, the parties, with the assistance of their counsel, agreed that the debt should be scaled as of the value at the date of the bond, which was one for three, and this is entered of record on the judgment. Afterwards P files his bill to have the debt scaled as of the date the bond fell due. **HOLD:** the agreement between the parties is conclusive, and the debt is not to be further scaled.

Smith v. Penn,

402

3. A bond is given on the 14th of May 1863, payable on demand, by M and others to J, the administrator of their intestate, for the balance then due him on his administration account, and this is almost wholly made up of commissions on receipts and disbursements, prior to the 15th of November 1862. The bond having been given with reference to Confederate State treasury notes as a standard of value, is to be scaled as of its date.

James & als. v. Johnston,

461

4. Though judgments have been recovered upon bonds given for purchases at a judicial sale made in October 1863, without any question as to the scaling of them, yet the cause being still pending, the claim to have them scaled may be made and adjudicated in that cause.

Henderlite v. Thurman,

466

5. An agreement is entered into on the 1st of June 1863, for the purchase by M of E of one hundred head of cattle, for which M was to pay E \$75 per head, in current funds, to be paid to E when he demanded the same; but the same is not to bear interest until after the ratification of peace between the United States and Confederate States governments. The proof is that Confederate States treasury notes were intended by both parties to be the medium of payment, whether the payment was made before or after the peace. Nothing was said as to the mode of payment if there was no such currency. This was a contract *in presenti*, and the debt should be scaled as of that date.

McClung's adm'r v. Ervin,

519

6. Bond executed in October 1863, for a loan of Confederate notes, payable at any time called for upon three months notice, without interest, the provision for notice being inserted at the instance of the obligor, is a bond payable immediately; and though not called for until after the war, is to be scaled as of its date.

Bowman v. McChesney,

609

7. See *Confederate Contracts*, No. 1, and *Sanders v. Branson*,

364

SECURITIES.

1. County bonds deposited by A as security for the payment of his note discounted at bank which he does not pay, may be made available by a sale of them; and the bank had the right to sell them whilst it held them, and after a transfer of the note and bonds to B, he had authority to sell them.

Alex., Loud. & Hamp. R. R. Co. v. Burke & als.,

254

2. In such a case A is entitled to notice of the time and place of sale of the bonds; but if he has actual knowledge of the fact a reasonable time before the sale is to take place, this is sufficient without formal notice.

Idem, 254

SET-OFF.

1. In a suit upon a bond given by M and others to J, the administrator of the estate of their intestate, for the amount due him upon a settlement, they cannot set-off moneys subsequently received by J as administrator, the claims not being in the same character.

James & als. v. Johnston,

461

2. Though J has made a statement of assets received and payments made by him since the bond was given, and finding a balance in his hands, endorses it as a credit on the bond, yet as the obligors do not acquiesce in the statement, they are not to be allowed the credit endorsed; but the balance due 988 *by the administrator must be ascertained by a correct settlement of his administration account. *Idem,* 461

3. Y brings an action of debt upon a bond against W and two others, W being the principal in the bond. The defendants seek to set off a judgment recovered by R against Y, which had been assigned to W. **HOLD:**

1. Under the statute, Code, ch. 172, § 4, the judgment is a good set-off to the bond, though the debt sued for is against W and two others, and the judgment is assigned to W; and though the plaintiff's claim is legal, and the claim of W is equitable.

Wartman & als. v. Yost,

595

2. See the opinion of *Moncure*, P. for the difference between the English statute of set-off and that of Virginia.

Idem, 595

SPECIFIC PERFORMANCE.

1. See *Vendor and Purchaser*, No. 1, 2, and *Christian v. Cabell & als.,*

82

2. In a suit for specific performance of a parol agreement for the sale of land, it must appear: 1st. That the parol agreement relied on, is certain and definite in its terms; 2d. The acts proved as part performance, must refer to, result from, or be made in pursuance of the agreement proved; 3d. The agreement must have been so far executed that a refusal of full execution would operate a fraud upon the party, and place him in a situation that does not lie in compensation. And no one of these conditions appears in this case.

Wright v. Puckett,

370

3. A contract for the sale and purchase of land made in January 1864, for Confederate money, both parties being *sui juris*, and the price being fair at the time, and then paid, and possession delivered, will be enforced at the suit of the heirs of the vendee.

Ambrose's heirs v. Keller,

769

4. In September 1864, R sells land to T, for Confederate money, which is paid; but the

deed is not made. After the war T sues R for specific execution of the contract. If there be no objection but inadequacy of price the contract will be enforced.

Talley v. Robinson's ass'nee, 888

5. R sets up the defence that the contract was made under duress—that he had been severely whipped by a mob and driven from the county. But it appears that T was in no way implicated in that outrage, though he had heard of it, and he gave R the price he asked for the land. The contract is valid.

Idem, 888

6. T admitting in his evidence that he promised to pay A for R, \$75, in addition to the sum stated in the contract, though this is not stated in the contract, or noticed in the pleadings, T should be required to pay it before specific performance is decreed.

Idem, 888

7. See *Equity Jurisdiction and Relief*, No. 6, and *Nagle v. Newton*, 814

STATE GOVERNMENT.

1. Between May and November 1860, D deposited tobacco, for inspection and storage, in the public warehouse at Richmond, and paid the inspection fees. The tobacco remained in the warehouse until March 1863, when the warehouse was accidentally consumed by fire, and the tobacco was burned. The present State government is not responsible to D for the loss.

De Rothschilds v. The Auditor, 41

STATUTES.

1. § 7, ch. 109, Code of 1860, in relation to divorces construed in *Carr v. Carr*, 168

2. Acts of May 29, 1852, and January 31, 1867, in relation to Building Fund Associations, construed in

White v. Mech. Building Fund Association, 233

3. Article XI, § 1, of the Constitution, and act of June 27, 1870, ch. 157, in relation to homestead exemptions, declared unconstitutional, in *The Homestead cases*, 266

4. The act, Code of 1860, ch. 135, § 15, as to ouster of possession, construed in

Buchanan & als. v. King's heirs, 414

5. The act, ch. 174, § 1, Code of 1860, concerning the removal of causes, construed in *Va. & Ten. R. R. Co. v. Campbell's ex'or*, 437

6. The § 1, of the act of March 3, 1866, known as the adjustment act, *Sess. Acts 1865-66, p. 184, construed in *Hilb for, &c. v. Peyton & als.*, 550

7. The act, Code, ch. 172, § 4, in relation to set-off, construed in

Wartman & als. v. Yost, 595

8. The act of March 30th, 1871, to provide for funding the debt of the State, construed in *Antoni v. Wright, sheriff*, 833
Wright, sheriff, v. Smith, 833

9. The act of March 7, 1872, which directs what shall be received in payment of taxes, dues, &c., and repeals all acts inconsistent with it, declared unconstitutional, in

Idem, 833

SUNDAY.

Sunday is not to be counted as one of the days of the term of a court.

Read's case, 924

TENANTS IN COMMON.

1. See *Joint-tenants*, No. 1, 2, 3, 4, 5, and *Buchanan & als. v. King's heirs*, 414

TENDER.

1. A tender of Confederate money in payment of a Confederate debt after the day of payment, is not sufficient.

Sanders v. Branson, 364

2. An offer to give to a receiver of the court a check upon a bank, without proof that the party had the money in the bank at the time, though that was not doubted by the receiver, is not a good and valid tender.

Poague v. Greenlee's adm'r & als., 724

3. A purchaser at a judicial sale cannot make a good and valid tender of the money due for his purchase, to the receiver of the court appointed to collect it. *Idem*, 724

4. When a purchaser of real estate, for currency, will not be discharged by a tender of Confederate money, though made on the day the note fell due. See *Confederate Contracts*, No. 11 and

Myers v. Whitfield, 780

TRUSTS AND TRUSTEES.

1. P by her will devised to T certain real estate, in trust for her daughter S, wife of F, with instructions to T, "to permit her said daughter to occupy and enjoy said property, should she prefer doing so;" and should she survive her husband, T "shall convey the said property in fee simple to her and her heirs. S was put into possession of the property, and in the lifetime of her husband, conveyed the property to H, the husband not joining in deed; and after his death she re-acknowledges the deed, and H received possession of the property. H afterwards conveyed to C. And then T brings ejectment against C to recover the property. HELD:

By the will of P, S acquired at once, on the death of P, an equitable estate in fee simple in the property, with the absolute right of possession for her own use; and on the death of her husband, to an absolute conveyance thereof to herself in fee simple, which it was a breach of trust in the trustee to withhold; and she could have enforced this right at any moment after the death of her husband. That her rights passed by her deed to H, and by the deed of H to C, who stood thereafter in the shoes of S; and he could no more be ejected at the suit of T, the trustee, than S could before her conveyance.

Campbell v. Prestons, 396

INTERNAL IMPROVEMENT COMPANIES.

1. Under the act ch. 174, § 1, Code of 1860, the case of a railroad company asking the County court to ascertain the compensation to a land owner for the land proposed to be taken for its purposes, which has remained in the court more than one year without being determined, may be removed to the Circuit court.

Va. & Ten. R. R. Co. v. Campbell's ex'or, 437

2. In such a case, if the Circuit court sets aside the report of the commissioners, that court should not send the case back to the County court, but should take jurisdiction of the case, and proceed in it with the same powers that are vested in the County court by the statute. *Idem,* 437

3. The land owner or his executor, whose land has been taken by a railroad company for its purposes, cannot apply to the County court for the appointment of commissioners to ascertain the compensation of the land owners for the land taken. *Idem,* 437

4. After the company has made a motion for commissioners to ascertain the compensation due to a land owner, and the commissioners have reported, and the court has allowed the money to be received by the clerk, and directed him to pay it to the land owner, or hold it until the further order of the court, the executor of the land owner applies to the same court for commissioners to ascertain such compensation; and this case is removed to the Circuit court. The removal of this case does not bring up the first, and neither the Circuit court nor the Court of Appeals can enquire whether there is error in the action of the court in the first case. *Idem,* 437

5. The record in the first case may be used by the company in their defense upon the second motion. *Idem,* 437

INTERROGATORIES.

See

Appellate Court, No. 20, and J. B. Campbell's ex'ors v. A. C. Campbell's ex'or, 649

977

*INVESTMENTS.

1. When an investment made under an order of the court, will be null and of no effect. See *Vendor and Purchaser, No. 7, and Beery & als. v. Irick & als.,* 614

2. To authorize the order of a judge in vacation for the investment of Confederate money by a fiduciary, under the act of March 5, 1863, Sess. Acts 1862-63, ch. 46, p. 81, three things are necessary: 1st. The money must be in the hands of the fiduciary; 2d. It must have been received in the due execution of his trust; 3d. For some cause he must be unable to pay it over to the parties entitled. If they do not all exist the order of the judge is null, and the fiduciary is responsible for the money.

J. B. Campbell's ex'ors v. A. C. Campbell's ex'or, 649

3. When Confederate money is received by an executor for a good ante-war debt, that he

may invest it under the order of a judge, he has not received it in the due exercise of his trust; and therefore he is not protected by such order. *Idem,* 649

ISSUES.

1. For the principles governing the trial of issues out of chancery, see *Practice in Chancery, No. 3, 4, 5, 6, 7, and*

Powell & wife v. Manson, 177

2. When an issue *quantum damnificatus* may be ordered, see *Equity Jurisdiction and Relief, No. 6, and*

Nagle v. Newton, 814

JOINT-TENANTS.

1. As a general rule, a joint-tenant or tenant in common is not to purchase in an outstanding adverse title to the common property for his own benefit, to the exclusion of his co-tenant. But the co-tenant must, within a reasonable time, make his election to claim the benefit, and to contribute to the expense incurred in the purchase of such title. If he unreasonably delays until there is a change in the condition of the property, or in the circumstances of the parties, he will be held to have abandoned all benefit arising from the new acquisition.

Buchanan & als. v. King's heirs, 414

2. In such a case, before the co-tenant can be held to have abandoned his claim to the benefit of the purchase of the outstanding title, it should appear, not only that he has been apprised of the purchase, but of the claim set up by his co-tenant. He may reasonably presume the acquisition was made in support of the common title, and may act on that presumption. *Idem,* 414

3. In such a case the burden is upon the purchasing tenant to show that his co-tenant had notice of the purchase, and of the exclusive claim asserted by him. *Idem,* 414

4. C and K are joint-tenants of land. C purchases a large tract, which includes the land held jointly, and takes the conveyance to himself; and he sells and conveys part of the large tract including the land held jointly. The grantee in this deed is tenant in common with the co-tenant of his grantor; and his possession is, in presumption of law, the possession of both, and is to be deemed in support of, and not in derogation of, the common title. *Idem,* 414

5. The acts of C in taking the conveyance to himself, and conveying to his grantee, are not such acts as are equivalent to an actual ouster, under Code of 1860, ch. 135, § 15. *Idem,* 414

JUDGMENTS.

1. For the grounds on which a court of equity will or will not relieve against a judgment at law, see the opinion of the court in

Holland and wife v. Trotter, 136

2. Where the defendant at law has been prevented from making his defense, by the assurances or promises of the counsel of the plaintiff, a court of equity will relieve him. *Idem,* 136

JUDICIAL SALES.

1. In a suit for partition of land by joint-tenants, tenants in common or parceners, whether partition can be conveniently made in kind or not, and whether the interests of those who are entitled to the subject or its proceeds, will be promoted by a sale of the entire subject or not, are questions for the court in which the suit is pending to decide; and its decision cannot be questioned in any collateral suit, except on the ground of fraud or surprise.

Wilson and wife v. Smith, 493

978 *2. In such a case, a sale made pending the suit, by agreement of the parties in person or by counsel, which sale is afterwards confirmed by the court, is as valid as if made under a previous decree of the court in the suit; and can no more be impeached collaterally than if so made.

Idem, 493

3. What sufficient order of revival of suit in the name of infant heir and widow of plaintiff, who dies before decree; and when it will be presumed a next friend was appointed to conduct the suit for the infant, or whether the failure to do so will affect the proceedings. See *Revival of Suits*, No. 3, 4 and

Idem, 493

4. But if there were any irregularities in the appointment, or the failure to appoint, a next friend of the infant plaintiff, objection on that account could only be made, if at all, in that suit, or on appeal from the decree therein; and such objection cannot be made in an independent suit.

Idem, 493

5. In a suit for partition of real estate by W against L, W dies, and the suit is revived in the name of his widow and infant son. The counsel employed by W will be presumed, in the absence of evidence to the contrary, to be continued as counsel in the cause; and a decree for a sale of the property entered upon the consent of the counsel, is a valid decree, and a sale under the decree will be sustained.

Idem, 493

6. See *Vendor and Purchaser*, No. 17, and *Beery & als. v. Irick & als.,* 614

7. On the 15th April 1863, there is a decree for the sale of land, for cash as to expenses, and for the balance, on a credit of six, twelve and eighteen months. On the day of sale it is proposed to the commissioners to sell for Confederate money; but they decline it, and say they sell according to the decree. Four of the heirs proclaim that they will take the money. The land worth \$15,000 in good money, sells to P for \$50,301. The cash is paid, bonds given, sale reported and confirmed; and S, receiver of the court, is directed to collect the money when due. S receives Confederate money in payment of the first bond, upon P's agreeing to take it back if the parties entitled refuse to receive it. When the second bond comes due P offers S to give him a check upon the bank of R, for the amount, which S declines to receive; and so when the third bond fell due. There was no proof that P had the money in bank, though S did not doubt it. **Held:**

1. The sale was a sale with reference to Confederate treasury notes as the standard of value.

Poague v. Greenlee's adm'r & als., 724

2. The offer of P to give S a check for the money, was not a good and valid tender: 1st. Because there was no evidence that P had the money in the bank at the time. 2d. Because a good and valid tender could not be made to the receiver of the court.

Idem, 724

3. P allowed his option, to take the land at its value in good money, to be credited with the true value of the money he has paid; or to surrender the land and account for rents and profits, and be credited for the value of the money paid. *Idem,* 724

JURISDICTION OF STATE COURTS.

1. See *Bankruptcy*, and *Cannon & al. v. Wellford, judge,* 195

2. C, trustee of a bank in liquidation, transfers to B the note of A, due to the bank, and certain county bonds, which had been deposited with the bank by A as security for his note, to be applied first to pay the debt due B, and then for the trustee. After this transfer, an order was made in a suit in the Circuit court of the United States, in which C, as trustee of the bank, was a defendant, appointing C receiver in the cause. A's note not having been paid at maturity, B gives him notice that unless the note was paid by a certain day, he would sell the bonds. A enjoins the sale in a State court. **Held:** The transfer of the note and bonds having been made before the appointment of C as receiver, the State court has jurisdiction of the case.

Alex., Loud. & Hamp. R. R. Co. v. Burke & als., 254

3. A State court has jurisdiction to decide that a provision of the constitution of the State is in violation of the constitution of the United States.

The Homestead cases, 266

4. When a case of an application by an internal improvement company to the County court to condemn land for its purposes, is removed to the Circuit *court, if the Circuit court sets aside the report of the commissioners made to the County court, it must proceed in the cause, and should not send it back to the County court.

Va. & Ten. R. R. Co. v. Campbell's ex'or, 437

5. In a suit in equity brought in February 1869, against an absent and home defendant, the bill is taken for confessed at the May rules, and at the July term of the court, the home defendant answers. At a special term of the court, held in December 1869, a decree is made in the cause, the decree reciting that publication had been made as to the absent defendant. As the regular term of the court was on the Wednesday after the 3d Monday in October, the cause might have been heard then, and therefore might be heard at the special term. Code, ch. 158, § 33.

Patton v. Hoge, 443

6. A County court has a discretion to grant or refuse a certificate for obtaining a license to retail ardent spirits to a person who has obtained a license to keep an eating house; and the action of the County court is final and conclusive on the question.

French v. Noel, 454

7. In such a case if the judge of the Circuit court allows an appeal from the order of the County court granting the certificate, and reverses and annuls the order, with costs; the said action is *coram non judge*, and of no effect.

Idem, 454

8. After the judgment of the Circuit court has been rendered, as well as before, the person injured by the judgment, may apply to the Court of Appeals for a writ of prohibition, to restrain the appellant and judge from proceeding to enforce the judgment.

Idem, 454

9. When in pursuance of the act of 1869-70, ch. 171, § 5, p. 277, the Court of Appeals sent a cause which had been pending in a District court of Appeals to the Circuit court, that was a decision, that the act was constitutional, and that the Circuit court had jurisdiction to rehear and decide the same.

Cowan v. Doddridge, 458

10. See *Conciliation—court of*, and

Myers v. Whitfield, 786

11. The release of a part of a verdict to bring it below the jurisdiction of the Court of Appeals, is in fraud of the jurisdiction of that court; and the court has jurisdiction to hear and decide the cause upon appeal. See *Appellate Court*, No. 15, and

Hansbrough & wife v. Stinnett, 593

12. The title of tenant by *elegit* is such an interest in land as may be the subject of adjudication in the Court of Appeals as a controversy concerning the title to land.

Lyons v. McGuire, 202

13. By § 1 of the act of March 30, 1871, the mayor of Lynchburg has concurrent jurisdiction with the Corporation court, of all petit larcenies.

Thomas' case, 912

JURORS.

1. As a general rule the evidence of jurors is not admissible to impeach their verdict.

Read's case, 924

LAND—HOW TO ACQUIRE AND DEFEND TITLE.

C is in possession of land under a settlement in 1771, the settlement right confirmed to him by the commissioners of the district, in September 1782, and which was surveyed in April 1783; and he lives upon and cultivates a part of the land, and obtains a patent for it in March 1799. In July 1796, W obtains a patent for a tract of land which covers a part of the tract held by C; but C's cleared land is outside the interlock, which is in forest; W not knowing that his patent covers any part of the land held by C under his settlement right. **Held:**

1. That C not having prevented the issue of the patent by *caveat*, and W not having

known that his patent covered any part of the land so claimed by C, the patent of W is valid, and vests in him the legal title.

Cline's heirs v. Catron, 378

2. The actual possession of C outside the interlock, does not constitute an adversary possession by C of the land within the interlock, so as to require W to enter upon and take actual possession of it, in order to give him possession under his patent.

Idem, 378

3. If C on obtaining his patent in March 1799, entered on the land and ousted W, it was not necessary for W to enter upon and dispossess C before he could maintain an action to recover the land.

Idem, 378

4. By an order of council of the 12th of June 1749, confirmed by a decree of the Court of Appeals in 1783. *800,000 acres of land was granted to the Loyal Company, and was surveyed in 1774. The rights under this grant, acquired by entry and survey, stand upon no higher footing than rights acquired by entry and survey under a land office treasury warrant; and in both cases, until patented, the lands are wasted and unappropriated, and liable to location by other parties.

Idem, 378

5. Though family traditions are admissible in evidence upon questions of boundary, they are not admissible to prove or disprove a title.

Idem, 378

6. The possession which would, under the former law, render a conveyance by a party out of possession, inoperative, must have been an adversary possession.

Idem, 378

7. What the kind of possession which will sustain the defense of adversary possession, against a plaintiff claiming under a patent.

Idem, 379

LANDLORD AND TENANT.

T owns a warehouse, and also a lumber yard, with office and shed attached, adjoining the warehouse, both fronting on a wharf owned by her, which runs the whole length between them and Elizabeth river, at Norfolk. In December 1865, she leases to H for five years, the lumber yard, office and shed, together with the use of the wharf in front of the lumber yard, for the purposes required in carrying on the lumber business, &c. But H is not to have the privilege of collecting wharfage either on vessels or goods landing or shipping for other purposes. In September 1867, T, by deed, demises to G the warehouse, with the appurtenances thereto belonging, for the year 1868, for a rent of \$1,525, payable quarterly; and in a separate clause it is agreed that G is to have the entire privilege and control of the entire wharf to said warehouse and lumber yard, except that H shall have permission to use the wharf in front of the lumber yard in carrying on his business in landing and loading with lumber, &c.; but on no account shall H be allowed to let anything whatever

remain on the wharf; but it is to be taken away as soon as put upon it; otherwise G will charge the usual wharfage on all such merchandise, lumber, &c. G is put into possession of the warehouse and wharf; but H uses the wharf in front of the lumber yard for his business, sometimes piling his lumber thereon, so that G cannot make much use of it, and H refuses to pay wharfage; but G gives no notice of this to T, and when three-quarters rent is due refuses to pay anything, on the ground that he has been ousted of a part of the demised premises by H's use of the wharf. **HOLD:**

1. If a tenant be at any time deprived of the leased premises by the landlord's agency, the obligation to pay rent ceases.

Tunis v. Grandy & al., 109

2. If the land be recovered by a third person, by a title superior to that of the lessor, the tenant is discharged from the payment of rent after eviction by such recovery. *Idem*, 109

3. If part only of the land is recovered, such an eviction is a discharge of so much of the rent as is in proportion to the value of the part evicted. But if the lessor himself wrongfully deprives the tenant of the whole or any part of the premises, the tenant is discharged from the payment of the whole rent until such possession is restored. *Idem*, 109

4. Under the demise to G of the warehouse and appurtenances thereto belonging, the wharf did not pass.

Idem, 109

5. The provision in the lease to G in relation to the wharf, is not a demise of the wharf, but a covenant. *Idem*, 109

6. If the provision as to the wharf makes it a demise of the wharf to G, the interest thus vested in G is in entire accord with the previous lease to H; and the interest previously vested in H was not demised to G. *Idem*, 109

7. If T intended to make a covenant only with G in regard to the extent to which the wharf might be used by H, then a breach of that covenant, supposing it to have been broken, would not amount to an eviction. *Idem*, 109

8. What constitutes an eviction? See the *opinion*. 109

9. If a tenant under a second lease is put into possession of the whole of the demised premises, and is afterwards
981 *evicted from a part thereof, by the lessee under the first lease, then the rent will be apportioned, and the lessor may distrain for it; but if the lessee under the first lease is in possession, so that the lessee under the second lease cannot get possession of a part of the premises demised to him, then the second lease, as to this part is void, and the lessor cannot distrain for a proportion of the rent; though he may recover the fair value of the balance of the premises, in an action for use and occupation. *Idem*, 109

10. The abandonment of the use of the wharf by G cannot amount to an eviction, whatever may have been the extent of H's right to the use of the wharf under his lease, or however that right may have conflicted with the right of G to its use under his. *Idem*, 109

LEASES.

1. See *Landlord and Tenant*, and *Tunis v. Grandy & al.*, 109

LIENS.

1. When vendor of lands having only an equitable title, has a lien upon the land for the purchase money in the hands of a subsequent vendee, who has acquired the legal title. See *Vendor and Purchaser*, No. 1, and *Day v. Hale & als.*, 146

Hale v. Hare & als., 146

2. W, Z and Y are partners, and joint tenants of real estate. W and Z sell their two-thirds interest in the real estate to Y, W receiving \$400 in cash for his interest, and Y executing to Z three notes, payable at different dates, amounting to \$700, for his interest. The deed from W and Z to Y, which conveys two-thirds of the property, reserves a lien as follows: "And the said Z hereby retains a lien on the property hereby conveyed as security for the payment of the above recited notes received in payment of his interest; the said W has been paid up in full for his interest." The lien is reserved on the two-thirds of the real estate conveyed in the deed. *Patton v. Hoge*, 443

3. See *Vendor and Purchaser*, No. 3, and *Higginbotham v. Brown*, 323

MALICIOUS SHOOTING.

1. See *Criminal Jurisdiction and Proceedings*, No. 1, and

Canada's case, 899

2. Whether a prisoner on trial is guilty of malicious shooting, with intent to kill, depends upon the question, whether if he had killed the person at whom he shot, instead of only wounding him with intent to kill him, the offence would have been murder.

Read's case, 924

3. If the killing would not have been murder, then he is not guilty of the offence of malicious shooting, however he may have been guilty of another offence; as of unlawful shooting with intent to kill.

Idem, 924

MANDAMUS.

1. If the judge of a Circuit court refuses to re-hear and decide a case sent to his court by the Court of Appeals under the act of 1869-70, ch. 171, § 5, p. 227, and directs it to be struck from his docket, an appeal cannot be taken from his judgment. The remedy is by application to the Court of Appeals for a *mandamus* to the circuit judge, to compel him to re-hear and decide the case.

Cowan v. Doddridge, 458

2. In such case the Court of Appeals will make an order for a writ of *mandamus nisi* to the judge, and direct that the service of a copy of the order shall be equivalent to the service of the writ. *Idem*, 458

MAYOR.

See *Criminal Jurisdiction and Proceedings*,
No. 2, and
Thomas' case, 912

MISDEMEANOR.

See *Criminal Jurisdiction and Proceedings*,
No. 1, and
Canada's case, 899

MISTAKE.

1. When it is obvious on the face of the paper, that a word or phrase has been omitted by mistake or inadvertence, and such words are naturally and obviously suggested upon a mere inspection of the paper, as the words which the parties must have intended to use to express their meaning, such words, 982 or *words of like import, may be supplied. *Peyton v. Harman*, 643

NEGLIGENCE.

1. See *Assignor and Assignee*, No. 1, 2, 3, 4, and
Wilson's adm'r v. Barclay's ex'or & als., 534

NEGOTIABLE INSTRUMENTS.

See *Checks on Banks*, and
Purcell v. Allemon & Son, 739

NEW TRIALS.

1. For the principles governing the granting of new trials upon an issue out of chancery. See *Appellate Court*, No. 6, 7, and
Powell & wife v. Manson, 177

2. For the principles upon which a new trial in an action at law will or will not be awarded. See opinions of *Staples* and *Anderson, Js.*, in
Hilb, for, &c. v. Peyton & als., 550

3. To authorize the granting a new trial on the ground of after-discovered evidence four things are necessary. 1st. The evidence must have been discovered since the former trial. 2d. It must be such as reasonable diligence on the part of the party asking it, could not have secured at the former trial. 3d. It must be material in its object, and not merely cumulative and corroborative or collateral. 4th. It must be such as ought to produce on another trial, an opposite result on the merits.

Read's case, 924

4. As a general rule, the evidence of jurors is not admissible to impeach their verdict. *Idem*, 924

5. On the trial of a prisoner for a felony, which lasts several days, the sheriffs are sworn to keep the jury, and not allow them to be spoken to, or to speak to them themselves in relation to the case. In the progress of the trial one of the deputies is called by the Commonwealth, and gives evidence of a fact which had occurred in his presence; and the same fact had been proved by other witnesses. This is not sufficient ground for setting aside the verdict. *Idem*, 924

OFFICERS.

See *Banks*, No. 1, and
Hodge's ex'or v. First Nat. Bank,
Richmond, 921

PARDONS.

1. The Governor of Virginia has authority under the Constitution, to grant a conditional pardon to a prisoner convicted of a felony.

Lee, sergeant, v. Murphy, 789

2. The condition annexed to a pardon must not be impossible, immoral or illegal; but it may, with the consent of the prisoner, be any punishment recognized by statute, or by the common law as enforced in this State.

Idem, 789

3. Though the warrant of the Governor speaks as commuting the punishment, yet as it substitutes a less for a greater punishment, and is intended to be done, and is done with the consent of the prisoner, it will be considered a pardon, and not a commutation of punishment. *Idem*, 789

PARENT AND CHILD.

1. G who was the guardian of two of his children, maintained and educated them at his own expense, and made no charge against them. He died in February 1861; up to which time his estate was ample to pay his debts; but by losses incurred since his death, it is not sufficient to pay them. In a question between creditors of G, his two children for whom he was guardian, are not to be charged in his guardianship account, with the expense of their maintenance and education.

Griffith & al. v. Bird & als., 73

2. When upon a divorce *a mensa et thoro* at the suit of the husband, the child of the marriage will be restored to the husband.

See *Divorce*, No. 4, and
Carr v. Carr, 168

PAROL EVIDENCE.

1. See *Trusts & Trustees*, No. 2, and
Phelps v. Seely & als., 573

2. See *Evidence*, No. 7, 9, and
Calbreath v. Va. Porcelain and Earthenware Co., 697

Sangston, cor. sec., &c. v. Gordon & Reily, 755

PARTIES.

1. The bankruptcy of a plaintiff in a suit at law, being suggested on the record, no further proceedings in the suit can be taken in his name; but his assignee 983 *must enter himself as plaintiff, though the suit may be in one State and his appointment made in another.

Cannon & al. v. Wellford, judge, 195

2. As to the rights of assignees where appointed in different courts, see

Idem, 195

3. See *Ejectment*, No. 1, and
Elys v. Wynne & als., 224

PATENTS.

1. See *Land*, No. 1, 2, and
Cline's heirs v. Catron, 378

PAYMENTS.

1. What does not amount to a payment of a judgment.

Moore v. Tate, 351

2. When payments made during the war to the agent of a non-resident creditor are valid. See

Hale v. Wall & al., 424

Wall v. Slusher, 424

3. L sends to C, through B, a check upon a bank in W, to pay a debt L owes C. B hands the check to C's son who takes it to W, and finds the bank has been removed from W to F, and he returns the check to B, who receives it, but does not inform L of its return. It is not a payment.

Larue v. Cloud, 513

4. A promise by a son of C upon a prece-
dent condition which cannot be performed,
to take the check to F and apply for the
money, is null, and L is still bound to pay C.

Idem, 513

PLEADINGS—AT LAW.

1. In assumpsit by the contractor against a county, for the price contracted to be paid for building a jail, it is not necessary to set out the dimensions or a description of the building in the declaration.

Carroll county v. Collier, 302

2. In such a case, the contract set out in the count fixes a time within which the jail is to be completed, but there is no averment that it was completed within the time. The count is defective.

Idem, 302

3. See *Debt*, and

Peyton v. Harman, 643

POWERS.

1. A husband who by his will gives property, real and personal, to his wife absolutely, if she survives him, may by his will authorize her to make a will in his lifetime, disposing of said property. And the wife having made a will in the lifetime of her husband, disposing of the property, and afterwards surviving her husband, and dying without re-executing or revoking her will, the same is valid to pass the property to her devisees and legatees.

Thorndike & als. v. Reynolds & als., 21

2. Though the wife does not say, in terms, that it is made in pursuance of the power vested in her by her husband's will: yet as his will was shown to her by his directions, and she had no property of her own at the time, and the provisions of her will have obvious reference to his will, it will be held that her will was made in pursuance of the power.

Idem, 21

3. The clause in the husband's will giving the power to the wife, must have been intended to take effect from its date; and so the will of the wife as an execution of the power will be intended to take effect from its date; though not to divest and pass the title in the lifetime of her husband and herself.

Idem, 21

4. The will of the wife was not revoked by the death of the husband, leaving the wife surviving him, and therefore it was not necessary for her to re-execute the will after his death.

Idem, 21

5. Though the wife survives the husband, and thereupon becomes absolutely entitled to the property, this does not extinguish the power; but the will of the wife executed under the power, in the lifetime of the husband, not having been revoked by her or re-executed, passes the property at her death to her devisees and legatees.

Idem, 21

6. H dies leaving a will and three codicils, in each of which he gives valuable property to his wife, if she survives him; and in some of these bequests he authorizes her to make a will in his lifetime, to dispose of it. By the third codicil he gives her one-half of his residuary estate, and then adds: "And for all the purposes contemplated in my will and the codicils thereto, I authorize

984 *and empower my wife to make a will in my lifetime, which shall be good and effectual in law and equity." This is a valid power to the wife to make a will in the lifetime of the husband to dispose of the property bequeathed to her; and looking to the language employed, all the provisions of the will, and the surrounding circumstances, the intention of the testator was held to be that the power was not confined to the bequest of the residue, but extended to all the bequests to her in the will and codicils.

Idem, 21

PRACTICE—AT COMMON LAW.

1. In ejectment against two holding different parts of a tract of land, the judgment may be separate against each, for the land in his possession, and joint for the costs.

Elys v. Wynne & als., 224

2. See *Internal Improvement Cos.*, and *Va. & Ten. R. R. Co. v. Campbell's ex'or*, 437

3. H brings two actions of debt against E, and the plea in both is payment. The parties agree that the suits shall be tried together, and there is one verdict and judgment for the amount of the debts in both actions. The court might have made an order consolidating the action; and the agreement was in effect a consolidation of the causes; and there was no error which can be set up, for the first time, in the appellate court.

Eagles v. Hook, 510

PRACTICE IN CHANCERY.

1. When depositions are taken and filed in a cause, both parties being present when they were taken, and the decree is obviously based upon them, the omission to refer to them in the decree will be considered a clerical mistake, and the cause will be considered as having been heard upon them as well as upon the other papers.

Day v. Hale & als., 146

Hale v. Hare & als., 146

2. As a general rule, the court will at any time before the hearing, grant leave to

amend where the bill is defective as to parties, or in the mistake or omission of any fact or circumstance connected with the substance of the bill, or not repugnant thereto. The amendment may be made by common order before answer or demurrer, and afterwards by leave of the court.

Holland & wife v. Trotter, 136

3. Upon the trial of an issue out of chancery, depositions taken in the Chancery court are not to be read to the jury unless proof be given that the witnesses are dead, or abroad, or otherwise unable to attend the trial.

Powell & wife v. Manson, 177

4. The positive denials or statements of an answer responsive to the bill, cannot be overthrown by the admissions, evasions and contradictions, if any, which may be found in the answer. *Idem*, 177

5. The plaintiff cannot destroy the weight of the whole answer by proving that the defendant is unworthy of credit; nor can he do so by proving, directly or indirectly, that the answer is false in one respect or several respects. The only effect of such proof being to destroy the weight of the answer to the extent to which it is disproved by that amount of evidence which is required by the rule in chancery. *Idem*, 177

6. Upon the trial of an issue out of chancery, the bill is not proof of its allegations, except so far as these allegations are admitted to be true by the answer. And the answer is not proof of the allegations therein contained, unless the allegations in the answer as to facts, be positive and responsive to some allegation of the bill. And to be responsive, such allegations of the answer must not be either evasive or contradictory. *Idem*, 177

7. On the trial of an issue out of chancery, the rule of evidence is the same as on the hearing in the Chancery court; and the allegations of the answer responsive to the bill must be taken as true, unless contradicted by two witnesses, or one witness and corroborating circumstances. *Idem*, 177

8. Upon a motion for a new trial of an issue out of chancery, on the ground that the verdict is contrary to the evidence, the judge, overruling the motion, refuses to certify the facts proved, because the testimony was conflicting; but all the oral testimony is certified. The appellate court will consider not merely whether the evidence adduced before the jury warrants the verdict, but also whether, having regard to the whole *case, further investigation is necessary to attain the ends of justice. 985 *Idem*, 177

9. In such a case, although there may have been a misdirection by the court, or evidence may have been improperly rejected, a new trial will not be granted if the verdict appears to be right upon a consideration of all the evidence, including that which was rejected. *Idem*, 177

10. If a debtor obtains an injunction to a sale of his property under a deed of trust, on

grounds that are insufficient and unsustained, the injunction, nevertheless, should not be dissolved, if the amount of the debt is not certain, until his indebtedness is ascertained by a commissioner of the court.

White v. Mech. Building Fund Association, 223

11. What accounts and proceedings should be directed in a suit by donee in a fraudulent deed brought after a decree setting the deed aside at the suit of one creditor of the donor. See *Conveyances—Fraudulent*, No. 3, and

Pratt & al. v. Cox & als., 330

12. When evidence in a suit in which there has been a decree will be regarded in an appellate court, as evidence in a second suit in equity arising out of the first. See

Pratt & al. v. Cox & als., 330

13. B files his bill under § 4, of the act of March 3d, 1866, to set up a tender of payment of a Confederate debt, and ask for general relief. Though, his tender not being in time, he will not be wholly relieved, under the prayer for general relief, the debt may be scaled. *Sanders v. Branson*, 364

14. It is the duty of the clerk to dismiss a suit, when the process is served, and the bill is not filed in the time prescribed by the statute. But if the bill is filed before an order of dismissal is entered, and the defendant answers without insisting upon the dismissal of the suit, and consents to a hearing of the cause, he thereby waives the objection.

Buchanan & als. v. King's heirs, 414

15. Though judgments have been recovered upon bonds given for purchases at a judicial sale made in October 1863, without any question of scaling them, yet the cause being still pending, the claim to have them scaled may be made and adjudicated in that cause.

Henderlite v. Thurman, 466

16. See *Revival of Suits*, No. 3, 4, 5, and *Wilson & Wife, &c., v. Smith*, 493

17. In what case two parties defendants may litigate the question of their liability to each other, one of them being liable to the plaintiffs. See *Vendor and Purchaser*, No. 7, and

Berry & als. v. Irick & als., 614

18. When an order made in a cause, on the motion of a purchaser, without notice to the parties, authorizing him to pay money to the receiver, is null and of no effect. See *Vendor and Purchaser*, No. 7, and

Idem, 614

19. When court will decree against one defendant without waiting until the equities between him and another defendant are decided. *Idem*, 614

20. There cannot be a bill of review to correct a decree of the Court of Appeals; except on the ground of after-discovered evidence. And for the rules governing such a bill in such a case, see *Appellate Court*, No. 18, 19, and

J. B. Campbell's ex'ors v. A. C. Campbell's ex'or, 649

21. When a cause is decided in the Court of Appeals, and sent back for further proceedings, what answers to interrogatories will be impertinent and immaterial. See *Appellate Court*, No. 20, and *Idem*, 649

22. What is not a final decree. See *Decrees*, No. 8, and

Ambrouse's heirs v. Keller, 769

23. There is a decree in a cause denying the relief the plaintiffs seek, but authorizing them to amend their bill, and ask other relief. If the plaintiffs present their bill of review verified by oath, and ask leave to file it, if the decree was interlocutory, the court should treat the bill as a petition for a re-hearing of the cause, and if the decree was erroneous, should rehear and reverse it. *Idem*, 769

24. How damages to a purchaser of land may be ascertained. See *Equity Jurisdiction and Relief*, No. 6, and *Nagle v. Newton*, 814

PRINCIPAL AND AGENT.

See *Agent*.

986 *PRINCIPAL AND SURETY.

1. In March 1862, K sold personal property at auction on nine months credit, amounting to about \$2,000. F purchased some of it, and gave his bonds for \$501.57 with R as his surety. On the 10th of April 1863, K sold all the bonds to R, including that of F, for Confederate money. **Held**: R can only recover of F the value of the Confederate money he paid K for the bond, with interest from the date of the purchase.

Kendrick & al. v. Forney, 748

PROHIBITION.

1. County court grants a certificate to F for obtaining a license to sell ardent spirits. N applies to the Circuit court for an appeal from this order, which is allowed; and the Circuit court reverses and annuls the order with costs. After the judgment of the Circuit court has been rendered, as well as before, F may apply to the Court of Appeals for a writ of prohibition, to restrain N and the judge from proceeding to enforce the judgment; the action of the county court being final and conclusive in the case.

French v. Noel, 454

RAILROAD COMPANIES.

1. See *Internal Improvement Co's.*, and

Va. & Ten. R. R. Co. v. Campbell's ex'or, 437

REMOVAL OF CAUSES.

1. The act, ch. 174, § 1, Code of 1860, in relation to removal of causes, applies to proceedings by an internal improvement company to condemn land for its purposes.

Va. & Ten. R. R. Co. v. Campbell's ex'or, 437

2. A suit in a State court cannot be removed to a U. S. court, unless the suit might have been brought originally in the last court.

Beery & als. v. Irick & als., 484

Newton's ex'or v. Bushong, 484

3. There are several plaintiffs in a suit in a State court, some of whom live out of the State, and others live in it, and the interests of all are so connected that the rights and interests of one cannot be adjudicated separately; the defendants live in the State. The non-resident plaintiffs are not entitled to have the cause removed to a U. S. court, under the act of Congress of March 2, 1867, for the removal of causes. *Idem*, 484

4. After a decree upon the merits has been made in a suit in a State court, and an appeal has been taken to the Supreme court of Appeals, and the case is pending in that court, no party has the right to have the cause removed to a U. S. court.

Idem, 484

REVIVAL OF SUITS.

1. See *Judicial Sales*, No. 1, 2, and

Wilson & wife, &c. v. Smith, 493

2. In a suit by W against L for partition of land, before any decree in the cause W dies, leaving a widow and child. The suit may be revived in their name; and neither a bill nor a *scire facias* is necessary, but it may be revived upon their motion without notice. Code, ch. 173, § 4, p. 718.

Idem, 493

3. The order of revival suggests the death of W, and that the suit be revived and proceeded in, in the name of I and L administrators with the will annexed, ——— Wilson, infant son and sole heir, and ——— Wilson, widow and devisee of said John W. Wilson, deceased. Though the administrators with the will annexed were not necessary parties, yet it does no harm; and though the christian names of the infant child and the widow are omitted, they are sufficiently described to identify them. *Idem*, 493

4. It would have been out of place to have revived the suit in the name of the next friend of the infant; and an order authorizing some person to prosecute the suit for the infant, might as well have been made in a subsequent order as in the order reviving the suit; and in an original suit to set aside the proceedings in the partition suit, *quære* if it may not be presumed to have been made.

Idem, 493

5. Even if there was not a formal assignment of a next friend by an order of the court in the partition suit, it may well be questioned whether such a mere informality would of itself avoid the proceedings in the suit, and the sale made under them: the infant being joined with his mother 987 and the administrators, **quære* if they may not be considered, in the absence of evidence to the contrary, and for the purpose of giving effect to the proceedings, as his next friend. *Idem*, 493

SCALING DEBTS.

1. What contracts are embraced in the act of March 3, 1866, called the adjustment act, see opinion of *Christian*, J. in

Jennings v. Jennings, 313

Hilb for, &c. v. Peyton & als., 550

2. Within six months after the act for scaling debts was passed, S recovered a judg-

ment by default against P. Afterwards P being about to move the court to scale the debt, the parties, with the assistance of their counsel, agreed that the debt should be scaled as of the value at the date of the bond, which was one for three, and this is entered of record on the judgment. Afterwards P files his bill to have the debt scaled as of the date the bond fell due. **HOLD:** the agreement between the parties is conclusive, and the debt is not to be further scaled.

Smith v. Penn,

402

3. A bond is given on the 14th of May 1863, payable on demand, by M and others to J, the administrator of their intestate, for the balance then due him on his administration account, and this is almost wholly made up of commissions on receipts and disbursements, prior to the 15th of November 1862. The bond having been given with reference to Confederate State treasury notes as a standard of value, is to be scaled as of its date.

James & als. v. Johnston,

461

4. Though judgments have been recovered upon bonds given for purchases at a judicial sale made in October 1863, without any question as to the scaling of them, yet the cause being still pending, the claim to have them scaled may be made and adjudicated in that cause.

Henderlite v. Thurman,

466

5. An agreement is entered into on the 1st of June 1863, for the purchase by M of E of one hundred head of cattle, for which M was to pay E \$75 per head, in current funds, to be paid to E when he demanded the same; but the same is not to bear interest until after the ratification of peace between the United States and Confederate States governments. The proof is that Confederate States treasury notes were intended by both parties to be the medium of payment, whether the payment was made before or after the peace. Nothing was said as to the mode of payment if there was no such currency. This was a contract *in presenti*, and the debt should be scaled as of that date.

McClung's adm'r v. Ervin,

519

6. Bond executed in October 1863, for a loan of Confederate notes, payable at any time called for upon three months notice, without interest, the provision for notice being inserted at the instance of the obligor, is a bond payable immediately; and though not called for until after the war, is to be scaled as of its date.

Bowman v. McChesney,

609

7. See *Confederate Contracts*, No. 1, and *Sanders v. Branson*,

364

SECURITIES.

1. County bonds deposited by A as security for the payment of his note discounted at bank which he does not pay, may be made available by a sale of them; and the bank had the right to sell them whilst it held them, and after a transfer of the note and bonds to B, he had authority to sell them.

Alex., Loud. & Hamp. R. R. Co. v. Burke & als.,

254

2. In such a case A is entitled to notice of the time and place of sale of the bonds; but if he has actual knowledge of the fact a reasonable time before the sale is to take place, this is sufficient without formal notice.

Idem, 254

SET-OFF.

1. In a suit upon a bond given by M and others to J, the administrator of the estate of their intestate, for the amount due him upon a settlement, they cannot set-off moneys subsequently received by J as administrator, the claims not being in the same character.

James & als. v. Johnston,

461

2. Though J has made a statement of assets received and payments made by him since the bond was given, and finding a balance in his hands, endorses it as a credit on the bond, yet as the obligors do not acquiesce in the statement, they are not to be allowed the credit endorsed; but the balance due 988 *by the administrator must be ascertained by a correct settlement of his administration account. *Idem,* 461

3. Y brings an action of debt upon a bond against W and two others, W being the principal in the bond. The defendants seek to set off a judgment recovered by R against Y, which had been assigned to W. **HOLD:**

1. Under the statute, Code, ch. 172, § 4, the judgment is a good set-off to the bond, though the debt sued for is against W and two others, and the judgment is assigned to W; and though the plaintiff's claim is legal, and the claim of W is equitable.

Wartman & als. v. Yost,

595

2. See the opinion of *Moncure, P.* for the difference between the English statute of set-off and that of Virginia.

Idem, 595

SPECIFIC PERFORMANCE.

1. See *Vendor and Purchaser*, No. 1, 2, and *Christian v. Cabell & als.,*

82

2. In a suit for specific performance of a parol agreement for the sale of land, it must appear: 1st. That the parol agreement relied on, is certain and definite in its terms; 2d. The acts proved as part performance, must refer to, result from, or be made in pursuance of the agreement proved; 3d. The agreement must have been so far executed that a refusal of full execution would operate a fraud upon the party, and place him in a situation that does not lie in compensation. And no one of these conditions appears in this case.

Wright v. Puckett,

370

3. A contract for the sale and purchase of land made in January 1864, for Confederate money, both parties being *sui juris*, and the price being fair at the time, and then paid, and possession delivered, will be enforced at the suit of the heirs of the vendee.

Ambrouse's heirs v. Keller,

769

4. In September 1864, R sells land to T, for Confederate money, which is paid; but the

deed is not made. After the war T sues R for specific execution of the contract. If there be no objection but inadequacy of price the contract will be enforced.

Talley v. Robinson's ass'nee, 888

5. R sets up the defence that the contract was made under duress—that he had been severely whipped by a mob and driven from the county. But it appears that T was in no way implicated in that outrage, though he had heard of it, and he gave R the price he asked for the land. The contract is valid.

Idem, 888

6. T admitting in his evidence that he promised to pay A for R, \$75, in addition to the sum stated in the contract, though this is not stated in the contract, or noticed in the pleadings, T should be required to pay it before specific performance is decreed.

Idem, 888

7. See *Equity Jurisdiction and Relief*, No. 6, and *Nagle v. Newton*, 814

STATE GOVERNMENT.

1. Between May and November 1860, D deposited tobacco, for inspection and storage, in the public warehouse at Richmond, and paid the inspection fees. The tobacco remained in the warehouse until March 1863, when the warehouse was accidentally consumed by fire, and the tobacco was burned. The present State government is not responsible to D for the loss.

De Rothschilds v. The Auditor, 41

STATUTES.

1. § 7, ch. 109, Code of 1860, in relation to divorces construed in *Carr v. Carr*, 168

2. Acts of May 29, 1852, and January 31, 1867, in relation to Building Fund Associations, construed in

White v. Mech. Building Fund Association, 233

3. Article XI, § 1, of the Constitution, and act of June 27, 1870, ch. 157, in relation to homestead exemptions, declared unconstitutional, in *The Homestead cases*, 266

4. The act, Code of 1860, ch. 135, § 15, as to ouster of possession, construed in

Buchanan & als. v. King's heirs, 414

5. The act, ch. 174, § 1, Code of 1860, concerning the removal of causes, construed in *Va. & Ten. R. R. Co. v. Campbell's ex'or*, 437

6. The § 1, of the act of March 3, 1866, 989 known as the adjustment act, *Sess. Acts 1865-66, p. 184, construed in

Hilb for, &c. v. Peyton & als., 550

7. The act, Code, ch. 172, § 4, in relation to set-off, construed in

Wartman & als. v. Yost, 595

8. The act of March 30th, 1871, to provide for funding the debt of the State, construed in *Antoni v. Wright, sheriff*, 833

Wright, sheriff, v. Smith, 833

9. The act of March 7, 1872, which directs what shall be received in payment of taxes, dues, &c., and repeals all acts inconsistent with it, declared unconstitutional, in

Idem, 833

SUNDAY.

Sunday is not to be counted as one of the days of the term of a court.

Read's case, 924

TENANTS IN COMMON.

1. See *Joint-tenants*, No. 1, 2, 3, 4, 5, and *Buchanan & als. v. King's heirs*, 414

TENDER.

1. A tender of Confederate money in payment of a Confederate debt after the day of payment, is not sufficient.

Sanders v. Branson, 364

2. An offer to give to a receiver of the court a check upon a bank, without proof that the party had the money in the bank at the time, though that was not doubted by the receiver, is not a good and valid tender.

Poague v. Greenlee's adm'r & als., 724

3. A purchaser at a judicial sale cannot make a good and valid tender of the money due for his purchase, to the receiver of the court appointed to collect it. *Idem*, 724

4. When a purchaser of real estate, for currency, will not be discharged by a tender of Confederate money, though made on the day the note fell due. See *Confederate Contracts*, No. 11 and

Myers v. Whitfield, 780

TRUSTS AND TRUSTEES.

1. P by her will devised to T certain real estate, in trust for her daughter S, wife of F, with instructions to T, "to permit her said daughter to occupy and enjoy said property, should she prefer doing so;" and should she survive her husband, T "shall convey the said property in fee simple to her and her heirs. S was put into possession of the property, and in the lifetime of her husband, conveyed the property to H, the husband not joining in deed; and after his death she re-acknowledges the deed, and H received possession of the property. H afterwards conveyed to C. And then T brings ejectment against C to recover the property. **Held:**

By the will of P, S acquired at once, on the death of P, an equitable estate in fee simple in the property, with the absolute right of possession for her own use; and on the death of her husband, to an absolute conveyance thereof to herself in fee simple, which it was a breach of trust in the trustee to withhold; and she could have enforced this right at any moment after the death of her husband. That her rights passed by her deed to H, and by the deed of H to C, who stood thereafter in the shoes of S; and he could no more be ejected at the suit of T, the trustee, than S could before her conveyance.

Campbell v. Prestons, 396

2. A resulting trust may be set up by parol testimony, against the letter of a deed; and a deed absolute on its face, may, by like testimony, be proved to be a mortgage. But the testimony to produce these results must, in each case, be clear and unquestionable. Vague and indefinite declarations and admissions, long after the fact, have always been regarded, with good reason, as unsatisfactory and insufficient. For comment on such evidence, see the opinion.

Phelps v. Seely & als., 573

3. Bonds are given to S, secretary of, &c., a voluntary association, and a deed of trust executed to secure them. And S is directed by the association to proceed to collect all the debts belonging to them. Though by the by-laws the secretary was to be elected annually, yet as S continued to act as such, and was recognized by the association, it was competent for him to direct the enforcement of the deed of trust.

Sangston, cor. sec., &c. v. Gordon & Reily, 755

4. It is not competent for the grantors in the deed of trust to question the authority of S to take the deed as a security for the 990 bonds; that will be presumed *until his principals disavow his act.

Idem, 755

5. Parol evidence is not admissible to prove that the bonds and deed of trust were not to be paid and executed according to their terms; but were only to be paid out of the profits of the property for the price of which they were given.

Idem, 755

USURY.

1. The mode of charging dues, interest and fines, by a building fund association is authorized by the statute, and not usurious.

White v. Mech. Building Fund Association, 233

VARIANCE.

1. In assumpsit by the contractor against a county, for the price contracted to be paid for building a jail, the declaration states that the county court appointed three commissioners, naming them, to let out the building of the jail; in the order of the county court offered in evidence by the plaintiff, only two of them are named. This is no material variance, and the order may be admitted as evidence. *Carroll County v. Collier*, 302

VENDOR AND PURCHASER.

1. M conveys a house and lot to W in trust for B for life, remainder to her children. On the 30th June 1870, B contracts in writing with C to sell to him the property for \$10,000 on the terms of \$2,000 when he received a good deed for the property, and the balance in five years, equal annual payments; possession to be delivered on the 15th of July. B to procure the approval of the contract by the proper court without cost to C. On the 9th of July W files his bill against B and her children, to have the contract approved, and by a decree of the same day, it is approved and W is directed to convey the house and lot to

C with special warranty. On the same day W executes the deed, and hands it to C, who in a few days writes to W stating various objections to the title, and saying he cannot have anything to do with the property in the state of the title. On the 15th of July, W tenders C possession; and C refuses to take possession, and renounces the contract. **HELD:**

1. This was a private, not a judicial sale, and C is not concluded by the decree from making objections to the title.

Christian v. Cabell & als., 82

2. The undertaking to make "a good deed" is not confined to the form of the deed, but includes a good title.

Idem, 82

3. If C had taken possession, and performed the contract on his part by paying the cash payment and executing his bonds, he would thereby have waived his objections to the title.

Idem, 82

2. In this case the house and lot had been owned by G, who sold and conveyed it to M. Whilst G owned it, she being a member of a building fund association, borrowed from it \$2,000, and gave her bonds in the penalty of \$4,000, and a deed of trust to K to secure her liabilities to the association. She had paid up all dues until December 1863; but there was an uncertain amount to which the property was still liable; and this could only be ascertained by a suit in equity and an account; and this incumbrance was unknown to C at the time of the contract. The house had been consumed by fire before proceedings were instituted by W, against C, to enforce the contract. **HELD:**

1. In a contract for the purchase of a fee simple estate, if no incumbrance is communicated to the purchaser, or be known to him, he must suppose himself to purchase an unincumbered estate.

Idem, 82

2. The objections which a purchaser may make are not entirely confined to a doubtful title. It applies to incumbrances of every description which may in any way embarrass the purchaser in the full and quiet enjoyment of his purchase.

Idem, 82

3. There is a difference between a defined and admitted charge to which the purchase money may, by consent, be applied when it comes due, and a contested charge, which will involve the purchaser in an intricate and tedious lawsuit of uncertain duration.

Idem, 82

4. In some instances the court will decree specific performance, if the vendor is prepared to comply with his covenants at the hearing; and the *court will 991 afford him a reasonable time to remove incumbrances, and perfect his title. But this is a matter of favor to the vendor, only to be granted in cases which admit of such relief without prejudice to the rights of the vendee.

Idem, 82

5. The court will not give time to the vendor when the defect to be remedied was

known to him or his attorney, at the time of the contract, and was concealed from the purchaser. *Idem*, 82

6. Especially will such indulgence be denied to the vendor when, besides a failure to disclose the existence of incumbrances, an account is necessary to ascertain the state of the title, the extent, nature and amount of such incumbrances. *Idem*, 82

7. The purchaser of real estate is the owner from the date of the contract, when the vendor is in no default, and is prepared to convey a clear title. But he is not the owner till the vendor can make a title according to the contract. *Idem*, 82

8. Any loss occurring to the property before the vendor is in a condition to convey a clear unincumbered title must fall on him and not on the purchaser. *Idem*, 82

9. The house having been consumed by fire whilst the incumbrance on the property still existed, so that W could not make a good title to it, the loss must be borne by B and her children, and not by C. *Idem*, 82

3. B claiming a part and H claiming the whole of a tract of land, and both claiming under W, who had sold to C, who owes part of the purchase money, to W, and H having paid it to W, the part of the land claimed by B is liable for its due proportion thereof.

Higginbotham v. Brown, 323

4. I sold land to G, but made no conveyance; G sold the same land to E, and E sold it to J, taking his bonds for the purchase money; and J sold to D, the purchase money due to E being unpaid, of which D had notice, but was informed that any lien that E had upon the land had been released in consideration of J's giving additional personal security to the bonds; and under that belief I conveyed the land to D. E has a lien upon the land in the hands of D for the unpaid purchase money due to him from J; and this though E assigned to J the title bond, which he received from G.

Day v. Hale & als., 146

Hale v. Hare & als., 146

5. How far a lien reserved in deed of conveyance by two joint-tenants will be construed as extending. See *Liens*, No. 2, and

Patton v. Hoge, 443

6. By article of agreement under seal, S sells to H a lot of land which at the time H is in possession as tenant of S. Some time afterwards H informs S that he cannot pay for the lot, and proposes to rescind the contract, which S consents to; and H informs S that P will buy the lot at the same price. S thereupon agrees to sell to P, and with the assent and at the request of H, sells and conveys to P. **HELD**:

1. The written contract, whether delivered up or not, may be rescinded by a subsequent parol agreement, which has been fully carried into effect; and in this case, the contract was rescinded.

Phelps v. Seely & als., 573

2. The sale to P having been at the instance of H, and with his concurrence, even if the contract could not be rescinded by a subsequent parol agreement, H would be estopped in equity, by his own acts, from setting up the written contract.

Idem, 573

7. In April 1857, land is sold by a commissioner under a decree in a suit for partition, the one-third cash, and the balance in five annual payments, a lien to be reserved on the land for the deferred payments, the parties entitled being the widow and several children of B. At the sale I became the purchaser, and by the decree, or by the agreement of the parties, I was allowed to retain the one-third of the purchase money for the lifetime of the widow; he paying her interest thereon annually. Separate bonds were given for this one-third, and I paid up the principal of his bonds for two-thirds, and the interest on the one-third until 1862; and he paid the interest then due and a part of the principal of the two-thirds. At the October term of the court, I, without giving notice to the parties, and without their knowledge, obtained from the court an order directing him to pay the balance of the purchase money in his hands, to E, the general receiver of the court, to be invested in State bonds.

992 He accordingly *payed the amount to E in Confederate treasury notes, and E invested the fund in State bonds; but before making his report, sold them, and invested in Confederate State bonds. The papers in the suit being destroyed, the widow and children brought their suit in equity against I and E to recover the fund. **HELD**:

1. The order having been obtained by I without notice to the parties and without their knowledge, was null and of no effect as to them, and he is still liable for the purchase money; and the lien still exists.

Beery & als. v. Irick & als., 614

2. The plaintiffs are entitled to an immediate decree against I; and are not to be delayed until the equities between I and E can be decided. *Idem*, 614

3. The cause going back for further proceedings, I and E or either of them, if they or he desire it, may litigate the question of the liability of E to I, and the extent of such liability, if there be any, in this case.

Idem, 614

8. See *Specific Performance*, No. 3, and

Ambrose's heirs v. Keller, 769

9. See *Specific Performance*, No. 4, 5, 6, and *Talley v. Robinson's ass'nee*, 888

WASTE AND UNAPPROPRIATED LAND.

By an order of council of the 12th of June, 1749, confirmed by a decree of the Court of Appeals in 1783, 800,000 acres of land was granted to the Loyal Company, and was surveyed in 1774. The rights under this grant acquired by entry and survey, stand upon no higher footing than rights acquired

by entry and survey under a land-office treasury warrant; and in both cases, until patented, the lands are waste and unappropriated, and liable to location by other parties.

Cline's heirs v. Catron,

378

WILLS.

1. Of a will of a married woman, made under a power given her by her husband's will. See *Husband & Wife*, No. 1, 2, 3, 4, 5, 6, and

Thorndike & als. v. Reynolds & als.,

21

WITNESSES.

1. M a witness called to prove the signature

of B, a party to an instrument, said he was not familiar with the handwriting of B, never having seen her write but once, and then only to make her signature; that he would not be able, from his knowledge of her handwriting, to distinguish it from that of others; but that he was of opinion, from having compared the present signature with the one he had seen her make, it was her handwriting. M was a competent witness, and the evidence was admissible.

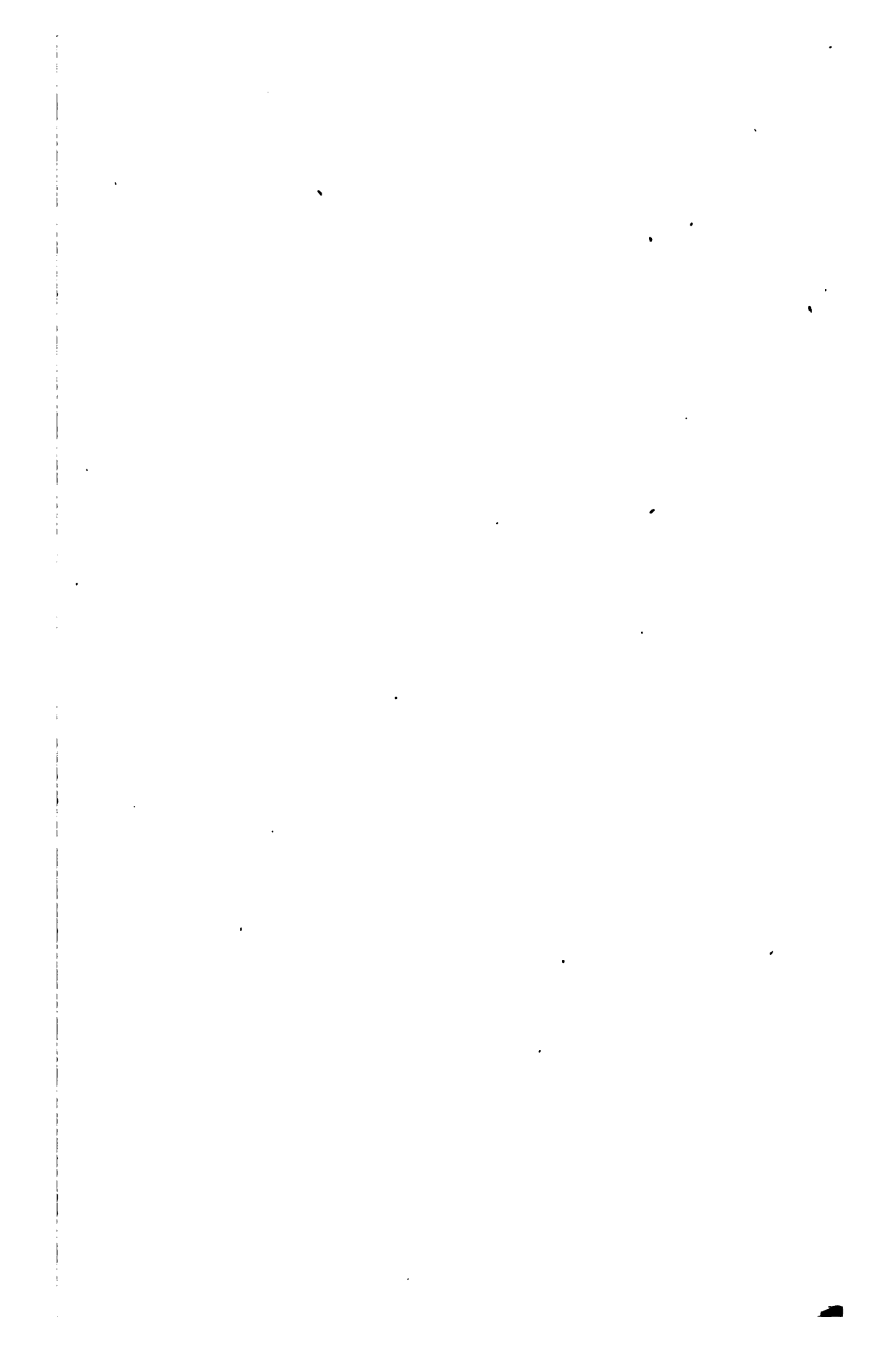
Pepper v. Barnett,

405

2. As a general rule jurors are not competent witnesses to impeach their verdict.

Read's case,

924





REPORTS OF CASES
DECIDED IN THE
SUPREME COURT OF APPEALS
AND THE
MILITARY COURT OF APPEALS
OF VIRGINIA.

BY PEACHY R. GRATTAN.

VOLUME XXIII.

FROM JANUARY 1, 1873, TO NOVEMBER 1, 1873.

JUDGES
OF THE
SUPREME COURT OF APPEALS
DURING THE TIME OF THESE REPORTS.

R. C. L. MONCURE, PRESIDENT.
JOSEPH CHRISTIAN. FRANCIS T. ANDERSON.
WALLER R. STAPLES. WOOD BOULDIN.

Attorney General : JAMES C. TAYLOR.

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CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

***Scott & als. v. Beutel & als.**

January Term, 1878. Richmond.

1. **Easements—Drainage—Not Apparent.**—One of two adjoining lots owned by the same parties is sold at auction under the decree of the court. At the time of the sale nothing is said of an easement running from the unsold lot through the one sold, for carrying the water from the former to a culvert in the street; and such easement was not to be seen on the lot sold, and was not known to the purchaser. The purchaser is entitled to have his lot free of the easement.
2. **Same—Same—Same—Adversary Possession.**—Both lots having been owned by the same person, though he had constructed the drain or culvert more than fifteen years before the sale, for the benefit of both lots, there can be no right by prescription to the use of the easement by the owners of the unsold lot, as there could be no adversary possession or use of it, whilst both lots were owned by the same person.
3. **Same—Same—Same—Same.**—So long as the tenements were owned and occupied by one and the same person, no easement was created or began to be created in favor of the one and operating as a service or burden upon the other.

- 2 ***The case is stated in the opinion of the court.**

Lyons and Stern, for the appellants.
Johnston & Williams, for the appellees.

CHRISTIAN, J., delivered the opinion of the court.

This is an appeal from a decree of the Circuit court of the city of Richmond. A brief statement of the facts disclosed by the record is necessary to a proper understanding of the legal question presented for the consideration of the court.

On the second day of December, in the year 1867, James Lyons, Esq., as special commissioner of said Circuit court, under a decree, entered by that court, in a certain chancery cause therein pending, in the name and style of "Scott and wife v. McKildoe's heirs," sold at public auction, a lot of land located at the south-east corner of Marshall and Third streets, in the city of Richmond, of which the appellee, Adolph Beutel, became the purchaser for the sum of \$4,037 75. The sale was approved by the court; and all of the purchase money having been paid, the said special commissioner

was directed to execute and deliver to the purchaser a deed with special warranty, conveying to him the said lot so purchased. A deed was accordingly executed by the said special commissioner, conveying to Beutel the said real estate, describing it with proper meets and bounds. But the deed thus executed and tendered to Beutel, contained the following reservation: "Reserving to the tenants of the lot adjoining on the east the perpetual use of the culvert now running from that lot through a part of the lot hereby conveyed into a culvert under Marshall street." This deed Beutel declined to accept, upon the ground that "it contains conditions and limitations in regard to the right to the enjoyment of the property which were not contemplated in any of the proceedings *in said suit, nor in the terms of sale as advertised, or as stated at the time and place of sale." He thereupon filed his petition in said suit, setting forth the facts connected with the sale and purchase of said lot, the situation of said culvert, and other facts, to show that he purchased the same without any reservation of any kind whatsoever, and that such reservation as the one set forth in the deed tendered him by the said special commissioner would materially lessen the value of the property.

To this proceeding, the said special commissioner, and the heirs of McKildoe, owners of the adjoining lot, are made parties. The heirs filed their answer to this petition, in which they claimed "that the culvert referred to was constructed in the life-time of James McKildoe, (from whom they derived title,) either by him or his predecessor, and was in use by the occupants of the lot, and has been in such use ever since, until the sale to the petitioner, which covered a space of more than twenty years; the said McKildoe having died in the year 1846; that the first use of said culvert was to carry off the water from a well on the lot purchased by the petitioner, but was afterwards used to carry off the water from the contiguous lot, which was and still is owned by respondents; and the culvert was thus openly and visibly used and employed when the said lot was purchased by the petitioner; and he purchased, therefore, with full knowledge of it."

The cause came on to be heard, by consent, at February term, 1869, when it was ordered "that the matters stated in said petition, exhibits and answers, be referred to one of the commissioners of the court, to

See monographic note appended to Hardy v. McCullough, 28 Gratt. 251. on Easements.

enquire and report thereon to the court." The commissioner, to whom the matter was referred, examined a number of witnesses, and reported their evidence to the court, together *with his own opinion, that upon the pleadings and evidence in the cause, "the purchaser, Beutel, is entitled to a deed, free from the reservation of the use of the culvert, inserted in the deed of the 8th July, 1868."

On the 25th of March, 1870, the said Circuit court entered the following decree:

"The court being of opinion that the purchaser, Adolph Beutel, is entitled under the decree in this cause, entered July 20th, 1868, to a deed to the property purchased by him and referred to in these proceedings, free from the reservation of the use of the culvert inserted in the deed of the 8th of July, 1868, to him from the special commissioner, and free from all right of any person but himself to use the said culvert, running from near the well on the lot bought by him to the public culvert under Marshall street, doth overrule the exceptions to said report, and doth approve and confirm the said report; and doth adjudge, order and decree that the said James Lyons, special commissioner, shall make, sign, acknowledge and deliver to said Beutel a deed, conveying to him, the said Beutel, with special warranty, the land in the said petition mentioned, free and clear of the reservations aforesaid, and all other reservations inconsistent with the full, free and absolute ownership and enjoyment of said land."

It was from this decree that an appeal was allowed to this court.

The court is of opinion that there is no error in the decree of the said Circuit court of the city of Richmond.

It is conclusively proved that when the lot in question was sold by commissioner Lyons, there was no notice to Beutel of the claim of the appellants, or any one else, to the use and enjoyment of any easement whatever; and the sale was made without any reservation whatever.

*Wellington Goddin, the auctioneer who sold the property, in answer to the question, "Did you and the parties who were at the sale examine the lot at that time, and did you see, or did you hear any one speak of seeing any culvert on the premises?" says: "I, and many of the persons who were at the sale, examined the lot before it was offered, and the mode of division, and I did not discover that there was any culvert on the premises, nor did I hear any one else speak of any culvert there. Had I known of any culvert there I certainly should have mentioned it when I offered the property for sale, and the right of parties to use it."

The advertisement of the commissioner made no mention of any claim of the appellants, or any one else, to the use of the culvert, but offered the lot without any reservation of any easement or privilege whatever existing in any other parties. It

is clear, therefore, that there was no reservation in the contract of sale.

By what authority, then, did the commissioner make this reservation in the deed which he tendered to the purchaser? It is claimed by the appellants, 1st: "That the culvert being an easement for all the property of McKildoe, mentioned in the record, in existence for more than fifteen years before the sale, stands under the law of Virginia upon the same footing as an easement which had been used for twenty years stands at common law;" and 2d, "that the said easement being common to all the property, was not sold by a sale of a part of the property; but the mere right to the use of it was sold; and it still remains common as an easement, as before."

As to the first proposition, which seems to be a claim by the heirs of McKildoe by prescription, it is sufficient to remark, that the whole property, both the lots on which the culvert was located, and the lot for which the use is claimed, were in McKildoe and his heirs, until the sale

*to Beutel. The estate of James McKildoe owned two lots at the southeast corner of Third and Marshall streets, fronting on Marshall. The corner lot was sold to Beutel. On this lot was the culvert; and it is through this lot that the heirs of McKildoe claim the right to run their waste water. So long as these lots belonged to the same owner there could be no easement in favor of one lot, or servitude upon the other; for a man cannot have an easement over his own land. And, of course, there could be no claim by prescription in the heirs of McKildoe to the use of this culvert, (as an easement for all the property of James McKildoe, their devisors,) because there was no adverse possession until the sale to Beutel. It is very clear that the appellants derived no right to the easement by actual use and enjoyment. Such a right in the estate of another can be created by actual use, only when such use has been adverse, peaceable and uninterrupted, and continued for a period of at least fifteen years.

So long as the tenements were owned and occupied by one and the same person, no easement was created, or began to be created, in favor of the one, and operating as a service or burden upon the other. So long as such unity of possession exists, no right of easement is annexed to one tenement or charged on another; and it is quite immaterial how long the drain or use of the culvert has subsisted, during such ownership no rights are acquired by such use.

But it is further insisted, that the privilege to use the culvert, being common to all the property, was not sold by a sale of a part, but still remains common, as an easement, to all the property, as before the sale.

The owner of two tenements, who sells one and retains the other, may undoubtedly grant the right of drain, or not, to pass with the estate conveyed; or may reserve *such a right over the estate conveyed, for the benefit of the one

retained, as he pleases. It is generally a matter of contract, and must be determined by the contract of the parties. Where the intention of the parties is not expressed in terms, the construction of their contract will depend upon the facts of each particular case.

In certain cases, by implication of law, when one owner of two tenements has so arranged them that one derives a benefit from the other, and sells one of them, the purchaser of the tenement sold takes it with all the benefits and burdens which appear at the time of sale to belong to it, as between it and the property which the vendor retains. The parties are presumed to contract in reference to the condition of the property at the time of the sale. Washburn on Easements, 2d ed. 76, mar. 49. But whether the estate sold be the dominant or servient estate, it is well settled, by numerous cases in England and in the States of the Union, that the easement or other incident of property, in order to pass by implication, must be open, visible, apparent and continuous. And it seems to be equally well settled, that where the servient estate is granted, and the dominant reserved, the easement reserved by implication must be, not only one that is apparent and continuous, and such as is indicated by the condition of the premises at the time of the sale, but the easement claimed must be one strictly of necessity, so that another cannot be substituted at a reasonable expense. Washburn on Easements, 2d edition, 71-82, and cases there cited; Randall v. McLaughlin, 10 Allen, Mass. R. 366; Carbre v. Willis, 7 Allen R. 364. See also Johnson v. Jordan, 2 Metc. R. 234; Thayer v. Payne, 2 Cush. R. 327; Daniel v. Anderson, 31 L. J. Ch. 610, 2 Eq. Cases 508; Suffield v. Brown, 33 L. J. Ch. 249; and Russell v. Harford, L. K. 2 Eq. 507.

Applying these well settled principles to the case before us, it is clear that the easement claimed, not being reserved at the sale, and not being apparent and obvious to the parties who went there to purchase—not even to the auctioneer who sold the lot—there can certainly, in this case, be no implication raised of a reservation of an easement in favor of the owner of the adjoining tenement. The evidence of the auctioneer is express and positive that he and many persons at the sale went over the lot and did not discover that there was any culvert on the premises. Beutel, the purchaser, who was examined as a witness, states that he examined the property on the day of sale, and that he did not see any gutter or culvert. It is true there is evidence of the lessee of the adjoining lot that there was a surface gutter on the lot, "open and visible;" but it is evident that this witness is mistaken, that there was no such gutter, at the date of the sale; for J. W. Gill, one of the appellants, testified that "at the time of the sale to Beutel the water from Dr. Garnett's superficial gutter was emptied on the ground, and ran over the ground from the mouth of that

gutter at the dividing fence, some three or four feet, to the mouth of Beutel's culvert. At the date of the sale to Beutel there was no brick or wooden conductor or gutter to carry the water from the dividing fence to the mouth of Beutel's culvert. Since the sale I have had a brick gutter put down on the surface, which conducts the water from the mouth of Garnett's gutter, at the dividing fence, to the mouth of Beutel's culvert."

But if this surface gutter, leading into the culvert, known to the party interested in its use, was "open and visible" as a drain through which he had been accustomed to run his waste water, still it is manifest from the evidence that it was not necessary to the enjoyment of the property (the adjoining lot) that this particular drain should be used; for with reasonable expense the adjoining lot can be easily connected with the culvert extending under Marshall street, in front of both lots.

We are, therefore, of opinion that there is no error in the decree of the Circuit court of the city of Richmond; and that the same be affirmed.

Decree affirmed.

10 *Wilkerson, Sheriff for, &c., v. Allan.

January Term, 1873, Richmond.

Criminal Law — Fine — Imprisonment — Pardon.—A. is indicted for a misdemeanor, and the jury find him guilty and assess his fine at \$600; and the court sentences him to be imprisoned for four months, and until he pays the fine. The Governor remits so much of the sentence as orders A.'s imprisonment for four months; and the jailor discharges him from custody. The Commonwealth then sues out a *capias pro fine*, under which A. is taken into custody by the sheriff; and he then applies for a writ of *habeas corpus*, and asks for his discharge. **Held:**

1. **Same—Governor Cannot Remit Fine.**—The Governor has no authority to remit the fine, and does not intend it by his pardon. See Code of 1860, ch. 17, §§ 24 & 25, p. 122.
2. **Same—Pardon—Effect of.**—The effect of the pardon was to remit the four months' imprisonment; but it did not affect the remaining part of the judgment.
3. **Same—Discharge—Effect of.**—The discharge of A. by the sheriff did not discharge his liability for the fine to the Commonwealth; and he may be taken in execution by a *capias pro fine*.
4. **Same—Capias Pro Fine and Ca. Sa. Distinguished.**—For the distinction between a *capias pro fine*, and a *ca. sa.*, see the opinion of CHRISTIAN, J.
5. **Same—Discharge—Statute.**—How a person in custody under a *capias pro fine* may obtain his discharge, see Code of 1860, ch. 200, §§ 19-20.

This was a writ of error from the decision of the Judge of the Circuit court of Prince Edward county, in a case of *habeas corpus*. The facts are stated by Judge Christian, in his opinion.

The case was argued for the Common-

wealth, by the Attorney General, and by Allan for himself.

CHRISTIAN, J.

The defendant in error was tried 11 before the County *court of Prince Edward, upon an indictment charging him with exhibiting an unlawful game. The jury returned a verdict of guilty, and "ascertained his fine at five hundred dollars." Upon this verdict the court (fixing his imprisonment at four months in the county jail) entered the following judgment: "It is considered by the court that the Commonwealth recover against the defendant, Edgar Allan, the sum of five hundred dollars, the fine by the jury in their verdict assessed, and the cost of this prosecution; and that the said Edgar Allan be imprisoned in the jail of this county for the term of four months, and afterwards, until he shall pay the said fine and costs aforesaid, or be otherwise discharged by due course of law. And thereupon the said Edgar Allan is remanded to jail."

This judgment was entered on the 25th May, 1872, and from this judgment no appeal was taken by the defendant; but application was made to the Governor of this Commonwealth for a pardon. On the 9th day of August, 1872, the following pardon was issued by the Governor:

"The Commonwealth of Virginia:

"To all to whom these presents shall come, greeting:

"Whereas at a County court held in and for the county of Prince Edward, in the month of May, 1872, Edgar Allan was convicted of a misdemeanor, and was thereupon sentenced to be imprisoned in the county jail for the term of four months: And whereas it appears to the Executive, from the recommendation of the Judge of the court which tried the prisoner, after an examination of the certificate of physicians, affidavits and other papers accompanying the petition for pardon, that he is a fit subject for clemency:

"Therefore, I, Gilbert C. Walker, Governor of the Commonwealth of Virginia, have, by virtue of the authority 12 *vested in me, pardoned, and do hereby pardon and remit so much of the sentence of the court as orders that the defendant be imprisoned in the county jail for the term of four months. Given under my hand, and under the lesser seal of the Commonwealth, at Richmond, this 9th day of August, 1872, and in the 96th year of the Commonwealth. (Signed.)

Gilbert C. Walker.

By the Governor:

James McDonald, Secretary of the Commonwealth."

The record does not show when the defendant was released from jail; but the presumption is, that he was discharged upon the receipt of the Governor's pardon. He was certainly at large on the 14th November, 1872; for on that day a *capias pro fine*

was issued from the clerk's office of the County court of Prince Edward. Under this *capias* he was arrested by the sheriff of Prince Edward; and while in his custody a writ of *habeas corpus* was issued (on the 16th November, 1872) by the honorable A. D. Dickinson, Judge of the Circuit court of Prince Edward county, on the petition of the said Edgar Allan, commanding said sheriff "to have the body of said petitioner before said Judge, at the court-house at Farmville, at 12 o'clock, M., on Wednesday the 20th day of November, 1872, with the cause of his detention." To this writ the sheriff made the following return:

"The within named Edgar Allan was taken into my custody on the 16th November, 1872, by virtue of the following process, to wit: A writ from the clerk's office of the County court of Prince Edward, commanding the sheriff of Prince Edward county to take him and safely keep until he shall satisfy a fine of five hundred dollars, awarded against him on a conviction of a misdemeanor, and \$19 92 costs; which said writ is herewith returned: And he is detained for no other cause."

13 "The case was heard before the Judge of the said Circuit court, the defendant exhibiting the record of the judgment of the said County court and the pardon of the Governor above referred to. And thereupon the following order was entered by the said Circuit Judge:—"It appearing to the court that the judgment on which the said writ of *capias pro fine* was issued, was rendered at the May term of the said court, 1872, and that the said Edgar Allan had received from the Governor of Virginia, Gilbert C. Walker, on the ninth day of August, 1872, pardon for the offence for which said judgment was rendered; and that since that time no further judgment has been rendered by said court against said Edgar Allan, it seems to the court that the said Edgar Allan is illegally detained in custody; and it is therefore ordered that he be discharged."

It is from this judgment that a writ of error has been allowed to this court.

I deem it wholly unnecessary to consider the question discussed at the bar, as to the effect of the Governor's pardon and remission of the four months' imprisonment imposed by the court, in releasing the defendant from the whole punishment, the fine as well as the imprisonment. However that question might be determined upon common law principles, relied on by the defendant in error, I think it is definitively settled by the statute law of this Commonwealth. Chap. 17, §§ 24-5, of the Code (1860,) p. 122, provides, (§ 24): "The Governor shall not remit, in whole or in part, any fine or amercement assessed or imposed by any court of record, court martial or other authority having jurisdiction to assess or impose the same, except as follows, (§ 25): Whenever judgment has been rendered against any person for contempt of court, other than for non-performance of, or disobedience to some order, decree

14 or judgment, the Governor shall *have power to pardon the offence and remit the punishment, whether corporeal or pecuniary, either in whole or in part."

The case before us, not coming within the exception of the 24th section, it was manifestly not a case in which the Governor had the authority to remit the fine; but is within the class of cases in which the Legislature has expressly declared that "the Governor shall not remit the fine, in whole or in part."

The Governor, under the plain provisions of the statute law, had no authority to remit the fine. All that he could do, under the powers with which he was invested by law, was to remit the sentence of the court, ordering the imprisonment of the defendant for the term of four months. And this is all which the pardon purports to do by its express terms.

The Governor well knew that his powers in the premises were limited and defined by the statute law; and thus cautiously expresses the exercise of the Executive clemency: "Therefore I, Gilbert C. Walker, Governor of the Commonwealth of Virginia, have, by virtue of authority vested in me, pardoned, and do hereby pardon and remit, so much of the sentence of the court as ordered that the defendant be imprisoned in the county jail for the term of four months."

He did not attempt to remit (as he had no power to remit) the fine of five hundred dollars by the jury assessed; nor did he attempt to interfere (as he had no power to interfere) with the judgment of the county court of Prince Edward, (except as to the four months' imprisonment imposed by the court,) which ordered that the said Edgar Allan be imprisoned in jail for the term of four months; and afterwards, until he shall pay the said fine and the costs, or be otherwise discharged by due course of law." It is very clear that under the

15 provisions *of the statute law, and the express terms of the pardon, that instrument did not discharge the defendant from the payment of the fine of five hundred dollars, due to the Commonwealth, as a part of the punishment prescribed by statute and assessed by the jury for a violation of her laws.

The only effect which the pardon of the Governor was intended to have, or could have, under our laws, was to remit "so much of the sentence of the court as ordered the defendant to be imprisoned for the term of four months." But the judgment of the court was, that he be "imprisoned in the county jail for the term of four months, and afterwards, until he pay the said fine and costs," &c. The effect of the pardon was to relieve him of the four months' imprisonment; but it did not at all affect the remaining part of the judgment.

As was before observed, the record is silent as to how he was released from jail; but, upon the presumption most favorable to the defendant, that he was discharged by the sheriff, (and did not escape,) upon

the receipt of the Governor's pardon, the only remaining question to be considered is, how far such discharge by the sheriff would operate to relieve him from the payment of the fine, or affect in any way the remedies of the Commonwealth to enforce its payment. Whether the sheriff, upon the receipt of the Governor's pardon, released the defendant without authority; or whether, in execution of the judgment of the court, it was his duty to hold the defendant for the term of four months, "and afterwards, until the fine was paid or he was discharged by due course of law," it is not necessary to decide in this case.

But it is said, that whether the sheriff acted with or without authority, the discharge of the defendant operated 16 *as a complete discharge of all liability to the Commonwealth.

It is likened to the case of a debtor in execution, under a *capias ad satisfaciendum*, when the discharge of the debtor from custody is a satisfaction of the debt. If the defendant had been in execution under a *capias pro fine*, (which was not the case, for he was in the custody of the sheriff, under the judgment of the court,) and had been discharged, even in that case the debt to the Commonwealth would not have been satisfied. In Webster's case, 8 Gratt. 702, Judge Lomax, in pointing out the distinction between a *capias ad satisfaciendum* and a *capias pro fine*, said "that the imprisonment under the *capias pro fine* was, in respect of such fine, not as a debt, but as a punishment for the crime, until the fine was paid. It is true that a *capias pro fine* is an execution, to compel the payment of the fine, as the *capias ad satisfaciendum* is to compel the payment of the debt. Notwithstanding that point of resemblance, these two species of process were never confounded in practice."

"In the original structure of the two writs, the levy of the *ca. sa.* was made a direct satisfaction of the debt; but in the frame of the writ of *capias pro fine* the imprisonment did not purport to be a satisfaction of the fine; it was a part of the punishment; and the fine still remained in full force, and could only be redeemed by satisfaction of the fine, whenever it might be made. * * * * The levy of the *ca. sa.* was attended with consequences which do not seem to have attended the imprisonment under the *capias pro fine*—such as the voluntary enlargement of the prisoner to discharge the debt, the effect and the liabilities arising under an escape, the privilege of the prisoner to discharge his person from custody under the *ca. sa.*, by making a surrender of his property, thereby in effect converting the *ca. sa.* into a

17 **fi. fa.* In all these particulars a distinction is observable between the *capias ad satisfaciendum* and the *capias pro fine*." It was accordingly held in that case, that "where a party is imprisoned upon a *capias pro fine*, for a fine and costs, he can only obtain his discharge from imprisonment by paying the fine and costs." But

the term of his imprisonment, under such *capias*, is limited by the provision of the statute, which will be noticed presently.

In North Carolina it was held that where a defendant is ordered into custody, upon a conviction, until he shall pay the fine and costs imposed by the judgment, and is permitted by the sheriff to escape, this is no discharge of the judgment. *State v. Simpson*; 1 Jones Law N. C. R., 80. See also *Hawkins v. Hall*, 3 Ired. Eq., R. 280. This first named case, seems to be one exactly in point; for in that case, as in this, the defendant was ordered into custody until he should pay a fine and costs, and was permitted by the sheriff to go at large without authority. The fact of the discharge was relied on as a discharge of the fine; but it was held, he might be again taken in custody under a *capias*, and be held until the fine was paid. See, also, on this point, 1 Bishop Crim. Proceedings, § 874, p. 875.

But I think the question is free from doubt, when reference is had to the provisions of our Code on this subject. The 18th section of ch. 209, Code of 1860, p. 842, is in these words (§ 18): "If a person who is sentenced to be confined in jail a certain term, and afterwards, until he pay a fine and the costs of the prosecution, fail to pay such fine and costs before the end of said term, he shall continue in confinement until the same be paid, or his discharge be ordered by the court. But the additional confinement shall in no case exceed six months from the end of said term."

18 *Now, it is certain that under this provision, if the defendant in custody escapes, or he is permitted by the sheriff to go at large without the authority of the court, his debt to the Commonwealth is not discharged. That is never discharged, until he pays the fine and costs of the prosecution. He may be discharged from custody when he remains in jail six months from the end of the term, or previously discharged by order of the court, or in the mode prescribed in the 19th section; which latter mode will be noticed presently, in another connection.

But much has been said of the hardship and inhumanity of the rule which would hold, that while the Governor, in the exercise of Executive clemency, remitted the four months' imprisonment imposed by the judgment of the court, and induced to do this, because of the physical condition of the defendant, certified by physicians, yet he must still remain in jail until the fine is paid. It is sufficient to remark, that the object of penal laws is to punish their violations, and to make that punishment certain and effective. With the hardship or inhumanity of the laws, this court has nothing to do, but must execute the laws as they find them. As before observed, the Governor went to the extent of his authority in remitting the four months' imprisonment. His action did not, and could not, remit the fine, or in any way affect the

remedies given by law to the Commonwealth, to enforce the payment.

There is a plain mode prescribed by statute, of which every defendant, situated like the defendant in error here, may avail himself for relief. The 19th section of chapter 209, Code of 1860, provides that, "whenever a person is in jail under a *capias pro fine*, issued from any court in this Commonwealth, on application to the court from the clerk's office of which such execution issued, or to the Judge of such court, in vacation, as the case may

19 *be, if to such court or Judge it shall appear proper, may order the person so in jail to be released from imprisonment, without the payment of the money mentioned in such execution; provided however, that in all such applications, the attorney for the Commonwealth, of the court from which the execution issued, shall have ten days' notice of such application." Sec. 20 provides that, "Whenever any court of this Commonwealth shall have directed any person convicted of a misdemeanor, to be confined in jail until the fine imposed upon such person, or until the costs of the prosecution shall have been paid, the person so confined may be released in the manner provided for in the preceding section; provided, that nothing in this act shall prevent the issue of a *fieri facias*, after such release from jail."

It will thus be seen that the statute has in plain terms prescribed the mode in which a party may be released from imprisonment, both when he is in execution under a *capias pro fine*, as well as when upon conviction he is ordered by the court to be held in custody until the fine is paid.

It is plain, therefore, that there is, under our laws, no means by which a party assessed with a fine as the penalty of a misdemeanor, (and who is ordered by the court to be imprisoned until the fine is paid,) to discharge his obligation to the Commonwealth, except by either paying the fine and costs, by being discharged by serving his term of six months, or being released in the mode prescribed by the 19th and 20th sections of chap. 209, just referred to.

I am, therefore, of opinion that the Governor's pardon did not have the effect (as by its terms, in strict conformity with the statute law, it was not so intended) to remit the fine imposed by the court, and does

not in any manner interfere with the 20 remedies of the Commonwealth "to enforce the payment of that fine. I am further of opinion, that the Circuit court of Prince Edward was in error in discharging the defendant, upon the writ of *habeas corpus* issued by him; and that the defendant is liable to be arrested upon the Commonwealth's writ of *capias pro fine*, and imprisoned until the fine due the Commonwealth and the costs of prosecution are paid, or until he is discharged in the mode prescribed by the statute. If the physical condition of the defendant is such that further imprisonment would be (as alleged) of serious detriment to his health, that is

matter to be addressed to the court which convicted him, or the Judge in vacation. If, in the language of the statute, "it shall appear proper," he may be released from prison "without the payment of the sum mentioned in the execution." Until this is done, in the mode prescribed by law, the defendant is liable to all the penalties which the Commonwealth may lawfully enforce against her violated laws.

I am opinion, therefore, that the judgment of the Circuit court of Prince Edward is erroneous, and ought to be reversed.

The other judges concurred in the opinion of CHRISTIAN, J.

Judgment reversed.

21 *Commonwealth of Virginia v. Levy & als.

January Term, 1873, Richmond.

1. **Case at Bar—Will.**—L., a citizen of New York, dies, leaving a will, which is duly admitted to record there. He owned an estate, real and personal, in New York, the residuum of which was valued at \$300,000, and he owned the farm called Monticello, in Virginia, valued at not more than \$10,000. By his will he gave the residue of his estate, including Monticello, to the people of the United States, in trust, for the establishment and maintenance, at Monticello, of an agricultural school, for the purpose of educating as practical farmers, the children of warrant officers of the navy of the United States, &c. If the U. S. declined to accept the trust, he gave the property, on the same trusts, to the State of Virginia. The executors of L. instituted a suit in equity, in New York, asking the instructions of the court in the administration of the estate; and in that suit the United States was a party, and appeared to maintain the devise and bequest. In this suit the court held the trust void. In a suit in Virginia, by the heirs of L. for the partition of Monticello, Virginia is made a party.
Held:

1. **Same—Decree—Conclusive.**—The United States represented the trust in the New York suit; and the decree in that suit is conclusive upon Virginia, though she was not a party.

2. **Same—Indivisible Trust.**—The trust is in its nature indivisible; and if the decree in the New York court does not include the Commonwealth of Virginia as to the land here, still the trust cannot be executed according to the intention of the testator; and the trust must therefore fail, and the heirs are entitled to the land.

3. **Decree by Default—Appeal.**—When an appeal is obtained from a decree by default, before an application is made to the court below to correct it, the appeal will be dismissed as improvidently awarded, unless the appellees waive the objection.

22 *This was a suit in equity, in the Circuit Court of the city of Richmond, brought in July 1868, by Jonas P. Levy and wife and Eliza Hendricks, against the Commonwealth of Virginia, and others, heirs and devisees of Uriah P. Levy, deceased. It appears that Uriah P. Levy,

who had lived for years in the city of New York, died in that city in the year 1862. He left a will, which bore date on the 13th of May 1858, and which was duly admitted to probate in the surrogate's court of the city of New York, as a will of real and personal estate, and Asabel S. Levy and David S. Codrington qualified as executors of the will. He left a widow, but no children; and his heirs and next of kin were his brothers and sisters, and the children of such of them as had died.

The testator owned Monticello and also another farm called Washington farm, both in the county of Albemarle; the latter of which, with the slaves upon it, he devised to Ashel S. Levy. He bequeathed various legacies, none of them of large amount, to his relatives and friends; and then made a residuary devise and bequest as follows:

"After paying the above legacies and bequests, or investing for the same, and subject to my wife's dower and use of furniture, I give, devise and bequeath my farm and estate at Monticello, in Virginia, formerly belonging to President Thomas Jefferson, with all the rest and residue of my estate, real and personal, or mixed, not hereby disposed of, wherever or however situated, to the People of the United States, or such persons as Congress shall appoint to receive it, and especially all my real estate in the city of New York, in trust, for the sole and only purpose of establishing and maintaining at said farm of Monticello, Virginia, an agricultural school, for the purpose of educating, as practical farmers, children of the warrant officers of the United States navy, whose fathers

23 *are dead. Said children are to be educated in a plain way, in the ordinary elementary branches, to fit them for agricultural life, and to be supported entirely by this fund, from the age of twelve to sixteen, and each of them to be brought up to do all the usual work to be done on a farm. The said farm to be so cultivated, by said boys and their instructors, as to raise all they may require to feed themselves and the school-master and one other teacher, and one superintendent of said farm. I also give and bequeath, for the purpose of giving such fuel and fencing for said Monticello farm school, two hundred acres of wood land, of my Washington farm, called 'The Banks Farm,' in Virginia; the said two hundred acres to be taken off from said farm hereby devised to my nephew Ashel, and to be designated by said Ashel.

"In establishing said farm school, I especially require that no professorships be established in said school, or professors be employed. My intention in establishing this school is charity and usefulness, and not for the purpose of pomp. In proportion to the smallness in number of teachers, so will industry prevail. The institution must be kept within the revenue derived from this endowment; and under no circumstances can any part of the real or personal estate hereby devised be disposed of; but the rent and income of all said estate,

real and personal, is to be held forever inviolate, for the purpose of sustaining this institution. The estate and lands in New York can be leased to great advantage for that purpose.

"Should the Congress of the United States refuse to accept of this bequest, or refuse to take the necessary steps to carry out this intention, I then devise and bequeath all the property hereby devised to the people of the State of Virginia, instead of the people of the United

24 *States; provided they, by acts of their Legislature, accept it and carry it out as herein directed. And should the people of Virginia, by the neglect of their Legislature, decline to accept this bequest, I then devise and bequeath all of my said property to the Portuguese Hebrew congregation of the city of New York, whose synagogue is in Crosby street, New York, the old Portuguese Hebrew congregation, whose synagogue is in Cherry street, Philadelphia, and the Portuguese congregation in Richmond, Virginia: Provided they procure the necessary legislation to entitle them to hold said estate, and to establish an agricultural school at said Monticello, for the children of said societies, who are between the ages of twelve and sixteen years, and whose fathers are dead; and also similar of any other denomination, Hebrew or Christian. In order to enable said Hebrew congregations to hold said estate and carry on said farm school, a charter will probably have to be obtained upon the application of said congregations to the Legislatures of Virginia and New York.

"Should the fund arising from said estate be more than sufficient to support and educate the children of warrant officers of the United States navy, the directors of said school are then next to select the children of sergeant majors of the United States army, as the beneficiaries; and if a surplus is still remaining, they are then to select from children of seamen of the United States navy, whose fathers are dead.

"Item. I direct my executors hereinafter named, or such of them as shall qualify, to invest the funds arising from said estate in some safe-paying stock, as fast as they accumulate, and to hold the whole of the property and estate hereby devised and bequeathed for said school, and in their hands, until the proper steps have been taken by congress or the Legislature of Vir-

25 ginia, or the *said Hebrew benevolent congregations, to receive the same and discharge said executors."

The testator appointed eight executors of his will; but only the two before mentioned qualified as such. The executors who qualified, brought a suit in equity, in New York, to have the will construed; and in that case the foregoing provision was declared to be void. This suit was then brought, to have the Monticello estate sold and divided among the heirs of Levy; and the State of Virginia not having been a party to the suit in New York, she was

made a defendant in this case; but did not appear or answer.

On the 30th of November, 1868, there was a decree for the sale of the land. And afterwards the Attorney General, Thomas R. Bowden, without moving the court to rehear the decree, applied to this court for an appeal on behalf of the Commonwealth of Virginia; which was allowed. The other facts are stated in the opinion of the court.

The Attorney General and Meredith, for the appellant.

Wm. Robertson, Potter and J. A. Jones, for the appellees.

MONCURE, P., delivered the opinion of the court.

Several interesting questions were discussed in the argument of this case by the able counsel of the different parties; as, for instance—1st, that the devise contained in the will of Uriah P. Levy, of the Monticello estate in Virginia, together with all the rest and residue of his estate, real and personal, not by the will otherwise specifically disposed of, in trust, to establish and maintain on the said Monticello estate an agricultural school, is void, for vagueness and uncertainty in regard to the beneficiaries intended to be provided for; 2dly, that

the said devise is void, because it tends
26 to create a perpetuity *forbidden by law; and because the contingency on which it was limited to take effect, might not happen within the period prescribed by law for the vesting of a valid executory devise; 3dly, that the said devise is not valid, under section 2 of chapter 80 of the Code of Virginia, because it was not "made for literary purposes or for the education of white persons within this State," as authorized by that section; but was made "for the sole and only purpose of establishing and maintaining at said farm of Monticello in Virginia an agricultural school, for the purpose of educating as practical farmers, children of the warrant officers of the United States navy, whose fathers are dead," without regard to the race or color, or residence of such children; 4thly, that the said section 2, of chapter 80, of the Code of Virginia, was annulled by the fourteenth amendment to the Constitution of the United States; 5thly, that the invalidity of the said devise, in all its parts, as well in regard to the Monticello estate and the two hundred acres of land, part of the Washington farm in Virginia, as in regard to the real and personal estate in New York, is *res adjudicata*; having been finally decided by the Court of Appeals of the State of New York, at the June term 1865 of said court, in the case of *Levy &c. v. Levy &c.*, 33 New York R., 6 Tiffany, 97; 6thly, that at all events, the said case is a final and conclusive adjudication of the invalidity of said devise, in regard to the real and personal estate included in it, in the State of New York; operating as such, not only in that State, but every where else; and 7thly, that the devise being certainly void, as to the real and personal estate in the State of New York, it is ren-

dered ineffectual and incapable of execution, as to the real estate in Virginia, even if it would be otherwise valid as to the latter estate; and therefore, on that ground, if no other, the trust as to that estate
 27 also must *fail, and the estate must go to the heirs at law of the testator.

In the view we take of this case, it will be unnecessary to decide all these questions; as our opinion, in regard to the last three of them, is conclusive of the case. We will, therefore, proceed to state that opinion, and the reasons on which it is founded. And,

First—That the invalidity of the devise, in all its parts, is *res adjudicata*, as aforesaid.

The testator died on the 22d day of March, 1862, in the city of New York, which was the place of his residence at the time of his death, and had been for a long time prior thereto. He left no issue living at his death, but left a widow and a large number of collateral heirs, consisting of brothers and sisters and the issue of deceased brothers and sisters, residing chiefly in the city of New York, but some of them residing elsewhere, in and out of the United States; though none of them, it seems, residing in Virginia. His will bore date on the 13th day of May 1858, and was recorded as a will of real and personal estate in the surrogate court of the county of New York, in the State of New York, on the 9th day of June 1862. Afterwards, to wit: on the 17th day of May 1866, it was produced to, and ordered to be recorded by, the Circuit court for the county of Albemarle, in the State of Virginia, as a will of real and personal estate. On the 12th day of June 1862, Ashel S. Levy and David S. Codrington, two of the executors nominated in the will, were duly qualified to act as such executors, by the surrogate of the city and county of New York; said surrogate having sole jurisdiction of said matter; and letters testamentary were duly issued to them only; the other persons named as executors neglecting or refusing to act. And the two above named became, and were and are, the sole executors of said will.

28 *On the 31st day of October 1862, the said acting executors of the said testator, who were also acting trustees under his will, brought a suit in the proper court, to wit: the Supreme court of the State of New York, for the city and county of New York, for the purpose of obtaining a judicial construction of such parts of said will as were set forth in the complaint, and especially the part which was intended to create a trust to establish and maintain on the Monticello estate an agricultural school. A copy of the will was exhibited with the complaint filed in said court as part thereof. All other parties concerned were made defendants to the suit, including "the people of the United States," "if they chose to appear," and "the people of the State of Virginia," "if they chose to appear," and also including the Hebrew congregations named in the will. The plaintiffs concluded their complaint by saying, that

"inasmuch as they are unable to decide or act upon the grave legal questions involved in the construction of the said will, and are fearful of acting erroneously as trustees of said property, they therefore pray this honourable court to settle and decide as to the validity of said devises and bequests, and the rights and duties of the plaintiffs, as executors and trustees in relation thereto, and all other questions incident thereto; that all said questions may be settled by the judicial decision of this tribunal; and that each of said defendants, if they see fit, may appear and answer this complaint, so that a final decision of all questions relative to the validity of said devises and bequests may be had, the respective rights of all said defendants may be permanently settled, and the duties and powers of the plaintiffs, as executors and trustees, defined and adjudged." And they asked for such order or further order or direction in the premises as the case might require or the court might think just.

29 *All the defendants appeared, excepting the "Portuguese Hebrew congregation of Richmond, Virginia," and "the people of the State of Virginia," who could not be personally served with process, in consequence of the pendency of the then existing civil war; but the summons was served upon the Portuguese Hebrew congregation of Richmond, by publication and deposit in the post-office, under an order duly made and entered in the cause on the 6th of November 1862. The defendants, "the people of the United States," appeared and answered by E. Delafield Smith, their attorney, and they submitted their rights in the premises to the court, to make such order and decree therein as should be agreeable to equity. The cause came on to be heard at a special term of the said Supreme court, on the 18th day of February 1863, and judgment was entered on the 21st of April following, declaring the devises and bequests, on which construction and judgment were prayed for in the complaint, to be invalid and void. An appeal to the general term of the said court was perfected by the plaintiffs on the 24th of April 1863. The cause was heard on the 21st of May, and judgment was rendered on the 30th of November, and entered on the 23d of December 1863, at a general term of said court, reversing or modifying the judgment of the special term. The decision of the court at the general term is reported in 40 Barbour's Supreme Court Reports, p. 585-626. An appeal from the said decision to the Court of Appeals, was perfected by the defendants, or most of them, in January and February 1864. Among the defendants appealing were the people of the United States, by their attorney aforesaid. The plaintiffs in the suit also appealed.

The cause was heard in the Court of Appeals, in June 1865, when a judgment was rendered by that court, reversing the judgment of the general term, and
 30 affirming *that of the special term of the Supreme court. The decision of

the court of appeals is reported in 33 New York Reports, 6 Tiffany, p. 97-139. After that decision was made, the executors and trustees aforesaid, considering it a final adjudication of the question as to the validity of the said devise and bequest, proceeded to administer the estate of their testator accordingly; and in pursuance of the said decision, the property embraced in said devise and bequest was divided between his heirs at law and next of kin. Afterwards, to wit: in July 1868 this suit was brought, for partition among the said heirs at law of the Monticello estate and the 200 acres of the Washington farm, in Albemarle county, Virginia. In the bill the facts aforesaid, or such of them as were deemed material by the plaintiffs, were substantially set out; and though the plaintiffs say they were advised that neither the people of the United States, nor the people of Virginia, nor any of the Hebrew societies named in the will, had any interest in the said lands, yet that it was proper to afford them the opportunity to assert their claim thereto, if they were so inclined; and they were, therefore, made defendants to the suit; and Thomas R. Bowden, Attorney General of the State of Virginia, was also made a defendant. All of the parties, plaintiffs and defendants, appear to have been non-residents of the State, except the defendants, "the people of the State of Virginia," Thomas R. Bowden, Attorney General, and "the Portuguese Hebrew congregation of Richmond, Virginia." Process to answer the bill was duly executed on the defendants, the people of Virginia, and the said Attorney General; and they having failed to appear and answer the bill, it was taken for confessed as to them. The said Hebrew congregation of Richmond appeared and filed an answer. The other defendants,

being all non-residents, were duly proceeded against as "such by publication. Some of them appeared and answered. On the 30th day of November 1868 the cause came on for hearing; when the court, (without deciding at that time on the claim of the defendant, Jacob S. Rogers, asserted in his answer, to the other lands in the proceedings mentioned, than the 218 acres, which he admitted that the Monticello tract contained,) being of opinion that the devise by Uriah P. Levy, of the said 218 acres, is invalid, and that the same ought to be sold for partition among his next of kin, therefore decreed a sale of the same accordingly, by a commissioner appointed by the court for the purpose. And that is the decree from which the appeal in this case was taken by the Commonwealth of Virginia and Thomas R. Bowden, Attorney General of the said Commonwealth.

Before we proceed to present our views on the questions arising on the merits of the cause, it may be proper to notice a preliminary one, which presented itself when the argument was about to be commenced, viz: that as the bill was taken for confessed as to the appellants, they ought to have moved the court which rendered the decree

to reverse it, according to section 5 of the chapter 181 of the Code; and that until such motion is made, and overruled, in whole or in part, an appeal to this court is premature, according to section 6 of the same chapter of the Code. And we would have felt ourselves bound to dismiss this appeal, as having been prematurely allowed, for the reason aforesaid, if any objection had been made on that ground by the appellees, or if they had not waived such ground of objection. But as they did expressly waive it, and as the case was very fully and ably argued on the merits, we deemed it best for all parties to proceed to hear and decide the case without regard to that preliminary question. A similar course was pursued by this court, in *Coffman v. Sangston, &c.*, 21 Gratt. 263.

32 *We, therefore, now recur to the first point we proposed to consider, viz: "That the invalidity of the devise, in all its parts, is *res adjudicata*, as aforesaid."

Certainly the case was an eminently proper one for a suit by the executors and trustees, to have the will construed, and the difficulties which attended its execution by them removed out of their way, by a court of competent jurisdiction. And it was eminently proper that such a suit should be brought in the court in which it was brought, to wit: in the Supreme Court of the State of New York, for the city and county of New York. The testator's domicile, at the time of his death, and for a long time before, was in the said city; his will was recorded there; his executors qualified and resided there; almost all of his heirs and next of kin resided there; and almost all of his estate was located there. There was situated there, real estate included in the residuary devise in question, to the value of two hundred thousand dollars; and personal estate included in that devise to the value or amount of one hundred and thirty-one thousand six hundred and six dollars and fifteen cents; thus making an aggregate amount of three hundred and thirty-one thousand six hundred and six dollars and fifteen cents, in New York; while the property in Virginia, included in the said devise, (which is the only other property included therein,) is of little comparative value; probably not as much as ten thousand dollars—much less than one-thirtieth of the value of the whole subject of the devise.

Why, then, is not the decree of the court of last resort in the State of New York, in the suit which was brought there, a final and conclusive decree upon the whole matter of the devise? It is not pretended that there was any fraud in the institution or prosecution of that suit; that it was not

fairly argued and decided; that the trust attempted *to be created by the will was not well represented and defended in the suit. On the contrary, it clearly appears from the reports of the decisions in 40 Barbour and 33 New York, before referred to, as well as from a printed pamphlet of the proceedings in the suit,

which was used without objection in the argument of the cause before this court, that there is no foundation whatever for any such pretension. The case was argued with very great ability, as well in support of the decree as against it, by the counsel who argued the case before the Supreme court of New York, at its general term, as appears by the argument itself, which is contained in the report of the decision, in 40 Barbour. And it was no doubt ably argued before the special term of said court, and also the court of appeals of New York; though we have no report of the arguments before those courts. The opinions delivered by the Judges in the different courts which decided the case are very elaborate, learned and able. The decision of the Supreme court, at its general term, reported in 40 Barbour, was in favor of the validity of the devise, and that the State of Virginia, and not the United States, was legally authorized by the will to execute the trust; and that court, accordingly, reversed the decree of the same court at its special term. But the court of appeals, in its turn, being the court of last resort in the State, reversed the decree of the general term, and affirmed that of the special term.

Now, that decree of the court of last resort in New York must be final and conclusive, not only as to the property in New York, but also as to the property in Virginia; unless it be true that the United States did not legally represent the trust, or that the courts in New York had no jurisdiction of the subject, so far as the real estate in Virginia is concerned.

34 *We think the United States did legally represent the trust. The devise was to the "people of the United States;" which means the United States itself. The government of the United States, though a government of limited powers, has capacity to take by devise, for some purposes. If the testator in this case had devised land in the District of Columbia, for the establishment of a school thereon, for the education of the children of deceased warrant officers of the United States navy, there could have been no doubt as to the capacity of the government to accept the devise. Nor can there be any doubt as to such capacity in this case, we presume, with the consent of Virginia to such acceptance. And we have no reason to believe that Virginia would withhold her consent in such a case. On the contrary, we may fairly presume that she would give it. The devise, then, being to the United States, and there being no evidence of non-acceptance, or of any difficulty in the way of acceptance by that government, the presumption is, that it could accept, and did accept the devise. That it did in fact accept, at least so far as to appear in the suit and maintain, to the utmost possible extent, the validity of the devise, is conclusively shown, as aforesaid. Virginia, certainly, had no right to accept the devise, until the Congress of the United States should refuse to accept it, or take the necessary steps to

carry out the intention of the testator. And Congress never did so refuse, but rather the contrary. Then, there was a perfect representation of the trust, in the litigation in New York. The government of the United States was a competent and sufficient, as it was an actual, party to that litigation; and Virginia, in that state of the case at least, was a wholly unnecessary party. There was, therefore, no defect of parties.

We have now to enquire whether 35 there is any thing *in the objection that a part of the subject itself, involved in the litigation, was real estate situated out of the territorial limits of New York, and therefore not within the judicial cognizance of the courts of that State.

The title to real estate is always governed by the law, *rei sitæ*; and generally suits concerning it must be brought in the forums of the State in which it is situate. But the latter is not universally the case; and there are cases in which suits concerning it may be brought elsewhere. A court of chancery acts upon the person; and wherever the person is found, generally that court has jurisdiction of a case against him. That, however, is not generally the case where the litigation is about real estate situated out of the limits of the State, whose jurisdiction is invoked; though it is sometimes the case. Story on the Conflict of Laws, § 544 and 545, and cases cited in the notes; 2 Leading Cases in Equity 491, 3 Am. ed.; Penn v. Lord Baltimore, 1 Ves. Sr. R. 444; 2 Am. Leading Ca. 614, 5th edition; Massey v. Watts, 6 Cranch's R. 148; MacGregor v. MacGregor, 9 Iowa R. 65. In the latter case the court seems to have held, on the authority of Massey v. Watts, that when the case involves a naked question of title, jurisdiction cannot be exercised out of the State where the land is situated; but when the object of the suit is to enforce a trust arising *ex contractu*, or from any other source, the situation of the land will be immaterial, and a remedy may be given by a decree in personam, establishing the trust, or for a conveyance of the land in question; and that the jurisdiction arising under these circumstances will not fail because it is incidentally necessary to decide on title. See, also, Dickinson v. Hoomes, &c., 8 Gratt. 353.

Without intending to lay down any rule in regard to the cases in which a court may properly take cognizance of a question concerning real estate *extra territorium*, 36 we *think we may safely say that this is such a case. Here the subject of the devise was one and indivisible, looking to its nature and its objects; and the court could not well decide upon one part without deciding upon the other. A decision upon one, depended upon a decision upon the other. As was said by the learned Judge, (Wright,) in the opinion delivered in the case in 33 New York R. 136: "The subjects of the trust are the real estate (Monticello) in Virginia, and real and personal estate in New York. The validity of the devise of

the land in Virginia depends on the law of that State. As to the estate, real and personal, in New York, it depends on the law of New York; because, as to the real, New York is the *locus rei sitæ*; as to the personal, the *locus domicilii*. The law, either of Virginia or New York, being hostile to the limitation, it is, I think, wholly void. The testator's plan embraces and requires all the property. If Monticello be subtracted, the site of the institution is gone; and it cannot be said that the testator would have founded it any where else. If Monticello remain, but every thing else is subtracted, then there are no funds to erect, endow and maintain the school. In short, the scheme is indivisible, and must wholly stand or wholly fail." If the failure of the devise of the real estate in Virginia necessarily involved a failure of the devise of the real and personal estate in New York, then the courts of New York, necessarily having cognizance of the question as to the validity of the devise of the estate in New York, must, incidentally, have cognizance of the question as to the validity of the devise of the estate in Virginia. If the government of the United States was capable of accepting, and did not refuse to accept, the devise—but, on the contrary, claimed under and maintained the validity of the devise in the New York suit, certainly,

37 *that suit against the claim, that government could not maintain another suit in Virginia for the recovery of the real estate here. The decision in the New York suit would, undoubtedly, be a bar to such other suit in Virginia. Having submitted itself to the jurisdiction of the New York court, and appeared and litigated the question in controversy therein, it was conclusively bound by the judgment of that court. A fortiori, the State of Virginia could not maintain such other suit; for, besides the difficulty of "former judgment," which would be in her way, she would have to encounter the further difficulty of having no title, unless she could show that Congress had refused to accept the bequest, or to take the necessary steps to carry it out; which she certainly could not show. We think, therefore, that the question as to the validity of the devise, in all its parts, is *res adjudicata*, as aforesaid. But if it be not, then the question arises, which we proposed to consider:—

Secondly—That at all events the said decision of the court of appeals of New York is a final and conclusive adjudication of the invalidity of said devise, in regard to the real and personal estate included in it, in the State of New York—operating as such, not only in that State, but every where else.

It cannot be necessary to say much, if any thing, more than what has already, incidentally, been said, in support of this proposition. The court, undoubtedly, had cognizance of that entire subject, and had all proper parties before it—at least, if we are right in maintaining that the United

States legally and properly represented the trust which the testator intended to create. Certainly the court considered that it had full cognizance of the case, both as to subject, and as to parties, and intended to make an end of the case, and to pronounce such a decree as would protect the executors and trustees, *and enable them to part safely with the subject in their hands, and surrender it for distribution among the heirs and next of kin. They accordingly so surrendered it; and it has been so distributed. Certainly that court will never hold that its decision is not final as to the subject of controversy, which was within the State. And whether that decision be right or wrong, it must be final and conclusive, not only in New York, but everywhere else. By the Constitution of the United States, article 4, section 7, and the act of Congress passed in pursuance thereof on the 24th of May, 1790, the records and judicial proceedings of the courts of each State have the same faith and credit given them in every court of the United States, as they have by law or usage in the courts of the State, whence the said records are or shall be taken. *Mills v. Duryee* and *McElmoyle v. Cohen*, 2 Am. Lead. Ca., 5th edition, and notes, p. 597-664. And now as to the last of the third questions we proposed to consider, viz:

Thirdly—That the devise being certainly void, as to the real estate in New York, it is rendered ineffectual and incapable of execution as to the real estate in Virginia, even though it might otherwise be void as to the latter estate.

The testator contemplated a scheme of charity, which, in his opinion, required the use of the whole subject which he devoted to that purpose. He was careful to provide against an invasion of the capital, and he relied especially on the estate in New York as the means of carrying his scheme into effect. "The institution must be kept," he said, "within the revenue derived from this endowment; and under no circumstances can any part of the real or personal estate hereby devised be disposed of; but the rent and income of all said estate, real and personal, is to be held forever inviolate, 39 for the purpose *of sustaining this institution. The estate and lands in New York can be leased to great advantage for that purpose." The value of that portion of the subject which was in New York was, as we have seen, \$331,606 15 cents; while the value of that in Virginia, being the mere intended site of the establishment, was, perhaps, less than \$10,000. The whole of the property in New York, at least, has been swept away by the decision aforesaid. It must be self-evident, therefore, that the testator never intended, that in such an event, any attempt should be made to use the small amount of property he had in Virginia for the purpose of building up and continuing the great school he had in contemplation. Such an attempt would, of necessity, be wholly abortive, as well as

contrary to the intention of the testator. As was well said by the learned Judge, whose opinion was delivered in the case, in 33 New York, before referred to: "The trust failing, as to the real and personal estate in New York, appropriated to erect, endow and maintain the school, the devise of the Monticello farm in Virginia, as the site for the institution, fails also. The purpose and intent of the testator cannot be effectuated; and therefore every part of the scheme fails." Id. 137.

But if the devise could be sustained as to the property in Virginia, in regard to which alone can it now by possibility be made effectual, (all the rest of the subject being hopelessly beyond our reach,) it would be a great burden to the State, and no benefit to it or to any person whatever; except, perhaps, to a few officials, who might be employed as agents, to attempt to carry out the scheme of the testator. If the State could lawfully appropriate the subject to the payment of her debt, or otherwise, according to her pleasure, it would be of some small value to her. But as it
40 could not, lawfully, be *applied otherwise than strictly according to the scheme of the testator, it would be a source of perpetual trouble and expense to the State, without any corresponding benefit whatever. It is fortunate for her, therefore, that she will be saved, by our decision of this case, from such an unprofitable burthen.

Before we conclude this opinion, it may be proper to say, that while we deem it unnecessary to decide the other points discussed in the argument of the cause, as aforesaid, we do not mean to intimate that if the whole case had come before us for decision as res integra, as well in regard to the estate in New York as in regard to the estate in Virginia, we would have come to a different conclusion upon it from that at which the Court of Appeals of New York arrived. Beyond all question, the devise would be void, for vagueness and uncertainty as to the intended beneficiaries, according to the principle of the cases of the Baptist Association v. Hart's executors, 4 Wheat's R.; Gallego's executors v. The Attorney General, 3 Leigh 450; Brooke v. Shacklett, 13 Gratt. 301; Janey's executor v. Latane, &c., 4 Leigh 327; and Seaburn's executor v. Seaburn, &c., 15 Gratt. 423; unless, indeed, the devise could be brought within the operation of the principle of the cases of Inglis v. The Trustees of the Sailors Snug Harbor, 3 Peters' R. 99; and Literary Fund v. Dawson, &c., 10 Leigh 147; or unless it could be brought within the operation of section 2 of chapter 80 of the Code of Virginia. It is extremely doubtful, to say the least, whether the contingency on which the devise was limited to take effect was not too remote to bring it within the operation of the cases aforesaid, of which Inglis v. The Trustees of the Sailors Snug Harbor is the leading one. And we are strongly inclined to the opinion that the case could not have been brought

within the operation of the statute;
41 which provided only *"for the education of white persons within this State;" while the devise extends to persons without regard to race, complexion or residence. The State might well be willing to undertake the execution of a trust, however troublesome, for the education of her own children, while she might be very unwilling to undertake one for the education of children residing mostly, if not entirely, out of the State.

But, without deciding these questions, we are of opinion that, upon the grounds and for the reasons before stated, there is no error in the decree; and that it be affirmed.

STAPLES, J.—Said he did not concur in so much of the opinion of the President as holds that the State of Virginia was represented by the United States, in the suits pending in the State of New York. He thought the State of Virginia was in no manner bound by the decrees rendered in those suits. Upon the other points he concurred with the majority of the court.

Decree affirmed.

42 *Hale & al. v. Clarkson & als.

January Term, 1873, Richmond.

1. **Bill for Discovery—Facts Known by Plaintiff.***—In a bill in equity to recover slaves, there is a call for a discovery of facts, which the evidence shows the plaintiffs knew at the time, or had the means of knowing. If this call for a discovery be the only ground of equity jurisdiction, the bill should be dismissed, with costs.
2. **Bill to Recover Slaves—Equity Jurisdiction.**†—In a suit to recover slaves against an adverse claimant, the fact that the title to the slaves depends upon the construction of a provision in a will, is no ground of equitable jurisdiction.
3. **Same—Same—Several Claimants—Distribution.**—The fact that there are more claimants than one of slaves in the adverse possession of others, and that distribution among the claimants will be necessary if the slaves are recovered, is no ground of equitable jurisdiction.

This was a suit in equity in the Circuit court of Lynchburg, brought in 1854 by Anselm Clarkson and others, claiming as legatees in remainder of slaves, under the will of John Clarkson, who died in the county of Franklin in the year 1817, against John S. Hale, Giles W. B. Hale's adm'r and others, who had purchased the slaves under proceedings against the life tenant during her life. The proceedings in the case were concluded by a decree rendered on the 23d of November 1858, by which John S. Hale and Hutcheson, as adm'r of G. W. B. Hale, were directed to deliver up the slaves in their possession to certain commissioners named, who were directed to sell the same at public auction, &c. From

***Bill for Discovery.**—See Hall v. Smith, 25 Gratt. 70.

†**Equity Jurisdiction.**—See on this subject, footnote to Goolsby v. St. John. 25 Gratt. 146.

this decree these defendants applied to this court for an appeal; which was allowed. The material facts are stated in the opinion of Judge Christian.

43 *Early, for the appellant.

Slaughter, Garland and Goggin, for the appellees.

CHRISTIAN, J., delivered the opinion of the court.

The whole subject matter of the controversy between the parties having perished, or been extinguished by the result of the late civil war, (the title to certain slaves being the sole question adjudicated by the court below), it is not necessary that this court should pass upon the merits of the cause. The question now presented, only involves the costs of the proceedings, dependent upon questions of chancery practice and pleading, to be settled by this court. The record is quite voluminous; but I deem it necessary to extract from it only such facts as shall present, intelligibly, the points now to be decided by this court.

John Clarkson died in the year 1817, leaving a will, one clause of which is expressed in the following language:

"I give and bequeath unto my daughter, Betsy Taylor, and Major Abram Taylor, her husband, Mealey and her children, by them freely to be possessed and enjoyed; and if it so happen that the said Betsy Taylor die, having no bodily heir, that she and Major Abram Taylor is [are] to enjoy them during their life; but is [are] not to remove the said negroes out of this State; and, at their death, to be equally divided among the rest of my children."

Abram Taylor qualified as one of the administrators, with the will annexed, of John Clarkson, and had the estate inventoried and appraised; but did not include Mealey and her children, or any of them, as a part of the testator's estate. Abram Taylor died intestate, in the year 1819, and his wife, Betsy Taylor, qualified as one of his administrators.

There being no issue of the marriage of Abram and Betsy Taylor, his distributees were his father and his widow; and between them, there was a division of certain slaves, of which the said Abram died possessed. But in that division, the woman Mealey and her children were not disposed of; they were retained by Mrs. Taylor, under a claim of title in her.

Under executions against Mrs. Taylor a number of Mealey's children were sold by John Wade, a sheriff of Franklin county, who became, himself, the purchaser. Mrs. Taylor afterwards became involved in certain law suits, with the personal representatives of her husband's father; and in consideration of services rendered in those suits, transferred her right in the negroes that said Wade, deputy sheriff of Franklin county, held under his purchase, to Giles W. B. Hale—the transfer being for the benefit of himself and his brother John S. Hale. Mrs. Taylor died in 1849, without issue; and John S. Hale and G. W. B. Hale's personal representatives, brought

an action of detinue against Wade, for the negroes; and in that suit a judgment was recovered, in 1853, for some eighteen or twenty slaves, the descendants of Mealey, held by Wade under his purchase. The slaves, thus recovered, were divided in January, 1854, between John S. Hale and Alexander B. Hutcheson, as personal representatives of G. W. B. Hale.

In September, 1854, a suit in chancery was brought in the Circuit court of Lynchburg, the bill being filed by the surviving children of John Clarkson, the testator, and the personal representatives of those who were dead, and certain grand-children of the testator, against John S. Hale, Alexander B. Hutcheson, administrator of *Giles W. B. Hale, together with one Wm. Leftwich and one

45 Moses G. Booth, who were also made defendants.

They exhibit with their bill the will of their ancestor, John Clarkson, and insist that under the clause of his will above quoted, disposing of the slave Mealey and her children, "Abraham Taylor and Betsy, his wife, took a conditional estate, in fee, or rather an absolute estate, in the negro woman Mealey and her children, defeasible upon her dying without issue living at her death; and in that event, the said negroes would go, to be equally divided, among the rest of the children of the testator;" and that upon the death of the said Abram and Betsy Taylor, the descendants of the woman Mealey passed to the children and grand-children of the testator. They aver that "the children of the woman Mealey, and their descendants, are numerous; that they do not know the number, nor the ages, sexes, and names of all of them, nor in whose possession all of them are. They do know, however, that some are in the possession of John S. Hale and Alex. B. Hutcheson, administrator of Giles W. B. Hale; some are in possession of one Moses G. Booth, and some in the possession of one Wm. Leftwich." And they call upon each one of the defendants to say what slaves, in his possession respectively, are descendants of the woman Mealey, the names, ages, and sexes of each slave, and by what claim of title they are held; and pray that the said slaves may be surrendered by the plaintiffs, and be sold by a decree of the court, and the proceeds distributed among those entitled.

The defendants demurred to the bill; and among other grounds of demurrer, insisted that the bill was multifarious. The cause was heard at the June term, 1856, upon the demurrer; and the following is an extract

46 from the decree entered on that day: "And the *court is further of opinion, that the bill is multifarious, in uniting the defendants, Moses G. Booth and Wm. W. Leftwich, John S. Hale and Alexander B. Hutcheson, in the same suit, when it does not appear that the said defendants had any common interest in the slaves sought to be recovered by the plaintiffs; and would now sustain the de-

murrer, if the plaintiffs had not asked leave to dismiss their bill, as to the defendants Booth and Leftwich. The court doth, therefore, adjudge, order and decree, that the plaintiffs have leave to dismiss their bill, as to the defendants, Moses G. Booth and Wm. W. Leftwich," &c.; and decreed costs to the defendants. There were other grounds of demurrer, and other questions arose upon the pleadings, and upon a motion to send the case back to rules; which, in my view of the case, as it stands after the bill was dismissed as to the defendants, Booth and Leftwich, it is not necessary to notice.

Hale and Hutcheson (the bill being dismissed as to the others) are the only defendants against whom the plaintiffs claim the right to recover the slaves who were the children of Mealey, and their descendants. As against these two defendants, it is very questionable whether there was any sufficient allegation, even, to give the plaintiffs the right to sue in equity for the recovery of the slaves sought to be recovered of Hale and Hutcheson.

The plaintiffs do not allege any ignorance of the names, sexes, or number of the slaves, the descendants of the woman Mealey, which were in the possession of these two defendants. They allege that they are ignorant of the number, names, ages and sex of all the descendants of Mealey. They say they know that some of them are in possession of Hale and Hutcheson; but they no where allege that they are ignorant of the names, number, age and sex of these slaves. But, in calling upon the defendants, Hale and Hutcheson, for a discovery, the plaintiffs show that they knew in fact that a number of slaves had been received by the defendants, Hale and Hutcheson, of a certain John Wade, in an action of detinue, tried in the Circuit court of Halifax, at the October term, 1863. As to these slaves, their number, names and sex, could be easily ascertained from the record of that case, of which the plaintiffs in their bill show they were cognizant. To say the least, it is not clear that the allegations of the bill, if true, and not a mere pretence, are sufficient to entitle the plaintiffs to sue in equity, upon the ground of seeking a discovery. See *Bass v. Bass*, 4 Hen. and Mun. 478; *Hardin's executor v. Hardin*, 2 Leigh 572; *Parker's administrator v. Parker*, 5 Leigh 149; *Armstrong v. Huntons*, 1 Rob. R. 323. But however this may be, I think it very clear, that on the hearing of the cause the bill ought to have been dismissed, (if there was no other ground of equity jurisdiction than that of seeking a discovery,) because it then appeared, by conclusive record evidence, that the allegations of the bill on which it was sought to found the right to a discovery, and to relief in equity upon that ground, were mere colourable pretences to establish the jurisdiction of the courts.

It is true, that if certain facts essential to a claim purely legal, be exclusively

within the knowledge of the party against whom that claim is asserted, he may be required, in a court of chancery, to disclose those facts; and the court being thus rightly in the possession of the cause, will proceed to determine the whole matter in controversy. But this rule cannot be abused by being employed as a mere pretext for bringing causes proper for a court of law into a court of equity.

If the answer of the defendant discloses nothing, and *the plaintiff supports his claim by evidence in his own possession, unaided by the confessions of the defendants, the established rules, limiting the jurisdiction of courts, require that he should be dismissed from the court of chancery, and permitted to assert his rights in a court of law. *Russel v. Clarke's ex'ors*, 7 Cranch's R. 69; *Jones v. Bradshaw & als.*, 16 Gratt. 355.

In the case before us, the claim of the plaintiffs is not aided by any disclosures or confessions of the defendants in their answers; but is supported by evidence obtained by the plaintiffs, and easily accessible; for a most important part of it is obtained from the public records, and was well known to the plaintiffs. They had instituted, in the county of Franklin, their action of detinue against these same defendants, for the very same slaves named in the decree in this cause; and they were the identical slaves which the defendants in this suit had received of John Wade. A comparison of the decree with the declaration in the one case and the judgment in the other, shows they are the same slaves. The record in the suit against Wade, and the depositions of Wade and Sam'l Hale, taken by the plaintiffs, show every fact which they call on the defendants, Hale and Hutcheson, to disclose; and conclusively show that their claim to call on them for a discovery was a mere colourable pretext to establish the jurisdiction of the court.

But it is said that the jurisdiction of a court of equity was properly invoked in this case, because the will of the testator was of doubtful construction, and the rights of the legatees under the will were uncertain. It is sufficient to remark, that this is not the case of an executor or other fiduciary who, uncertain how to execute trusts under a will, comes into a court of equity, invoking its aid to construe the will and advise him of his duties and obligations under it.

Nor is it a suit by legatees, *under a will for distribution of certain property among them, according to their rights under a will, which they ask the court to construe; and which property is already in their possession; but it is a case where parties are seeking, in a court of equity, to recover certain slaves in the possession of an adverse claimant. Now, the fact that the title to the property they are seeking to recover, arises out of a will, affords no ground for equity jurisdiction. A will may be construed by a court of law as well as a court of equity. It is done every day where the title of the plaintiffs, in an action of

law, arises under a will. It was done with reference to this very will, the construction of which is sought in this suit; and that, too, by these same plaintiffs, in an action of detinue against one of the original defendants, Moses Booth. See *Clarkson et al. v. Booth*, 17 Gratt. 490.

But it is further claimed, that a court of equity will take jurisdiction in this case, to prevent a multiplicity of suits; because in this case the parties not only seek to recover the property held adversely by the defendants, but ask for a sale and distribution of that property among the various parties entitled thereto, according to their respective rights. To hold that this would be a ground of equitable jurisdiction, in such a case, would be to declare that equity jurisdiction depended upon the number of plaintiffs; and that where there is a purely legal demand, if there be but one plaintiff, he cannot be entertained in a court of equity, but must bring his action at law; while in a claim of the same nature, if there be more than one plaintiff, and they ask for a division of the property among them, after it is recovered of an adverse claimant, a court of equity upon that ground may take jurisdiction, though the claim be one purely legal, and the parties have a perfect remedy at law. This would be a total perversion of all those rules which plainly define

50 *The boundaries of the two jurisdictions of courts of law and courts of chancery.

Upon the whole case, I think it is clear that the grounds of equity jurisdiction were colourable only, and that upon the hearing, the bill ought to have been dismissed. The decree ought to be reversed.

Decree reversed.

51 **Burch, Mayor, v. Hardwicke.*

January Term, 1873, Richmond.

1. *Prohibition—Supersedes.*—In a case of prohibition, if the order of the court is final in form and disposing of the whole case, though it should have been interlocutory, a *supersedes* may be awarded to it.

2. *Same—Order—Final—How Determined.*—In such a case, whether the order is final or not, must be determined by looking to the order itself; and not by enquiring whether it should or should not have been final.

3. *Same—Statute—Ultimate Prayer of Both Petition and Declaration.*—The common law mode of proceeding in prohibition has been modified by the statute, Code of 1860, ch. 155, p. 658; and the ultimate prayer, both of the petition and declaration, when one is necessary, which is not always the case, is that a writ of prohibition may be awarded; and when the case shall have been fully heard, whether on petition and answer or on declaration and formal pleadings, the judgment, whether for or against the issuing the writ, will be a final judgment.

4. *Petition—When Case Decided Finally.*—When the

*See note to *Ambrose v. Keller*, 22 Gratt. 760.

whole case is presented by the petition and answer to the rule, and only a question of law is involved, the court may decide the case finally upon these papers; and no other or further proceedings are necessary.

5. *Mayor—Chief Executive Officer—When Prohibition Will Not Lie.*—Under art. 6, s. 20, of the constitution of Virginia, the mayor of a city is the chief executive officer of his city, and as such is authorized to supervise the other officers thereof in the execution of their duties. In investigating charges against the chief of police, he acts as the chief executive officer of the city, and not as a court; and a writ of prohibition will not lie to restrain him from proceeding with the investigation.

6. *Same—Same—Co-Ordinate with Corporation Court.*—The mayor, when acting as chief executive officer of the city, is in no sense or to any degree the inferior of the corporation court; nor is he in any wise subject to its superintendence. They are distinct and co-ordinate departments of the corporate government.

52 *This was a writ of error to the judgment of the corporation court of Lynchburg, prohibiting George H. Burch, mayor of the city of Lynchburg, from proceeding to investigate charges against Wm. W. Hardwicke, the chief of police of the city. Hardwicke applied to the judge of the corporation court of Lynchburg for a writ of prohibition, to restrain the mayor from investigating charges made against Hardwicke, as chief of police, by several citizens, on the ground that the mayor had no jurisdiction to make the investigation, but that by the charter of the city the power was vested in police commissioners. The Judge issued the writ; and, upon the hearing of the cause, made the prohibition absolute. And Burch, thereupon, applied to this court for a writ of error; which was awarded. The case is stated in the opinion of the court.

Halsey, for the appellant.

Kirkpatrick and Goggin, for the appellee.

BOULDIN, J., delivered the opinion of the court. This case comes before the court on a writ of error to a judgment of the corporation court of the city of Lynchburg, in a case of prohibition.

The case was briefly this: In September 1872, James Casey, C. J. Aikers, John Henry and James M. Casey, citizens of the city of Lynchburg, presented their petition to George H. Burch, as mayor of said city, preferring charges of misconduct in office and neglect of duty against William W. Hardwicke, as chief of police of said city; and praying the said Burch, as mayor and chief executive officer of the city aforesaid, after due notice to said Hardwicke, to enquire into and investigate said charges; and if they should be established, that said Hardwicke should be removed from office.

53 *The application was made under the 20th section of the 6th article of the constitution of the State, a portion of which is as follows:

Sec. 20. There shall be chosen by the electors of every city a mayor, who shall be the chief executive officer thereof, and who shall see that the duties of the various city officers are faithfully performed. He shall have power to investigate their acts, have access to all books and documents in their offices, and may examine them and their subordinates on oath. The evidence given by persons so examined, shall not be used against them in any criminal proceedings. He shall also have power to suspend or remove such officers, whether they be elected or appointed, for misconduct in office or neglect of duty, to be specified in the order of suspension or removal; but no such removal shall be made without reasonable notice to the officer complained of, and an opportunity afforded to be heard in his defence."

These provisions of the State constitution constitute a portion of the laws for the government of the city, which the courts, the mayor, the officers of the city, and the citizens, are alike bound to respect. And acting, as he supposed, in obedience and conformity to, and under authority of these provisions, the mayor, as the chief executive officer of the city, seems to have given to the appellee, Hardwicke, notice, as required by law, that he should proceed to investigate the charges of misconduct preferred as aforesaid against him. Hardwicke appeared and denied the authority of the mayor to proceed with the investigation; but his objection was overruled; and the mayor avowed his purpose to proceed. Whereupon, Hardwicke presented his petition to the Judge of the corporation court, supported by affidavit, praying for a rule against the mayor and the citizen aforesaid, to show cause why a writ of
54 prohibition should not issue *against them, restraining said mayor from taking jurisdiction to try said Hardwicke, and the citizens aforesaid from prosecuting their charges before said Mayor.

The mayor answered the rule; setting forth the authority under which, as chief executive officer of the city, he deemed it his duty to investigate the charges against the chief of police, and if necessary to remove him.

The questions presented were purely matters of law; no question of fact being raised. On the 11th day of November, 1872, the court rendered the following judgment:

"This day came again, as well the plaintiff as the defendant, George H. Burch, by their attorneys; and the defendants, James Casey, John Henry, C. J. Aikers and James M. Casey, who appear to have had legal notice of this motion—they were solemnly called, but came not; whereupon, the plaintiff and the defendant, George H. Burch, being fully heard, it is considered by the court that the commonwealth's writ be awarded the plaintiff, to prohibit the defendant, George H. Burch, mayor of the city of Lynchburg, from proceeding to try or remove from office the said plaintiff, William W. Hardwicke, as chief of police

of the city of Lynchburg, and to absolutely suspend all further proceedings against said plaintiff, on the petition of the defendants, James Casey, John Henry, C. J. Aikers and James M. Casey; and that the defendant, George H. Burch, do pay to the plaintiff his costs by him in this behalf expended. And the said defendant in mercy, &c. &c."

To this judgment Burch obtained a writ of error from this court; on which the case now comes before us.

A preliminary objection has been taken by the counsel for the defendant in error, and urged with great earnestness and ability, that the writ of error should be
55 dismissed, *as improvidently awarded, because, as they contend, the judgment of the court below was interlocutory merely, and not final.

To sustain this position they have collected with much industry, the ancient common law authorities, showing, as the law aforesaid was, that the award of the writ, in a contested case, was a preliminary proceeding; and from such preliminary proceeding, that no appeal would lie.

Were this conceded to be now law, it would only show that in making such preliminary order, the court should be careful not to make it final on its face, so as to put the case beyond the further control of the court; that it would be error in the court to make such order a final one; but it certainly does not show that the court, if it really intends to enter a final order, making an end of the case, may not do so in any stage of the cause, however premature such action may be; nor does it show that such order is not final, because it is premature. This would be to make the finality of a judgment depend on its propriety; to make a judgment intended by the court to be final, and actually final in its terms, interlocutory, because erroneous; to confound what has in fact been done with what ought to have been done.

We think it cannot be seriously questioned, that a court may in fact enter a final judgment in any stage of the cause, however erroneous or premature it may be; and that when such judgment is so entered, it may be reviewed by the appellate tribunal, as a final judgment. How, then, do we ascertain when a judgment or decree is final? That must always be ascertained, not by enquiring what ought to have been done by the court, but by inspecting the terms of the judgment or decree, and learning from its face what has been done. If

it appears on the face of the judgment
56 or decree, that "further *action in the cause is necessary to give completely the relief contemplated by the court, then the decree is to be regarded not as final, but interlocutory." But "when a decree makes an end of a case, and decides the whole matter in controversy, costs and all, leaving nothing further for the court to do, it is certainly a final decree." These principles have been repeatedly announced by this court, in chancery causes, and have been very recently reaffirmed in the latest

case on the subject: *Ambrouse's heirs v. Keller*, 22 Gratt. 769. The same principle applies to judgments.

Applying these principles to the judgment before us, we think it impossible to reach any other conclusion than that it is in form, substance and intent a final judgment. It grants to the defendant all the relief prayed for, and all contemplated by the court, to wit: a peremptory writ of prohibition; it gives him his costs; and closes with the formal conclusion to final judgments, "and the defendant in mercy, &c." Thus deciding "the whole matter in controversy, costs and all, leaving nothing further for the court to do."

If such a judgment be not final, it is difficult to conceive the terms in which a final judgment should or could be rendered. It might, at common law, have been erroneous as premature; but would not on that account be less final.

But, the common law proceeding in contested cases, was based on forms and fictions which have been long abolished, both in England and Virginia; and the proceeding now is very different and far more simple. See opinion of this court, delivered by Judge Moncure, in the cases of *Mayo, mayor, &c., v. James*, 12 Gratt. 17; and *Supervisors of Culpeper v. Gorrell, &c.*, 20 Gratt. 484, and authorities cited.

The plaintiff, in prohibition at common law, in a seriously *contested case did not pray in his declaration that a writ of prohibition might be awarded him; but his complaint was based entirely on the fiction that such writ had already issued, and that the defendant was in contempt for proceeding with his suit regardless of the writ; when, in point of fact, no such writ had ever issued; and the prayer of the declaration was, not that a writ of prohibition should issue, but for damages against the defendant, for disregarding the writ assumed as aforesaid to have been issued. See 1 *Wm's. Saunders*, p. 136, &c., where the declaration is given in full. The fact thus assumed was not traversable; and the issuing pro forma of the writ, or the fiction that it had issued, being at common law the foundation of the proceeding, the original award of the writ, if in fact made, was regarded a preliminary order not to be appealed from.

But, by the provisions of chapter 155, Code of 1860, p. 658, taken from the Code of 1849, these cumbrous forms and useless fictions of the common law have been dispensed with; and the ultimate prayer, both of the petition and declaration, when one is necessary, (which is not always the case,) is, that a writ of prohibition may be awarded; and when the case shall have been fully heard, whether on petition and answer, or on declaration and formal pleadings, should the court be of opinion that the writ ought to go, it will be awarded, not as a preliminary or original writ, but as a writ of execution, with costs (and damages, if proper,) to the plaintiff; and the case is at an end—the judgment is final.

And so, in like manner, should the defendant succeed, final judgment will be entered for him, with costs. See *Supervisors of Culpeper v. Gorrell*, and others above cited, where the entire proceeding, from the commencement to final judgment, was in this court. That case can in no material mat-

ter be distinguished from the case before us; and the judgments in each are in form and effect the same, and alike final. The principle established in that case is this: that a declaration, if deemed necessary by the court, or if demanded by the defendants, would, as a general rule, be required by the court below; but, that it is not in all cases necessary; that if the case be as fully presented on the petition and answer, as it could be by declaration, a declaration would be a useless form, and may be dispensed with. It was dispensed with by this court in that case, although demanded by the defendant. But no declaration having been demanded by defendant in this case, the question does not arise.

We are of opinion, therefore, that the judgment of the court below was final, and that the writ of error was not improvidently awarded.

This brings us to the consideration of the errors assigned by the plaintiff in error. And in the view taken of the case by the court, it will only be necessary to consider the fourth error, which is as follows:

"4. Because the mayor of a city, in investigating the acts of a city officer, and suspending or removing him for misconduct in office, does not sit as a judicial tribunal, but simply as an executive officer administering the government of the city, in respect of which there is no remedy by writ of prohibition; this being a remedy which applies exclusively to courts."

The court is of opinion that the objection is well taken.

The writ of prohibition is an ancient common law remedy, issuing from the superior courts of common law to the inferior courts, to restrain the latter from excess of jurisdiction. Its object was to keep within the limits and bounds of their several jurisdictions the various courts of the realm. See 8 *Bacon's Abr.* title Prohibition, p. 206. The injury for which the common

law provided "a remedy by the writ of prohibition, says Sir William Blackstone, "is that of encroachment of jurisdiction, or calling one non coram iudice, to answer in a court that has no legal cognizance of the cause." And he goes on to say that the writ issues from the superior court, "directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court." 3 *Black. Com.* p. 111-12. And this account of the object and functions of the writ has been approved by English jurists and elementary writers too numerous to mention.

The same restriction of the writ to judicial proceedings—to courts alone—has been distinctly and repeatedly sanctioned by this court. In the case of Mayo, mayor, &c. v. James, 12 Gratt. 23, Judge Moncure, speaking for the court, says of the writ of prohibition: "It is in effect a proceeding between courts—a superior and an inferior—and is the means whereby the superior exercises its due superintendence over the inferior, and keeps it within the limits and bounds of the jurisdiction prescribed to it by law." Again: In the case of The Supervisors of Culpeper v. Gorrell & others, 20 Gratt. 484, 522, the court say: "A prohibition is a proper remedy to restrain an inferior court from acting in a matter of which it has no jurisdiction, or from exceeding the bounds of its jurisdiction."

It thus appears that both in England and in Virginia the writ of prohibition is a proceeding between courts alone. And furthermore: That such courts must bear the relation of superior and inferior; the superior having authority to exercise due superintendence over the inferior."

60 *Now, it cannot with any propriety be said, in the first place, that the mayor of a city, constituted by law the chief executive officer thereof, and clothed with discretionary power to supervise the officers in his own department, to investigate their conduct, and to remove them from office, acts as a court, in the discharge of these executive functions. That would be to confound the functions of the judicial and executive departments. Nor is the mayor, when acting as chief executive officer of the city, in any sense or to any degree the inferior of the corporation court, or any wise subject to its superintendence. They are distinct and co-ordinate departments of the corporate government; as much so as the executive and judicial departments of the state and federal governments; and neither has the right to supervise and control the other in the discharge of their respective duties. In *Marbury v. Madison*, 1 Cranch's R. 137, 170, Ch. J. Marshall, speaking of courts interfering with the discretionary powers of the executive, says: "It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance so absurd and excessive could not have been entertained for a moment. The province of the court is solely to decide on the rights of individuals; not to inquire how the executive or executive officers perform duties in which they have a discretion. Questions in their nature political, or which by the constitution and the laws are submitted to the executive, can never be made in this court." The principle thus affirmed by Ch. J. Marshall, in *Marbury v. Madison*, has been reaffirmed in numerous later cases in the U. S. supreme court. See *Gaines v. Thompson*, 7 Wall. U. S. R. 347, and cases there cited.

On the conceded facts of this case the court is of opinion, that the plaintiff in error, whilst investigating the

charges of misconduct in office and neglect of duty, *preferred against William W. Hardwicke, as chief of police of the city of Lynchburg, was acting, not as a court, but as chief executive officer of the city, supervising the conduct of a person regarded by him an inferior officer in his own department; that the power of removal in such case is a discretionary power vested in him as chief executive officer of the city; and in that character, that he was not inferior to the corporation court; and was no wise subject to its superintendence or control; and, as a necessary consequence, that the writ of prohibition was improvidently and erroneously awarded.

The judgment of the corporation court must be reversed, with costs to the plaintiff in error, and a judgment entered in his favor, discharging the rule, and giving him his costs in the corporation court.

Other questions of much interest and importance have been pressed on the court, with great force of argument, by the counsel on both sides; but, as the case goes off on a question of jurisdiction, the court has not thought it necessary, or even proper, that these questions should be decided.

ANDERSON, J., did not concur in the opinion, on the preliminary question; but he concurred on the merits.

Judgment reversed.

62 *Crouch & als. v. Davis' Ex'or.

January Term, 1878, Richmond.

1. Wills — Creditor — Legatee — Modern Tendency.*—

Though the rule that a legacy will be held as a satisfaction of a debt due from the testator to the legatee, still nominally exists, the tendency of the more recent decisions is to consider the bequest a bounty, and not the discharge of an obligation; and the courts now lay hold of any circumstances, however trifling, for the purpose of repelling the presumption that the legacy was intended as a satisfaction of the debt.

2. Same—Same—Same.—D., an unmarried man, made his will in March 1869, and died in February 1863. By the first clause of his will he gives to his three nieces \$15,000, to be equally divided between them; and by a subsequent clause he gives to their brother \$5,000. He was guardian of his nieces; and was indebted to them as guardian at the time he made his will. There was a legacy of \$20,000 to Ann, a servant, and her children, whom he set free, which he directed his executors to invest in State bonds and hold for their benefit; and whatever balance he might be worth he gave to his sister C. and her children. He owned a considerable estate, real and personal. HELD: That under the circumstances of his case, the legacy to the

*Creditor—Legatee.—In *Glover v. Patten*, 17 Sup. Ct. Rep. 417, the court, citing among others the principal case as authority, said, "The appellants rely * * upon the general proposition that, where a debtor bequeaths to his creditor a legacy equal to or greater than the amount of his debt, it shall be presumed, in the absence of a contrary intent

nieces was not in satisfaction of the debt due to them.

3. Investment in Confederate Bonds by Order of Court.

—The executor in 1864 filed his bill to have the direction of the court in the administration of the estate; and under an order of the court authorizing him to invest the moneys in his hands in Confederate or State bonds, he invested in Confederate bonds. These, and nearly the whole of his testator's personal estate, became worthless by the results of the war. And it turns out that he owed a considerable amount of debts.

Held:

1. Legacies—Charge on Real Estate.*—The legacies, as well as the debts, are a charge upon the real estate.

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***2. Executor—Responsibility—Legatees.**—The executor is not responsible, under the circumstances, for the failure to invest the \$30,000 given to Ann and her children, in bonds of the State of Virginia.

3. Same—Same—Creditors.—As it did not appear that the creditors were willing to receive the Confederate currency, the executor is not responsible for the loss sustained by the investment.

4. Confederate Currency—Legacies—How Payable.—Though the testator died in 1863, when Confeder-

inferable from the will, that the legacy was intended to be in satisfaction of the debt. Had Mrs. Patten, subsequent to the execution of the agreement of September, 1865, made special bequests to her daughters, or either of them, of amounts equal to or greater than the amount of her indebtedness to them, the rule might, perhaps, be invoked as an answer to their claim; but the rule is in fact nothing more than a presumption, and may be rebutted by slight evidence that such was not the intention of the testator." See also, 3 Min. Inst. (4th Ed.) pt. 1, 593.

***Legacies—Charge on Real Estate.**—In *Smith v. Mason*, 89 Va. 715, 17 S. E. Rep. 3, the following language of JUDGE STAPLES, in the principal case, is quoted and approved: "It is universally conceded that, as a general rule, the personal estate is the natural primary fund for the payment of legacies. Whether they are chargeable on the land, when the personal property proves deficient, is always a question of intention. When the charge is not created in express terms, it may be established by implication."

In *Lee v. Lee*, 88 Va. 807, 14 S. E. Rep. 534, the court, citing the principal case, said: "As a general rule the personality is not only the primary but the only fund for the payment of legacies. The testator, however, may charge the land, and this may be done either expressly or by implication; but in any case the intention to charge must be clear—so clear as to admit of no reasonable doubt. Hence, when the land is not charged and there is a deficiency of personality, the legacies abate to the extent of such deficiency."

In this latter case "it was held that the intention of the testator to charge the legacy on the personality was deducible from the circumstances therein." *Smith v. Mason*, 89 Va. 716, 17 S. E. Rep. 3. See *Wood v. Sampson*, 25 Gratt. 848, also holding that "whether general pecuniary legacies are chargeable on real estate is always a question of intention," and laying down the rule that this intention is to be obtained from the facts and circumstances and not from parol evidence of declarations of intention of the testator.

ate treasury notes were the currency of the country, yet the will having been made in 1859, this is the time to which we are to look to ascertain his intention; and the legacies were not, therefore, payable in Confederate currency.

5. Executors—Choses in Action—Liability†—Burden of Proof.

—It appearing that a large number of debts were due to the deceased, many of them by persons living out of the State, others reported bad, and others good or doubtful—if the executor has not brought suit to recover those reported good or doubtful, from persons living in the State, the burthen is on him to show that they could not be recovered.

6. Domiciliary Executor—Foreign Agent.—The testator owning land in Arkansas, and there being no agent of his there, the executor in Virginia may employ and pay an agent to attend to it.

Hector Davis, a citizen of Richmond, died in February 1863. He left a will which bore date on the 21st of March 1859, and which was duly admitted to probate in the Circuit court of the city of Richmond.

By the first clause of his will the testator gave to his nieces Jennie, Sallie and Bettie Davis, the sum of fifteen thousand dollars, to be equally divided between them. He then gave to his servant woman Ann, her freedom, to be removed out of the State with her four children; and after their removal, the sum of twenty thousand dollars; Ann to have the interest on one-fifth of the amount, and the interest of the balance to be expended in raising the children until they come of age; then the principal to be given them. And he wished the said

amount to be invested in State stock by his executors, *and applied as aforesaid. He gave to his nephew R. D. James the sum of five thousand dollars. And then he says: "Whatever balance I may be worth I want given to my sister Ann Crouch and her children." He appointed R. D. James and Franklin Matthews his executors; the first of whom qualified as such.

The testator left a large estate. His stocks in various banks were appraised in the then currency, at \$67,980, his other stocks, public bonds, slaves and furniture were appraised at 23,040=\$91,020. He owned besides, real estate in Richmond and in the State of Arkansas, and there were many

†**Executors—Choses in Action—Liability.**—In *Estill v. McClintic*, 11 W. Va. 416, the court, citing the principal case as authority, said, "It is true as a general rule, that if an administrator reports debts as solvent or doubtful, it is his duty to produce proof of his exculpation from responsibility for them. He should show why such claims have not been collected."

But, in *Wimbish v. Blanks*, 76 Va. 308, the court, making reference to the principal case, said it was by no means certain that the rule as to liability of an executor for the collection of choses in action belonging to his testator laid down in the principal case extended to mere trustees for the collection and payment of debts like the case at bar. The court suggests that there is well defined distinction between the trust which devolves on executors and that with which trustees are invested.

debts due to him; many of them, however, due from persons living in the southern states. He was also largely indebted to others at the time of his death.

In the year 1864 James, the executor, instituted a suit in equity, in the Circuit court of the city of Richmond, against all the legatees in the will, asking for directions in the administration of the estate. In this suit an order was made on the 25th of November 1864, that James should deliver to Mrs. Crouch and her children the real estate of the testator, and pay her the net rents which had accrued thereon since his death. The papers in this case, except the orders in the order book, were destroyed in the fire of April 3d. 1865.

In September 1865, Ann Crouch, by her husband Wm. S. Crouch, as her next friend, and her children, filed their petition in the Circuit court of the city of Richmond, in which they referred to the will of Hector Davis, the suit that had been brought by James, the executor, the decree of the 25th of November 1864, and the destruction of the original papers in the cause, and stated that James had not settled an account of his administration upon the estate, and that he had failed and refused to deliver the real estate to the petition, or to

65 *pay her the rents; but had retained the same in his possession, and had collected the rents thereof. They therefore prayed that said James might be attached for his contempt, and committed until he complied with the decree of the 25th of November 1864. And that he might be compelled to account for and pay over to the petitioner the residue of the estate of said Davis, which remained after satisfying the specific legacies.

Upon the filing of this petition, which was verified by the oath of Wm. S. Crouch, on the motion of the petitioner the court made an order in the cause, that James be attached for his contempt failing to comply with the decree of the 25th of November 1864, unless he showed sufficient cause to the contrary on a day named.

To this rule James filed his answer. He said that he made no objection to the decree of the 25th of November 1864, because at that time he had reason to believe, and did believe, that the other property of the estate would be amply sufficient to pay the debts and special legacies bequeathed by the will of his testator, Hector Davis; and he was therefore willing that the real estate included in the "balance" which was left to Ann Crouch and her children, should be delivered to them.

But since the date of that decree a great change had occurred in the condition and finances of the country, and especially in the property of said Davis' estate. The property embraced in the inventory of the estate was \$91,020; and of this amount \$67,980 consisted of bank stocks, all of which were now worthless; \$2,700 in bonds of the Confederate States of America, and \$460 in other stocks, both equally worthless, and \$14,550 in slaves, all of whom, but those

that he had sold, had become free by the results of the war. In fact, of all the estate in the said inventory and appraisement mentioned, there remained only \$3,000

Virginia State bonds appraised at 66 *\$3,900, \$1,000 bond of the city of

Richmond appraised at par, and household and kitchen furniture appraised at \$430. It was not in his power to dispose of these stocks and other assets, and pay off the special legacies, because he could only have sold for Confederate currency, which the legatees were unwilling to receive; and the proceeds of sale would therefore have remained in his hands, in that currency, and have become as worthless as the property left by the testator. He was therefore advised not to disturb the property in question, but to hold it in the condition he received it, until he should be otherwise directed, or some change of circumstances might enable him to settle with the legatees.

He further says that the debts of his testator amount to between five and ten thousand dollars, which he had been unable to settle, because the creditors would not receive Confederate money, and that he had been informed of one bond of \$17,000 given by H. N. Jones, who resides in Texas, and as to whose solvency he knows nothing, in which his testator was security for said Jones.

He further states that under an order in the cause, made on the third of December 1864, he placed his accounts in the hands of Wm. F. Watson, as special commissioner, for settlement, and that they remained in the hands of said Watson until his death; and respondent had not been able as yet to get possession of them; though he expects to do so in a few days.

In declining to deliver the real estate he intended no disrespect to the court; but acted under the advice of counsel, and with no other view or purpose than that of discharging his duty as executor, and of protecting the interests of parties entitled under the will of the testator, and with the purpose of being governed by the order 67 of the court when the facts that had occurred should be properly made known to it.

Upon the coming in of the answer of James, the court set aside the order of the 25th of November 1864, and made a decree directing one of the commissioners of the court to settle the executorial account of said James, and that he take an account of all assets belonging to the estate, and of all claims due by the same.

In November 1865 James filed his bill in the cause, in which he refers to the former bill filed by him, and the proceedings which had been had in the case, and the destruction of the papers. He states the loss of the property, as given in his answer to the rule. As to the debts due to his testator he is unable to form any conjecture of their amount or what will be realized from them. They consist in many cases of unsettled accounts and of debts contracted in Confederate

money; and most of the debtors reside out of Virginia in the southern and southwestern states. With all his efforts he has not been able to collect one dollar of these debts since the fall of Richmond. He is equally in the dark as to the debts due by his testator. When he filed his answer to the rule he supposed they would amount to between five and ten thousand dollars; he has since heard of other claims against the estate, which are unsettled, and he does not know their amount. The special legacies amount to \$40,000, and the value of the personal property in his hands is about \$1,750.

He further says that he had received from dividends of stocks, rents of real estate, sale of negroes and some collections of debts, some thirty-odd thousand dollars which he invested, in conformity to the order of the court, in bonds of the Confederate States, which he holds. They are of course worthless. He is advised the special legacies are chargeable upon the real estate, *and must be paid before "whatever balance the testator may be worth" can be ascertained, and given to Mrs. Crouch and her children. He submits, therefore, that the real estate and its rents should not be turned over to Mrs. Crouch and her children, until it is ascertained that said real estate is the "balance of what the testator is worth," after paying debts and special legacies; but that it should be committed to a receiver. He could not pay the debts and legacies, because the parties would not receive the money; and since the evacuation of Richmond, not being able to pay the legacies, he thought it but just that he should apply some of the rents of the real estate to the support of the infant legatees, the three nieces of the testator, and the children of Ann. And, making Wm. S. Crouch and Ann Crouch and her children parties defendants, he prays that the order of the 25th of November 1864 may be suspended; that the court may take upon itself the supervision and direction of the administration of the estate; make the proper orders, direct the proper accounts; and for general relief.

Ann Crouch and her children answered the bill. They insist that by the will of Hector Davis they are entitled to his real estate without liability for his debts; because he has not charged his real estate with either debts or legacies; and it is manifest he supposed that his estate was ample to pay his debts and legacies and leave a balance for the respondents. They insist that the executor has been guilty of gross mal-administration of the estate, for which he and his sureties are responsible: First, that the pecuniary legacies were payable in the currency of Virginia at the death of the testator, and the executor should have paid them. Second: He was directed by the will to invest \$20,000 in

State stocks, and it was his duty to do so, and he is liable to all the *loss resulting from his failure to do it; and there was no decree of the court forbidding

it. Third: That as to his own legacy, the investment in Confederate bonds is to be considered his own act, like the act of any other individual disposing of his own property; and he is responsible for the loss of it. Fourth: That as to the slaves sold, they were bequeathed to the respondents, and were illegally sold by the executor; and he must account for their value. Fifth: Because he failed to obtain from the proper court directions how the legacies should be paid. And lastly: They insisted they were entitled to the possession of the real estate, and no receiver was necessary, or could legally be appointed by the court.

Commissioner Thomas J. Evans returned his report in March 1868. He presented several statements. Statement A was the account of the executor from the commencement of his administration down to April 3d, 1865, showing a balance in the hands of the executor in Confederate currency, of \$13,823 12 of principal, and \$312 50 of interest. Statement B. was an account of the administration from the 3d of April 1865 down to February 1868, showing a balance in the hands of the executor in gold or United States currency, of \$13,484 72 of principal, and \$703 82 of interest. The balance of the first account was not brought into the second. C and D were special statements, made at the instance of counsel, and need not be further noticed. Statement E. was an account of assets belonging to the estate of Hector Davis. Of these assets \$48,548 20 consisted of debts, many of which are reported as worthless; a number of them as unknown; a large number as doubtful; \$32,126 28 of which are charges for small sums, being balances of accounts on his books; a few were marked probably good, and others were marked good. The other personal assets were reported at \$1,524 00, and the real estate in *Virginia at \$15,435 00. Statement F. is an account of claims against the estate of Davis to the amount of \$28,240 38 in good money. Statement G. is an account of money paid to Ann, the freed woman, for the support of herself and her children since the war, \$1,474 50. These payments are credited to the executor in statement B.

The counsel for Mrs. Crouch and her children filed nineteen exceptions to the report; but as most of them referred to the sufficiency of the evidence, or were sustained by the court below, these will not be noticed.

The 1st exception is to a credit in statement A for \$1,000, money put into the hands of an agent sent to Arkansas by the executor, to see after and guard the interest of the estate of the testator in land owned by him in that State; there being no person there to attend to it, and no person on the land but slaves. The ground of the exception was, that the executor in Virginia had no control over the estate in Arkansas, and therefore had no right to expend money for it.

The 6th and 9th exceptions are to the investments made by the executor in Confederate States bonds. As to this investment

to the extent of \$20,000, if allowed at all it should be charged as the bequest to Ann and her children. As to this bequest the will directed it to be invested in State bonds, and there was therefore no necessity to apply to the court for authority to invest it, and the decree does not require him to do it. As to the excess over \$20,000, the executor should have paid the debts—Confederate debts—with it, and especially a debt claimed by himself.

It appears that on the 20th of February 1864, on the petition of James, the executor of Davis, the Circuit court of the city of Richmond gave him leave to invest the cash on hand belonging to the estate

71 of his testator, *in interest bearing bonds or certificates of the Confederate States or of the State of Virginia or any other sufficient bonds or securities in said State, which were to be payable to the executor, and not transferable except, &c. And that the executor so invested the amount credited to him in the statement A. The 10th exception is to the amount of \$5,760 13 reported as a specie debt due to the executor. Hector Davis was a dealer in slaves; and he also sold slaves on commission. In this last business he employed James, giving him one-fourth of the net profit of commissions. An account with James was kept on the books of Davis. This account commenced before the war, and was continued until the death of Davis. On the 31st of December 1862 the credit to James on this account was \$9,593 87 in Confederate currency, which was converted into good money at \$5,760 18; and this with interest from the 31st December 1862 was reported by the commissioner as a debt due to James from the estate. It was insisted by the executor that this was a Confederate debt, and should have been paid by the executor out of the Confederate currency in his hands. The report having been referred back to the commissioner, he reversed his decision, and disallowed the debt; and then the executor excepted to the report disallowing it.

The 12th exception is to a debt of \$5,269.24 with interest from the 1st of January 1863, subject to a credit of \$800 paid April 1st, 1866, due from Davis to Jennie, Sallie and Bettie Davis, as their guardian. He qualified in the County court of Goochland some time before 1855; and his account was settled by commissioner Fleming in October 1863, showing the amount due his wards: the whole having been received by him before the 27th January 1862. The debt was excepted to on the ground that the 72 legacy to them of \$15,000 was *a satisfaction of the debt; and because the report of Fleming was made after the death of Davis, and when his estate was unrepresented. And the commissioner states that there were a number of charges in the account kept by Davis which were probably correct; but which he was compelled to disallow for want of proof.

The 15th exception insists that the executor shall be charged with every debt reported

by him "good," and every debt reported "doubtful," unless he obtained judgments against the debtors. A witness proved that a number of these debtors lived in Virginia; but he said that there had been great difficulty in collecting debts since the war; nobody has paid who could help it.

The cause came on to be heard on the 22d day of July 1870, when the court overruled all the exceptions of Ann Crouch and her children, except the 10th, 12th, 13th, 14th and 18th; and confirming the report in all other respects, recommended it to the commissioner to examine and report upon the 12th and 14th exceptions. And Ann Crouch and her children applied to this court for an appeal from this decree; which was allowed.

Lyons & Stern, for the appellants.

Before proceeding to notice the very well put and learned argument of the counsel for the appellees, we will proceed to state the principles upon which, in our opinion, the cause turns, and upon which it should be decided, as follows:

I. The law declares that the first duty of an executor, after the payment of funeral expenses, is to collect and then to pay the debts of the testator. 2 Williams on Ex'ors, 890 et seq.; 1 Lomax on Ex'ors, 609; 2 id. 475.

II. When the testator by his will 73 directs the manner *of investment, that is, the security in which investments shall be made, the executor is bound to follow the will; and if he does not, is guilty of a devastavit, for which he and his securities are responsible out of their personal or private estate. 2 Williams on Ex'ors, title Devastavit, 1628-9, 36; *ibid*, p. 1642-3, 1667; 2 Lomax on Ex'ors, 475, 82, 83; *Garrett et als. v. Carr*, 3 Leigh, 407, 414; *Carter's Ex'or v. Cutting*, 5 Munf. 223; *Southall's Adm'r v. Taylor's Adm'r*, 14 Gratt. 269.

It was the duty, therefore, of the executor to have paid all the debts which were payable in Confederate money; or if the parties refused to receive payment, to bring evidence of the fact, so that they might be dealt with as creditors who had been tendered payment and refused, and thereby lost their right to recover. There certainly was no conceivable excuse for seeking investment of the assets, while this plain duty was unperformed, and especially the executor's own debt, unpaid; and there could be no "embarrassing circumstances" to excuse him for not paying the debt, or to render his duty difficult or uncertain; his path was plain and simple: it was to pay the debts and invest the legacy as the will directed. The will directed that \$20,000 bequeathed to Ann Davis should be invested in State stock. There was no embarrassment or difficulty here; the duty was clear, the path plain, and there were no "embarrassing circumstances."

III. The debt due by the testator to the executor on account of the partnership,

even if not paid by the legacy to him, was undoubtedly payable in Confederate currency—the currency of which the partnership assets consisted—and none other. James was a partner, and it is impossible for men to divide profits without being liable for losses, and thus partners; and, being partners, it follows:

74 *1. All the partners have a community of interest, joint and inseparable, in all the profits of the concern. Story on Partnership, ch. 3, § 15-20 et seq. Each partner must share profits and losses according to his interest. § 21.

2. Partnership property may be realty, personality, funds or money. Story on Partnership, §§ 92, 3, 4, 8.

3. One partner cannot appropriate any portion to himself exclusive of the partnership. § 174.

4. A partner cannot be a creditor of the firm, therefore, for profits, and can only be a creditor of his partner for excess of advances by him, or when the copartner has received all the assets, including his shares of the profits.

5. A partner of the firm cannot prefer a claim while strangers, who are creditors of the firm, are unpaid. § 39 to 307 of Story.

The foregoing principles establish necessarily and conclusively that James must take his share of the profits in the thing, whether money, funds or realty, in which the profit was made; or, if he claims gold, he must pay gold to Davis. His share of the profits is no debt against the firm, for that would be absurd, and no debt against Davis, for Davis is liable to him for profits no more than he is liable to Davis, and neither party guarantees profits. If the profits are made in bad paper, each partner must take his share in the bad paper, and then he may do with it what he pleases; and what he makes of it is his own; but his partner is not responsible for it; otherwise, if one partner is entitled to one-third, and the other entitled to two-thirds, the one entitled to two-thirds, would ruin him entitled to one-third; for, for every \$100 guaranteed to him entitled to one-third, he must guarantee \$200 to the one entitled to the two-thirds. Community of interest forbids this. Mr. James

75 *had in his hands at all times a sufficient amount of money of the kind due to him to pay his debt and thousands of dollars of others; and by neglecting to do so, and making illegal and unwarranted investments, he has lost his debt, and is responsible for all the others of like nature which he could have forced the creditors to take; or show an attempt to do so and refusal, which will forever bar their claim. Debts have priority over legacies.

V. As to the \$1,000 paid Bowcock, the exception should have been sustained and the amount charged to the executor, for reasons there stated. The executor is silent as to the cause of sending Bowcock to Arkansas; does not show any benefit that the estate derived from it; exhibits no report from him, as according to the receipt

he was to return; and this is enough to show that he was not the proper person to send, even if necessary to send any one, which is not shown; and, above all, the executor had no control over the property in another State. This is admitted by the counsel for James, who say he was "not accountable" for debts due from residents of other States. Is this the manner in which a man in his senses would have acted for himself? Did an executor ever before attempt to screen himself in such a way? Not to attempt to collect a cent in another State, because he was "not accountable" for such debts, but yet advanced money to a man to go to another distant State with no purpose in view, and no good accomplished by it. Mr. James should be charged with the amount thus furnished his friend for a pleasure trip, for such it must have been, as he has never come back, and made no report of any business done by him, as far as we know; nor has the executor furnished any statement or description of the property left by Davis out of Virginia, or, in fact, that he left any.

76 *VI. It was the duty of the executor to have sold all the bank stocks, and all the fancy stocks of the estate, and all the Confederate bonds which came to his hands, and with the proceeds of them to have satisfied the legacies and such debts as were payable in Confederate money; and failing to do so, he is responsible for the loss of those stocks. To retain those stocks was equivalent to investing the assets of the estate in them; and while a man may invest his own money in such securities, an executor or administrator cannot, except under the penalty of being liable for the amount invested, if the stocks fail. This is the law even when the question is as to the investment of a surplus fund; but it applies with much more stringency in a case like this, when there were legacies, as well as debts, to the satisfaction of which those stocks, or the proceeds of them, should have been applied, among which were the debts and legacy due to the executor himself. It was the duty of the executor, therefore, to sell those stocks:

1st. Because it was matter of notoriety, that if the Confederacy failed they would be utterly lost.

2dly. Because the debts and legacies required it.

3dly. Because the will directed \$20,000 to be invested, not in bank stock or fancy stocks, but in the stock of the State of Virginia.

4thly. Because the devisees of the real estate were entitled to have it exonerated from liability for debts and legacies.

5thly. Because, if debts and legacies could not be paid with the proceeds of those stocks, it was the duty of the executor to sell them, and lend the proceeds out on real security. 2 Williams on Executors, p. 1629, note 1; Brazier & Clark, 5 Pick. R. 96; 2 Lomax on Ex'ors, p. 477.

77 The court will see that the loss to the estate by the *failure of the executor to sell these stocks, was \$69,440, at least \$29,000 more than enough to have paid all the legacies.

VII. It being, as already shown, the duty of the executor to collect the debts due to his testator, he is responsible; and must account for all that he does not show to have been bad, at least for all of the Virginia debts, and he does not show, as to a very large number of them, any excuse for the failure to collect them. On the contrary, in account "E," he puts down the doubtful at \$27,534 21; probably good at \$2,444 44; making twenty-nine thousand nine hundred and seventy-eight dollars and sixty-five cents; and among the debts marked doubtful, is one by N. M. Lee & Co., of 3,839 dollars and 70 cents, and another from N. M. Lee alone, of \$14,760 12, when that same N. M. Lee was so good as to be offered by him as one of his securities on his executorial bond, and received by the court; and yet no attempt was made to recover either of those debts until the bankruptcy of Lee. Those two debts could not have been even doubtful, therefore, without imputing to the executor the purpose of practising a fraud upon the court by offering Lee as security upon a bond of 200,000 dollars. The executor is, therefore, responsible for that debt; and by this specimen the list of doubtful debts may be judged; and the wisdom of the rule which makes the executor liable for them, vindicated.

The total amount due by all debtors, marked doubtful, is \$27,534 21, of which the fifty-seven "doubtful" residents of Virginia owe \$23,357 45 in Federal money. It seems from this that the executor has not so prosecuted the Virginia debts as to know whether they are good or not, and has marked doubtful fifty-seven out of eighty-four.

78 The worthless debtors in Virginia are only two in *number, and their indebtedness \$988 74, while the total amount marked worthless is \$10,082 34. How does the executor know so much about the non-residents unless he has brought suit? And he says he has not. The fact is, he reports positively as to non-residents; and as to the residents, who, in amount, are largely in the majority, he reports doubtful, yet alleges non-residence as a reason for not knowing the debtor's responsibility, and declining to attempt collections because he is "not accountable" for debts due by non-residents.

The Virginia debtors, in amount, are more than one-half, and yet he did not sue one of them.

The defence set up by the learned counsel for the executor, to excuse him from his liability for his failure to make an effort to recover debts, of which the worst he can say of them is that they are doubtful, which admits that they might by proper pursuit be recovered, a chance from which the estate was entirely cut off by the laches of the executor, is reliance upon the stay law, and assuming that it prohibited the execu-

tor from suing. The court will find, however, that the statute of March 29, 1862, which was in force when Davis died, did not prohibit suits, but only prohibited the issuing of executions, except in certain cases, and expressly authorized proceedings to recover interest upon debts. See pages 95-97 of Sessions Acts 1861-62. So that there was nothing to prevent the executor from recovering judgments, and thus obtaining liens, or from recovering annual interest. And there is not in the record, even at this date, one particle of proof showing that the doubtful debts are not still good, or were not good at the close of the war. The simple assertion of the executor upon that subject being no proof, as

79 it is no proof of his allegation that he offered to pay debts and legacies *in Confederate money, and creditors and legatees declined to receive it.

VIII. That Confederate debts were payable in Confederate money, has been so distinctly and fully settled by this court that there is no occasion to discuss the question; indeed, it does not admit of discussion; but it is denied that the legacies were payable in Confederate money.

The rule upon that subject is thus laid down by Williams, in his book on Ex'ors, Vol. 2, p. 1202: "Upon this subject the intention of the testator, as apparent upon the construction of the will, is to furnish the rule of decision. But where legacies are given generally, it will be presumed that the testator intended that they should be paid in the money of the country in which he was domiciled and the will was made, without regard to the currency of the place where the legatees reside." 16 Sim. R. 613; 10 Ves. R. 330; 2 Bro. C. C. 38; Prec. Chan. 210; id. 226; 2 Lomax on Ex'ors, 264, (top), 151 (marg.); 1 Roper on Legacies, ch. 14, § 2, 856.

The rule thus expounded is as applicable to the present case as to any other. It is not to be presumed that it was the intention of the testator, who was a Southern man, resident in the South, and whose will by the settled rule of interpretation speaks from his death except as to land, that his legacies should be paid in any other than the currency of the country in which he was domiciled at the time of his death, and of which he was a native.

That he did not intend that it should be paid in Federal money is as perfectly certain as anything of the kind can be, because there was no Federal money in Virginia, and no means of getting it; and to have gotten it, would have been treason by the statute.

80 *It is equally certain that he did not intend them to be paid in specie, because there was not specie in the country to meet all the demands of circulation; and it was not more customary to pay either debts or legacies in specie in 1859, than it was in 1863, Bank notes having taken the place of specie in '59, and Confederate treasury notes in '63. In what currency, then, can it be presumed, with any show of reason,

that the testator intended his legacies should be paid, if not in Federal money or in specie?

What is there, then, to rebut the presumption which the law raises, so much in accordance with common sense and the inevitable necessity of the case, to wit: that the testator intended that the legacy should be paid in the currency of the country in which he was domiciled and always had been?

To be able to presume that he did not intend it to be paid in that currency, it is absolutely necessary to indicate some other currency to which the evidence points, as the currency which was in the contemplation of the testator. Now, we ask again, what is that currency, it being shown that neither Federal money or specie could have been in the contemplation of the testator? And until that is done, we think we may rest perfectly content with the position which the authorities cited and the reason of the case justify us in assuming that the legacy was to be paid in the currency of the country in which the testator was domiciled at the day of his death, or not to be paid at all.

IX. Both the legacy and the debt due to the executor were payable in Confederate money. That money was at home, in the hands of the creditor; and therefore, upon the plainest principle of common sense and law, they are to be considered as paid; and to that extent any loss of funds by investment or otherwise is necessarily the loss of the executor. If that were not true,

81 then this extraordinary *anomaly would occur, to wit: that when an executor, who is both creditor and legatee, squanders the assets of an estate, he may turn around and sue his own security for the legacy and the debt, upon the ground that he has committed a devastavit in not paying himself.

XI. The bequest of \$15,000 to Jennie, Sallie and Bettie Davis, ought to be considered as a satisfaction of the debt due to them; and if not, then, as that was a debt entitled to priority over all others, it was the duty of the executor to have sold all the slaves, bank stocks and other stocks, except those of the city of Richmond and the State of Virginia, and if necessary to have purchased with them so much good money as would have paid the debt due to the wards, and to have paid it; and for his failure to do so, the executor is personally liable for the loss of the money.

XII. That the real estate is not liable for the legacies, if the personal estate was insufficient to pay them, nor for any simple contract debt.

We will now proceed to notice the reply of the counsel for the appellee.

In the first place, we do not perceive how any matter stated in the petition, which was presented to this honorable court, to take up the case as privileged, can be introduced properly into an argument upon the merits of the cause in this court; but if it may, we respectively submit that the rec-

ord justifies the allegation that the executor has been guilty of great delay in the settlement of the estate of Hector Davis. For although he took charge of the estate on the 13th of March 1863, he has made no effective or even serious effort at a settlement of it, and has been the real cause of all the delay and the losses which have been sustained by his failure to do his duty, by

bringing forward and insisting upon
82 *the most unjust and unconscionable demands, and wasting the assets by illegal and injudicious investments. If the executor had done his duty promptly, as he might and ought to have done it, our clients would not have been involved in this nine years' effort to bring him to a settlement. Nor is the executor at all relieved by the fact which is relied upon in the second paragraph, page 2, of the argument of our learned opponents, that the country was at war, that Davis (like the executor, his partner,) was a buyer and seller and auctioneer of slaves, and had many dealings in the south and south-west, because none of these causes hindered or prevented the executor from properly disposing of the assets in Virginia. Nor is he aided by the voluntary allegation of his answer, (which is relied upon,) that the creditors and legatees of Hector Davis believed the estate was solvent; and, therefore, refused to accept payment in Confederate money:

1. Because the allegation is voluntary and affirmative, and there is not one particle of proof to sustain it.

2. Because the legatees and Confederate creditors had no right to refuse such payment, if tendered to them; and if they did, it was the duty of the executor to file his bill in the court of chancery to compel them; and thus throw upon them the loss of the money, if it should be lost. If such was the fact, it was the duty of the executor to prove it, and thus relieve the estate; a tender being equal to payment.

Nor is the executor at all relieved or protected by the plea of the stay law; for the stay law did not prevent him from suing the debtors and recovering judgment; which he wholly failed to do. See Sessions Acts 1861-2, p. 95.

The 5th ground of relief relied upon, that the executor retained in his hands all
83 the stocks and slave property *which came into his hands, instead of being a justification, is a plea of guilty, for the law is laid down in the most unmistakable terms in Lewin on Trusts and Trustees, pp. 297-8, in which it is said, quoting Sir Thomas Plumer in *Tebbs v. Carpenter*, 1 Mad. R. 290: "I am anxious not to discourage persons from acting as executors, by throwing difficulties in their way, and am willing to make every proper allowance; but I must not forget the established doctrine of this court. If persons accept the trust of executors, they must perform it; they must use due diligence, and not suffer infants to be injured by their negligence. If there be crassa negligentia, and a loss sustained by the estate, it falls upon the

executors." "An executor is not to allow the assets of the testator to remain outstanding upon personal security, though the debt was a loan by the testator himself in what he considered an eligible investment. And it will not justify the executor, if he merely apply for payment through his attorney, but do not follow it up by instituting legal proceedings:" citing *Lawson v. Coleman*, 2 Bro. C. C. 156; *Southall's adm'r v. Taylor et als.*, 14 Gratt. 269.

Certainly there could not be crassa negligentia in an executor or a trustee, if this was not: To hold bank stocks, railroad stocks, insurance stocks, and Confederate bonds and slaves, until they were lost, while he suffered debts and legacies, which might have been paid by the sale of them, to remain unpaid—a charge upon the estate—those assets constituting more than three-fourths of the whole value of the estate. To state such a case, is to make it as plain as any argument can make it.

Under the next head, it is said that the Confederate money which the executor received could not be paid to creditors who were unwilling to receive it, and that it could not be paid to legatees, or invested for their benefit, until the debts were paid.

84 *To this there are several answers, to wit:

1st. That there is not a particle of proof that payment was ever tendered to any creditor, and refused by him.

2dly. That all Confederate creditors were bound to accept it; and tender to them was equivalent to payment. And there appear to be only two debts of any magnitude which might not have been paid with Confederate money, to wit: the debt to Holladay's ex'or, and to the Davises, which will be noticed again.

3dly. Payments might have been made to legatees, and refunding bonds taken; and there is no proof that any attempt was made thus to settle with the legatees.

4thly. The will furnished to the executor the rule of investment by which he should have been and was conclusively bound, viz: the investment in Virginia State stock; and if he could not invest for legatees, as he says, he could for creditors. But this is a singular argument in a case in which the executor did invest, and claims protection by the investment. There is no question, therefore, of the power to invest. The question is as to the propriety of the investment. We say it was bad; the executor says it was good; and we will presently give the reasons and authorities to sustain our view.

In answer to our position that the legacies are not chargeable upon the real estate, the counsel for the appellee cite numerous authorities, for the purpose of showing that the lands were chargeable with the legacies.

Special comment upon them is unnecessary, because one or two principles, very well understood, which properly apply to this case, settle the whole question, which

will be found in the very familiar and favorite authority in Virginia, to wit: *Lomax on Executors*, vol. 2, top paging 163, marg.

84, § 8, top p. 170, marg. 90, ed. of 1857.

85 *First, it is laid down that money legacies are payable only out of the personal estate; and, secondly, that the real estate will not be charged with the payment of legacies, unless that intention is expressly declared or clearly to be inferred from the language and dispositions of the will; and that a simple bequest does not have that effect. For this the learned compiler refers to the case of *Lupton v. Lupton*, 2 Johns. Ch. R. 614; the decision in which, he says, coincides with the more recent decisions and the present doctrines in England; and he refers to many authorities.

In *Lupton v. Lupton*, it was decided that a residuary devise of "all the rest of his real and personal estate not before devised is not sufficient to charge the real estate with pecuniary legacies." Now, in this case the language of the testator is, "whatever balance I may be worth I want given to my sister, Ann Crouch, and her children." This is manifestly a residuary bequest, and nothing more, in the language of a man inops consilii, not using the most accurate expressions, to be sure, but leaving a large estate, out of which he gave a few legacies, not amounting to the half of it, nor indeed the third of it. He never had it in contemplation to charge the real estate, but intended to give the whole residuum to his sister, Ann Crouch, and her children.

In respect to the legacies to the testator's wards, we insist that the legacy to them is a satisfaction of their debt.

"It is an established rule, that a legacy given by a debtor to his creditor, which is equal or greater than the debt, shall be presumed to be intended as a satisfaction of the debt, debitor non praesumitur donare." 2 *Lomax on Executors*, ed. 57, marg. page 95, § 1, citing *Brown v. Dawson*, Prec. Chan. 240; *Fowler v. Fowler*, 3

P. Wms. 353; *Richardson v. Greese*, 86 3 Atk. R. 65, and other cases; *and all the authorities are cited and commented upon in 2 *Roper on Legacies*, ch. 17, § 1, 2.

This is the strongest language which can be used in the argument in behalf of the legatees claiming this bequest. If nothing can be found in the will, therefore, to rebut this presumption, there cannot be a shadow of a doubt about the law; and there is not in the will a word, not one, which is inconsistent with the presumption. The attempt of the counsel for Jennie, Sallie and Bettie Davis to find something in the will to rebut this presumption is about as far-fetched as any we ever heard of. They say, "the scheme of the will seems to have been to give all about \$5,000 each." He gave to Ann Davis and her children their freedom and \$20,000; to Mrs. Crouch, his sister, and her children, the excess of his personal estate, about \$51,000 valuation in Confederate money, and his choses in

action about \$48,500, and real estate \$15,435 in gold or United States currency.

Now we ask in all candor, does it not appear that these last were the true objects of his bounty, and their legacy largely in excess of the others?

We admit the testator intended \$5,000 each for James and the three Davises; let it be so, and let it be received in satisfaction of their debts.

All of the circumstances which have been received against the general presumption and rule of law, are collected and authorities cited, to sustain them, in 12 Mass. 395, note.

1. Where the legacy is less than the amount of the debt.

2. Where, though equal to the debt, there is a difference in the duration or time of payment, making it less beneficial to the legatees.

3. Where the legacy and debt are of a different nature.

87 *4. Where the provisions of the will are expressed to be given for a particular purpose.

5. Where the debt is contracted subsequently to the making of the will.

6. Where the legacy is contingent or uncertain.

7. Where the debt is contingent.

8. Where there is an express direction in the will for the payment of debts and legacies.

9. And, perhaps, where the legatee is a servant of the testator, and the debt is for wages.

It is only under the third and fifth of these exceptions to the general rule that the appellees claim.

First, as to the 3d exception, that the legacy and debt are of a different nature. The cases cited upon this point show such a difference, as follows:

"One gives a bond on his marriage, either within four months, to settle lands of 100 pounds per annum on his wife, or that his heirs, executors, &c., shall pay her 2,000 pounds within four months after his death; husband, after this, devises to his wife lands of 88 pounds per annum; this shall not be taken in part of the 100 pounds per annum, but only as a benevolence." 2 P. Wms. 614.

Now, it is not necessary to say that this case does not touch the one before us; and yet the appellees rely upon such authorities.

On page 3 of the note by Messrs. Guy and Gilliam, they say: "it was not a debt due from the testator, in its technical sense, to the wards." If that be true, then they have no claim for a debt. If it was not a debt to his wards, what was it?

The kind of difference which is meant by the decisions is this, for example: the testator owes a debt which is "charged upon the land in his possession, and not on the person of the testator." 1 B. Monroe,

228.

88 *See the general rule: Toller 336; 2 Fonblanque 330, and in the the cases cited by the appellees.

Secondly, as to the fifth exception. When Hector Davis died, his will went into effect; and whatever he owed the Davises he owed then, for he could contract no debts afterwards; and as the legacy largely exceeded the debt, it should be regarded as in satisfaction of it. When he made his will, there was a balance due from him; it might have been more or less at his death.

The report of commissioner Fleming answers all objections in respect to the debt not being known and ascertained by Davis, because the commissioner expressly reports that "Hector Davis kept an account of receipts and disbursements as guardian aforesaid," "which disclosed not only perfect fairness towards his wards, but even liberality."

The case is, therefore, the ordinary and simple case of a testator devising much more than he owed to his wards, to whom he was indebted. The total of his indebtedness, if all the credits to which the commissioner thinks him entitled were allowed him, was less than \$2,000 to each, and he bequeathed to each \$5,000.

Passing from this point we proceed to consider the other points of the case. First, as to the \$20,000 directed by the testator to be invested in State stock.

The chancellor, in his opinion, justifies the executor for his failure to invest the \$20,000 in State stock, as directed by the will of his testator, because of the investment of that money in Confederate bonds under the authority of an order of court—because of the heavy premium he would have to pay for State stock—the uncertainty of its ultimate value, and the notice he had received from the receiver of the Confederate government that the government would claim the legacy as confiscated property.

89 *Without repeating here what has been already said as to the duty of an executor to invest according to the directions of the will of his testator, but taking that for granted which the effort to excuse it admits, we will proceed to consider the reasons assigned in support of the excuse, and

1st. As to the order of court.

The statute to which reference has been heretofore made, Acts of '62, '63, p. 81, is the foundation of the order, and affords not the slightest justification for it. The act contemplates and provides for a wholly different case from this, viz: one in which the fiduciary is "unable to pay over to the cestui que trust, or parties entitled thereto," "moneys in his hands."

And it manifestly was not at all in the contemplation of the legislative mind, or within the scope of the act, to change any man's will, where that will could be carried into execution; and intended to provide, and does provide, only for a case in which the fiduciary could not lawfully dispose of the money to which the beneficiary was entitled without an order of court. And it is simply to stultify the Legislature to suppose that with a knowledge of a will au-

thorizing an executor to invest in State stock, it would pass a law giving him leave to ask the court to give him leave to do the same thing.

Here, on the contrary, there was no impediment; and the executor could have invested without difficulty. The order, therefore, founded upon that statute, affords no excuse to the executor, because it did not apply to the case; but if it did, does it afford any justification to the executor?

Manifestly not.

The will said to the executor, invest in Virginia State stock. The court said, do that same thing, or invest in other securities as you please. Now, the court did
90 not *undertake to control the executor; and did not, therefore, direct him, or command him to make any particular investment, but left him perfectly free to act as the will directed him to act; and his action in opposition to the will was purely voluntary; which leaves him exactly in the position in which he would have stood if there had been no order. The order, therefore, must be regarded as out of the question.

2. As to the high price of the stock.

This reason is wholly independent of the order, and would be good without any order, if good at all; and we submit, with all respect, is not good under any circumstances; for if good in this case it would be equally good in every case in which the stock selected by the testator for an investment rose in value after his death; and that, we are sure, nobody will insist upon; for the rise in the price of the stock, instead of depreciating the stock, as an investment, only commends it, because it shows the stock was worth more than the currency; but in truth the order condemns this excuse, for the judge who made it with full knowledge, of course, of the price of the stock, which was a matter of notoriety, said to the executor, you may purchase it. We are only surprised the chancellor did not observe that when he made this excuse.

3. As to the threat of confiscation.

We do not perceive how that could affect the investment at all, as the threat was not to confiscate the State stock, but to confiscate the legacy, which was the only thing that could be confiscated, if any thing could; and that could be just as well confiscated under one form of investment as another: And if the investment had been made in State bonds, it would have been made in the name of the executor, and not of the devisee, exactly as it was made; and, therefore, would have
91 been no more *accessible to the confiscating officer than it was in the form in which it was made. But what business had the executor to change the investment directed by his testator, and authorized by the court, because of any threat by the confiscating officer, even if he could show, which he does not, and cannot, that by changing the investment he could elude the confiscating officer? But here again the order answers the excuse; for the executor

informed the court, or he did not, of this threat; if he did, the court disregarded it, and said invest, notwithstanding the threat; if he did not, then the manifest threat had nothing to do with the investment, as it is very obvious it did not.

Upon the whole, we submit that the order of court had not the slightest influence upon the investment, and furnished no excuse for it, and leaves it as it is, a clear, unpardonable devastavit; and this conclusion is in truth avowed by the executor in his letter to Virginia Davis, of the 28th December 1866, in which, speaking of the direction of the will to make the investment in State stock, he says: "I saw the injustice of such an investment; and notwithstanding I was directed by the will to do so, I refused to make it, well knowing, if it was done, it would deprive you practically of what was intended to be left you by your father. In consequence of thus acting, some of the other legatees have brought suit against me, claiming the will ought to have been carried out, and the investment made;" thus avowing, not that he had obeyed an order of court, but disobeyed the direction of his testator.

Lastly, as to the uncertainty of the ultimate value of State stock.

It is difficult to treat this reason with that gravity which is consistent with our very cordial and sincere respect and esteem for the judge who gives it.

92 *What was there to create doubt of the value of Virginia State stock?

The reply is, the possible fall of the Confederacy; and if for that reason State stock should be doubted, how could Confederate stock be regarded better than State stock? If we may be pardoned for the use of a metaphor in a law argument, the State stock was the shadow of Confederate stock; its position depending upon the location of the body which cast the shade. Is it not positively ludicrous to say, then, that the State stock was unsafe, and the Confederate stock safe, since the State stock was certainly safe if the Confederate stock did not become worthless; and, therefore, the Confederate stock must fail before the State stock? And yet the executor is justified in paying a large premium for Confederate stock in preference to State stock, because State stock bore a higher premium than Confederate stock.

Begging that the court will regard all the points made upon the record, although they may not be repeated here, we most respectfully submit this note, in conclusion, for the appellants.

Johnston & Williams and Steger, for the executor.

Guy & Gilliam, for the Misses Davis.

STAPLES, J., delivered the opinion of the court.

It is insisted by the counsel for the appellants, that the legacies bequeathed to Jennie, Sallie and Bettie Davis, should have been treated as a satisfaction of the debts

due them by the testator, as guardian. In support of this proposition, the learned counsel relies upon the rule in equity, that where a debtor bequeaths a legacy to his creditor, of equal or greater amount than the debt, and of the same character, 93 and payable *after the debt becomes due, it is presumed that the legacy was intended to be in satisfaction of the debt. There is no doubt this rule still nominally exists; but the tendency of the more recent decisions is, to consider the bequest a bounty, and not the discharge of an obligation. And the courts now lay hold of any circumstances, however trifling, for the purpose of repelling the presumption that the legacy was intended as a satisfaction of the debt. 2 Roper on Legacies, 1742; 2 Redf. on Wills, § 52, 516.

So far as this record discloses, the only debt of any importance against the testator, at the time of the execution of the will, was the one due to his wards. After satisfying that debt, the testator was possessed of an ample estate to pay all the pecuniary legacies, and also to make a reasonable provision for Mrs. Crouch and her children. There is no doubt that this was his purpose. Unmarried and intestate, he had no immediate family of his own to provide for. His nephew and nieces were very naturally the objects of his bounty and his affection. It is clear that the legacy bequeathed to R. D. James was not intended as a satisfaction of the debt due him; because that debt was contracted after the will was executed. This legacy is the same in amount with those given to the nieces respectively. Why should the testator make this difference between them? Why discriminate in this way, in favor of the nephew, and against the nieces? They were his wards; and it is reasonable to suppose his relations with them were more intimate, and his regard for them stronger than for either of his other relatives. The very first clause in the will contains the bequest in their favor; thus showing they were prominently in his mind when he determined to make his will.

"Item first (he declares): I give to my nieces Jennie, Sallie and Bettie Davis, 94 the sum of fifteen thousand *dollars, to be equally divided between them." This language, taken in connection with the other provisions of the will, and all the facts and circumstances of the case, plainly indicates, I think, that the testator intended a gift of five thousand dollars to each of his nieces, without deduction or abatement. There was no error, therefore, in the decision of the Chancery court on this point.

In the next place, it is insisted that the court erred in holding that the pecuniary legacies constitute a charge upon the real estate. It is universally conceded that as a general rule the personal estate is the natural primary fund for the payment of legacies. Whether they are chargeable on the land, when the personal property proves deficient, is always a question of intention. When the charge is not created in express terms, it may be established by implication. And

in seeking for the expressed intention of the testator, his words are to receive that interpretation which a long series of decisions has attached to them; unless it is very certain they were used in a different sense. 1 Redfield on Wills, p. 433-435. Thus it has been held in numerous cases, that where pecuniary legacies alone are first given, and no part of the real estate is specifically devised, and there is a residuary clause, devising and bequeathing the residue of the real and personal estate, this operates to charge the entire property with the legacies. This rule of interpretation is founded upon the idea that the testator, in blending his real and personal estate into a common fund, plainly manifests his purpose to make no distinction between them. And inasmuch as the will contains no previous devise of any part of the real estate, the residue in such case can only mean what remains after satisfying the previous gifts. This

is the well established doctrine of 95 both English and American *courts.

Greeville v. Brown, 7 House of Lords Cases, 688; Lewis v. Darling, 16 How. U. S. R. 1, 10; Wilcox v. Wilcox, 13 Allen's R. 252; Shulters v. Johnson, 38 Barb. R. 80.

The only case cited by the learned counsel for the appellants, as establishing a different rule, is Lupton v. Lupton, 2 John. Ch. R. 614. That case is, however, easily distinguished from the one now under consideration; and is not in conflict with the authorities mentioned. Chancellor Kent was of opinion that the residuary clause in that case was nothing more than the usual formula in wills, indicating merely that the testator did not intend to die intestate as to any portion of his property, but to dispose of the whole of it. In the present case it is apparent that the residuary clause was not designed simply to prevent a partial intestacy, from a failure to recollect all the testator's property; but was intended as a substantial and beneficial bequest in favor of the residuary legatees.

In Lupton v. Lupton the will contained several antecedent specific devises of real estate, to which the residuary clause might be referred; thus giving it its appropriate construction. In this case the testator makes no specific devise of any part of his real estate; and he does not even refer to it in his will. Nor does he adopt the ordinary formula to which Chancellor Kent refers. By a single clause he blends his real and personal property into one mass; and declares, "whatever balance I may be worth, I want given to my sister Ann Crouch and her children." What did he mean by these words? Did he refer to the balance of his personal estate simply? If his purpose was to devote his personal property only to the payment of the pecuniary legacies, and to give all his real estate to Mrs. Crouch and her children, nothing

would have been easier than to have 96 so provided in *plain and explicit language. The testator having made no specific devise of any part of his real estate,

and having blended his entire estate into one residue, it seems to me the inference is irresistible that his intention was to give only the residue remaining after the previous dispositions of his will are satisfied.

It is also insisted that the executor ought to have paid the debts and legacies with the Confederate currency in his possession. If it appeared that the creditors of the estate were willing to receive payment in that currency, there might be some reason in holding the executor responsible for his failure so to employ the funds in his hands. But, nothing of the kind is proved or asserted. As the Confederate notes were then greatly depreciated, and the debts contracted before the war, the fair presumption is, I think, the creditors were not willing to accept those notes in payment of their debts.

The same may be said with respect to the legatees. The executor cannot be justly chargeable with a devastavit, in failing to pay them, even if there were no debts against the estate; unless it appears that the legatees were willing to receive the Confederate notes, if they had been tendered. The ground is taken, however, that the legatees were payable in the currency in circulation at the death of the testator in 1863. It is true that a will of personal estate generally operates upon the property possessed by the testator at the time of his death, whenever acquired; but in order to ascertain his meaning and intention, we look to the date of the will. 2 Lomax on Ex'ors, p. 8. The cases cited by counsel only show that where legacies are given generally, it will be presumed that the testator intended they should be paid in the money of the country in which he was domiciled and the will was made. And this rule will be observed, though the testator may change his residence and die in

97 *another country. This but illustrates the principle of looking, not to the death of the testator, but to the time and place of executing the will, in order to ascertain the objects of his bounty, and the kind or value of the currency in which they are to be paid. This is the rule fairly deducible from all the cases. Holmes v. Holmes, 1 Russ. and Myl. R. 660; 2 Wm's Ex'ors, 1232. This principle is not affected by the act of March 3d, 1866, for the adjustment of Confederate liabilities. That act, by its very terms, only embraces wills executed between the first day of January 1862 and the 17th of April 1865. It does not confer the slightest authority upon the courts to apply the scale of depreciation to legacies given long anterior to the existence of the Confederate currency.

It is next made a ground of complaint, that the executor did not use the Confederate notes in the purchase of gold, and with that pay the debts and legacies. In the light of subsequent events, such a course would have been wise and judicious. Judged by circumstances then existing, it would have been regarded as an act of the greatest folly and rashness in a fiduciary. If, as

was the prevailing opinion, the southern cause had been successful, such an act would have been regarded as an unjustifiable sacrifice of the assets and securities of the estate, and treated as a devastavit on the part of the executor. He was not bound to incur any such risk. The executor was required to act as a judicious man, looking alone to his worldly interests, would have acted under the circumstances; but he was not required to go beyond that.

Another ground of complaint urged by appellants, was the failure of the executor to invest the twenty thousand dollar legacy given to Ann and her children, in State stocks or bonds; as directed by the 98 will. It is*to be borne in mind, that the condition of the country and of all securities, public and private, was altogether different in 1863 when the testator died, from what it was in 1859, when the will was executed. The executor being greatly embarrassed by this altered condition of affairs and other difficulties attending the administration of the assets, filed his bill in the Circuit court of Richmond, in order that the trusts of the will might be executed under the supervision of a court of chancery. In the progress of the cause, the court, upon the petition of the executor, entered an order or orders, authorizing him to invest the currency in his hands in Confederate or State securities. The investment was thereupon made in Confederate bonds. It is true that Ann and her children were alien enemies, and could not be served with process or brought before the court. Nevertheless, the executor had the right to apply to the court for its assistance; and the court had the right to make just such an order as was made. No existing investments were thereby altered, no rights were violated. Confederate currency received properly, in a due course of administration, was simply converted into Confederate bonds, until it could be applied to the claims of creditors or legatees. The estate, exclusive of this fund, and exclusive of the realty, was greatly more than sufficient to pay all the legacies. But for the loss of this property, the investment could now be made according to the directions of the will. And the burden would fall upon the residuary legatees, who were parties to the suit; must have been apprised of what was done, but made no objections to any of the orders entered in the cause. But let it be conceded that these orders were not binding upon the non-resident parties. The act of the executor, in bringing the suit and invoking the aid of the court, evinces, I think, entire good faith, 99 due diligence, *and a laudable desire to protect the rights of creditors and legatees. And I do not see how it is possible, consistently with the rulings of this court, to throw upon him the loss of this fund. Eliot v. Carter, 9 Gratt. 541; Myers v. Zetelle, 21 Gratt. 733.

It was argued, however, that as the court authorized an investment in State bonds, and the testator so directed, those securities

should have been selected by the executor. The executor states that he made no investment in the name of Ann and her children, because they were alien enemies; and he was notified that the Confederate authorities would take step to sequester their legacies. He did not deem it advisable to purchase State bonds, because they were greatly appreciated, as compared with the currency. He, therefore, concluded to make what he considered as merely temporary investments in Confederate bonds. They were regarded by many of the most sagacious business men of the country as equally safe with any other securities. The executor honestly exercised the discretion vested in him by the court in purchasing them.

If we are now to say that he is liable, because he did not purchase State bonds rather than Confederate, we must declare that he had no discretion in the premises. We must hold, that whatever may have been the condition or the resources of the estate, or the circumstances surrounding the executor, he could not make, and the court could not authorize, any disposition of the funds, until this legacy was secured. At that time there were large claims against the estate, which could not be paid. Until they were settled, however, the executor was under no obligation to pay legacies or make investments for legatees. He had the right, under the sanction of the court, to retain the funds under his control until the liabilities of the estate and the rights of all parties were settled and adjusted. If loss has thereby ensued, it is not fairly attributable to any breach of duty on the part of the executor; and the Chancery court very properly so decided.

The appellant's exceptions to the commissioner's report, from No. 1 to No. 8 inclusive, also Nos. 11, 16, 17 and 19, were properly overruled. In regard to the questions arising under the fifteenth exception, there is more difficulty. That exception is based upon the failure of the executor to collect debts due the estate, or to institute any proceeding to secure the same. A list of these debts is reported by the commissioner, amounting to forty-eight thousand five hundred and eighty-five dollars and twenty cents. One of the witnesses examined expresses the opinion that but little could have been realized from these claims, and that many of them were not recognized by the testator as existing debts. It seems, however, that a large number of the debtors reside now, or did reside, in Virginia; and a majority of these is reported by the commissioner as good, or in doubtful circumstances. And this is all the information we have upon the subject. The Judge of the Chancery court, in the course of his opinion, said: "That as to the claims in Virginia uncollected, no proof has been brought before me, showing that any of these claims have been lost by the negligence or improper conduct of the executor." The learned Judge is not entirely correct in his statement of the principle. The executor was bound to adduce the proof in his

exculpation. When assets are traced to his hands, it devolves upon him to show why they have not been collected; and not upon the legatees or distributees to establish misconduct or negligence. *Tebbs v. Carpenter*, 1 Mad. R. 290; *Lawson v. Copeland*, 2 Bro. Ch. Cas. 130.

It is not intended, however, now to decide any of the questions arising under this exception. There ought to be further inquiry as to the claims upon resident debtors, whether any of the debts reported as doubtful or worthless are now available, and whether the executor, by instituting suits at any time since the death of the testator, ought to have collected any of them, or secured satisfactory liens upon real estate.

Appellants' exception number 10, in relation to the claim of R. D. James, the executor, against the estate, amounting to \$5,760 13, was properly sustained, for the reasons given by the Judge of the Chancery court. No error was, therefore, committed in that particular, to the prejudice of the appellee.

The decree affirmed, except, as to the debts in Virginia uncollected by the executor.

102 *Gregory & al. v. Winston's Adm'r & als.

January Term, 1878, Richmond.

1. **Case at Bar—Advancement.**—J. held an estate for her widowhood, in a tract of land, remainder to the children of her husband; two of whom were by her. Her son R. used her money, with her concurrence, to buy the interests of the remaindermen in the land, and took the conveyances to himself. Upon the evidence in the cause, held that the money so used by R. was intended as an advancement by his mother to him.
2. **Disposition of Property—Deception of Intended Husband.**—A woman about to be married, may dispose of her fortune as she pleases; provided it is done with proper motives, and without an intention to deceive her intended husband.
3. **Same—Same.**—The equity which arises in cases of this nature, depends upon the peculiar circumstances of each case, as bearing upon the question whether the facts proved do or do not amount to sufficient evidence of fraud practised on the husband.
4. **Same—Same—Fraud.**—The grounds upon which such transactions are invalidated, as against the husband, is the fraud of the wife.
5. **Voluntary Settlement by Intended Wife—Not Necessarily Fraudulent.**—Although a settlement by the intended wife is voluntary, and not disclosed to the intended husband, it is not, therefore, necessarily fraudulent. The court will consider the nature of the provision, the situation of the husband in point of pecuniary means, and any other facts which tend to show that no fraud was intended.
6. **Bond Given by Intended Wife—Concealment from Husband—Effect of.**—It is clear that an obligation founded on a valuable consideration, executed *bona fide* pending a treaty for marriage, cannot be

set aside merely because it is concealed from the husband.

7. **Equity in Favor of Husband—When It Arises.**—The equity in favor of the husband does not arise, unless it can be clearly made out, that at the time of the conveyance of her property by the wife there was an engagement of marriage between them.

103 *8. **Case at Bar—Concealment from Intended Husband.**—In this case a bond is given for the purchase money of land, and the deed of trust to secure it recites the bond: and that, as well as the conveyance to her, are immediately put upon record. This does not indicate any expectation or desire to keep the transaction concealed from the intended husband.

9. **Same—Confederate Currency.**—R. made his will on the 29d of April 1861, and died in 1862. By his will he directs his executor to sell to his sister S. a tract of land at \$15,000, if she is willing to take it at that price. S. agrees to take the land; and in January 1863, executes her bond for the amount. It is not a contract made with reference to Confederate currency as the standard of value, or to be paid in that currency: there having been no such currency when the will was made.

In March 1869 Thomas L. Gregory and Jane B. Winston filed their bill in the Circuit court of the county of Hanover, in which they state that Philip B. Winston, of the county of Hanover, the husband of the female plaintiff, died in October 1853, leaving a will, by which he gave to her, during her widowhood, the tract of land whereon he lived, containing by estimation nine hundred and eighty-two acres; and directed that at her death or marriage this land should be sold by his executors, and the proceeds of sale should be equally divided among all of his children and their descendants per stirpes. That there were ten of these children, surviving them, of whom Sallie P. and Richard M. were the children of the testator by the female plaintiff, and the others were by a former marriage. That in addition to the land, the testator left to her a large personal property in fee, and a considerable amount for life or widowhood. That after the death of her husband she cultivated the land, and was very successful, and realized large profits. That her son Richard M. Winston, who had no other property, except the slaves acquired by his marriage, except that acquired under the will of his father, lived with her, and acted as her general agent in the management of her

104 *business; and whilst so acting he purchased with the monies and credit of the female plaintiff, the interest of said remaindermen in the land devised to her as aforesaid; and they set out the amount paid to each of eight of them, amounting in the whole to \$12,350 75. And she, with the said Richard M. Winston, as her surety, executed her bond for \$1,600 to Sallie P. Winston, for her interest in said land, which is still outstanding and unpaid. That the whole of said sum of \$12,350 75, with the exception of about \$1,800, which was the money of the said Richard M. Winston, was

paid with the moneys of the female plaintiff.

They further say, that Richard M. Winston died in February, 1862, having made a will dated April 22d, 1861, which had been admitted to probate, and Bickerton L. Winston qualified thereon as administrator with the will annexed. That Richard M. Winston directed by his will, that if he should die, leaving no child, the executor should sell the estate loaned to his mother Jane D. Winston, known as Poplar Spring, of which he had become the purchaser from the various legatees, to his sister Sallie P. Winston, for \$15,000, should she be willing to take it at that price; the annual proceeds of which sum to go to his wife Rosalie S. Winston, during her life or widowhood; the said principal sum of \$15,000 to go to his mother, Jane D. Winston, if living, and her heirs forever; if not living, then to his sister Sallie P. Winston, or some of his nephews or nieces; but in this case, Rosalie S. Winston to have the power of designating to which of them it shall go.

They further say, that until after the death of Richard M. Winston, your oratrix thought the interests of the said remaindermen in the said land had been conveyed to her; that she never intended that the deeds should have been executed in any other

105 way; that it was always *her purpose to provide equally for her two children; and that the provision of the will of her son Richard M. Winston was a surprise to her; that several times during the lifetime of Richard M. Winston, she requested him to bring the deeds from the said remaindermen to her; but he told her they were in the clerk's office, and had better remain there. They were permitted to remain in the office, where they were destroyed; and consequently she never saw them until after the death of Richard M. Winston.

They further say, that on the — day of March 1863, some time after the death of Richard M. Winston, Bickerton L. Winston went to the residence of your oratrix, taking with him instruments of writing, prepared for the said Sallie P. Winston to execute under the will of Richard M. Winston. That your oratrix was, at the time, without counsel, and ignorant of her rights in the premises. That Bickerton L. Winston, as administrator as aforesaid, on the said — day of March 1863, received from your oratrix one thousand dollars in Confederate currency, in part payment of the said sum of \$15,000, for the interest of Richard M. Winston in the said land. That the said Sallie P. Winston, with your oratrix as her surety, on the said — day of March 1863, executed a bond dated January 1st, 1863, payable to said Bickerton L., as administrator as aforesaid, in a penalty of twenty-eight thousand dollars, conditioned for the payment of 14,000 dollars, within six months after the death or marriage of the said Rosalie S. Winston, and for the payment of interest upon the last mentioned sum semi-annually, until the death or marriage of

the said Rosalie S. Winston. That at the same time and place, other instruments in writing, were brought there by the said Bickerton L. Winston, which are believed to have been a deed from him, as administrator as aforesaid, to the said Sallie P. Winston, conveying *the interest of the said Richard M. Winston, in the said land, in conformity with his will; and a deed of trust upon the said land, securing the payment of said bond, executed by the said Sallie P. Winston.

They further say, that the said bond was executed by Sallie P. Winston during the course of a treaty of marriage between her and the plaintiff, Thomas L. Gregory; and that at the time of its execution he was the intended husband of the said Sallie P. Winston, and the day had been appointed for the solemnization of their marriage, which took place on the 22d of April 1863. That Rosalie S. Winston was residing with Mrs. Winston, and she and Bickerton L. Winston knew at the time the bond was executed, that said Thomas L. Gregory was then the intended husband of the said Sallie P. Winston, and that they expected to be married in a short time thereafter. That no notice was given to said plaintiff of the obligation entered into by the said Sallie P. Winston to the said Bickerton L. Winston, as adm'r as aforesaid; and that said plaintiff, Thomas L. Gregory, never had any notice or knowledge thereof, until some time after he had married the said Sallie P. Winston.

They further say, that the said bond was executed at a time when Confederate currency was the currency in circulation, and was executed in reference to that currency. That Bickerton L. Winston, as adm'r, &c., was proceeding under the statute against Gregory and his wife and Jane D. Winston, to enforce payment of interest on the bond. And they pray for an injunction to restrain him from proceeding to recover said interest; upon the grounds: 1st. That Richard M. Winston having purchased the interest of the remaindermen with the money of Jane P. Winston, and taken the deeds to himself, there was a resulting trust in her favor, to the extent that he had used

107 her money in the purchase; *and that there is, to that extent, a failure of the consideration of said bond. 2d. Because the bond having been executed by Sallie P. Winston, during the treaty of marriage with the plaintiff, Thomas L. Gregory, without notice to him, her then intended husband, it was a fraud upon his marital rights, and relieved him from all liability as the husband of his said wife, upon the bond. And 3d. Because the said bond was executed in the month of March 1863, (notwithstanding it bears date the first of January, 1863,) with reference to Confederate currency as a standard of value, which was at that time worth twenty cents to the dollar; and if obligatory upon the plaintiffs at all, should be scaled to the gold standard of value. They make Bickerton L. Winston, as adm'r with the will annexed of

Richard M. Winston, Rosalie S. Winston and Sallie P. Gregory, the wife of the plaintiff Thomas H. Gregory, defendants to the bill, and call upon them to answer. The injunction was granted.

Bickerton L. Winston answered the bill. He denies that Richard M. Winston, acting as the agent of Jane D. Winston, and with her money, purchased the interest of the remaindermen in the tract of land, for her; for both Richard M. Winston and Jane D. Winston repeatedly told respondent that the money of hers, used by Richard M. Winston in the purchase of said interests, was given by her to him as an advancement to him. And Jane D. Winston also stated to respondent, during the same conversation, that it was her purpose to make her daughter Sallie P. Winston advancements out of the profits of her estate, equal to what she had given to Richard M. Winston. He says further, that Richard M. Winston owned one-tenth in the remainder of the land; he bought another interest from his former guardian,

William O. Winston, and paid him out 108 of money *due him by his guardian; he bought two interests from respondent, one his own and the other which he sold as ex'or of John R. Winston, and gave respondent an order or orders on Edmund T. Winston for the purchase money, which orders had not been paid. And he insists she cannot now claim the said land, having been privy and a party to all the transactions connected with the sale of the land to Sallie P. Winston, and the execution of the deed to her by respondent; and having elected to take under the will of Richard M. Winston. That Richard M. Winston made his will some time before his death, and left it with Jane D. Winston when he went into service in the Confederate army; that she knew all its provisions long before his death; was privy to all the transactions between respondent and Sallie P. Winston relating to the purchase of said land by said Sallie P. Winston. That she paid the interest in full regularly upon said bond, up to January 1866, and has continued to make payments towards the interest on said bond up to August 1868. And notwithstanding her full knowledge of all these facts, he never heard until the filing of the plaintiffs' bill in this case, that she ever pretended that the land was purchased by Richard M. Winston, with her money, for her use or benefit.

Respondent further says, he knows Richard M. Winston believed that the money he got from his mother to aid him in the purchase of said interests in remainder, was a gift to him, and that the deeds for the same were to have been made to him; and the deed from Sallie P. Winston, for her interest in the land, was probably made in the house of the said Jane D. Winston, as they resided together, and she gave her bond with Richard M. Winston as security, for the purchase money; and she must have known that the deed was made by the said Sallie P. to Richard M. Winston.

109 *Respondent denies that said bond and deeds in the bill mentioned, were carried by him to the residence of Jane P. Winston, and executed on the — day of March 1863. They were carried there and executed on the 16th of January, 1863; and so far from having been carried there to be executed by the parties, in ignorance of their contents and legal effect, without opportunity for consideration or for advice of counsel, the facts of the case are as follows: In the latter part of the year 1862, at the instance and request of said Jane D. Winston and Sallie P. Winston, respondent visited their residence, when the whole matter was discussed; and the said Jane D. and Sallie P. Winston determined and insisted upon taking R. M. Winston's interest in the land upon the terms prescribed in his will. Accordingly the deed and bond were prepared by James Lyons, the mutual friend and counsel of all the parties; and so prepared, were carried by respondent to the residence of the said Jane D. and Sallie P. Winston, on the 16th of January 1863, and after being read and carefully examined, were executed in the presence of Robert O. Doswell, a friend of the family and clerk of the county court of Hanover, and Lucien B. Price, the friend, adviser and business agent of Jane D. Winston.

Respondent further says, that at the time of the execution of said papers, he knew nothing about any marriage engagement, nor contemplated engagement, between said Thomas L. Gregory and the said Sallie P. Winston; nor does he believe that any such at that time existed; and if he did, the contract then consummated was made and fully agreed upon some time in the year 1862, certainly prior to January 1863; at which time respondent believes no such engagement existed. But he insists that the execution of said bond and deed of trust would have been no fraud upon the marital
110 rights of the *said Thomas L. Gregory, even if executed the day before the marriage; because the said Sallie P. Winston received a full, valuable consideration for executing the same. He denies that the said bond was executed with reference to Confederate money, or was to be paid in Confederate money. The price was fixed by Richard M. Winston, in his will, which was executed in April 1861; at which time Confederate money did not exist. And moreover, when the bond was executed, respondent expressly and positively declares that he would not receive Confederate money, except to a small amount necessary at that time for purpose of administration of the estate.

Rosalie S. Winston also answered the bill. Her answer is in most respects substantially the same as that of Bickerton L. Winston. She admits that Richard M. Winston lived with Mrs. Winston, and acted as her general agent in the management of her business affairs; but she denies emphatically, that he, acting as her agent and with her money, purchased the interest of the remaindermen in the land, for her

use and benefit. After stating what money of his own was applied to the said purchase, she says: the residue of the money used in the purchase of said land was obtained by Richard M. Winston, as respondent believes, from said Jane D. Winston, as an advancement. Said Jane D. Winston has frequently stated in the presence of respondent, that she had given said money to Richard M. Winston as an advancement; and that it was her purpose to advance to her daughter Sallie P. Winston an amount equal to what she had so advanced to Richard M. Winston. At that time she could well afford to make said advancements, as the yearly profits of her estate were very considerable. After Richard M. Winston had purchased the interests of the remaindermen in
111 said land, Jane D. Winston, *to carry out this understanding between herself, Richard M. Winston and Sallie P. Winston, in regard to the advancements to be made to the said Richard M. Winston and Sallie P. Winston, as aforesaid, paid to the said Sallie P. Winston a yearly interest on an estimated principle, to equalize the two.

Respondent further says, that at the time of the execution of the bond and deeds, hereinbefore referred to, she might have heard of a marriage engagement between complainant, Thomas L. Gregory and Sallie P. Winston, but cannot say whether she had or not. But she insists that if such an engagement existed at the time of the execution of the said bond and deed of trust it would not be a fraud upon his marital rights. She denies that said bond was executed with reference to Confederate money, or was to be paid in that money.

Jane D. Winston, Mr. and Mrs. Gregory, Rosalie S. Winston, and Bickerton L. Winston, gave their depositions in the case, which were excepted to; and there were also a number of other persons who were examined as witnesses. The testimony of these witnesses was of course conflicting; but the court, not considering that testimony, but basing its opinion upon the written evidence in the cause, it is unnecessary to give that evidence, except indeed a portion of that of Mrs. Rosalie S. Winston, which is made the basis of Judge Anderson's dissenting opinion.

The statements of the bill, as to the will of Philip B. Winston, and the number of his children, and also as to the provisions of the will of Richard M. Winston, are correct; as are also the descriptions of the bond and the deed from Bickerton L. Winston, as adm'r with the will annexed of Richard M. Winston, to Sallie P. Winston, and her deed of trust, to secure the
112 bond; but one *of the disputed facts in the cause is, as to the day when the bond and deeds were executed. They are dated on the first of January 1863; but it is certain they were not executed on that day; and the only question was, whether they were executed on the 16th of January or in March 1863.

There was no question either, that Rich-

ard M. Winston paid for the interest of seven of the remaindermen with money derived from his mother's estate. One of the interests was paid for out of his own estate; and his mother and himself executed their bond to Sallie P. Winston, for her interest, which has not been paid. The deeds for these interests were made to Richard M. Winston. The disputed fact was as to the terms on which Mrs. Winston advanced the money to Richard M. Winston. Mrs. Winston insisted that the understanding between herself and Richard M. Winston was, that the deeds from the remaindermen were to be made to her; and that if enough could be made from her estate to enable her to advance to Sallie P. Winston a sum equal to that advanced to Richard M. Winston, then he was to have the land at her death; but that if she was not able to make an equal provision for her daughter, then he was not to be entitled to the whole of the land. On this question Rosalie S. Winston said, in answer to the following interrogatories by defendants' counsel:

Question 22. Now please state any discussions or conversations you may have heard between Jane D. Winston, Sallie P. Winston and R. M. Winston, with reference to the purchaser of the said interests?

Answer. I know that the subject was fully discussed as each several interest was bought out.

Question 23. At or before the time of the first purchase, was there any understanding or agreement between Jane D. Winston, Sallie P. Winston and R. M. Winston, as to how they should be paid for, and to whom they should belong?—Objected to as leading.

Answer. There was such agreement and full understanding of all the parties concerned, that they should belong to him.

Question 24. What was the agreement as to how they were to be paid for, and if Mrs. Jane D. Winston was to pay any portion: was it also a part of the agreement that compensation should be made to Sallie P. Winston; and if so, how was she to be compensated?—Objected to as leading.

Answer. The first payments he made with his own money; the payments afterwards were made with the money loaned him by Mrs. Jane D. Winston. It was also a part of the arrangement that compensation should be made to Mrs. Sallie P. Gregory, by paying her an interest on an estimated principal beginning at the same time—at the same age, I mean, as such advancements were made to her brother, until an equal amount of principal was given to both.

Question 25. Who was to make that compensation to Sallie P. Winston?

Answer. My husband, I suppose. The estate was bound for this payment until she was made equal.

After several questions and answers in relation to other matters, the following questions and answers were put and given:

Question 37. You state in answer to the 24th chief question, that "the first payment he (meaning R. M. Winston) made

with his own money; the payments afterwards were made with the money loaned him by Mrs. Jane D. Winston." State whether or not the money thus obtained from Mrs. Jane D. Winston was understood to be an advancement to the said R.

114 M. Winston, *or merely loaned by her to him, to be repaid by him?—Objected to as leading.

Answer. As advancements, certainly.

Question 38. You further state, in answer to the 24th question: "It was also a part of the arrangement that compensation should be made to Mrs. Sallie P. Gregory, by paying her an interest on an estimated principal;" and in answer to the 25th question, which is in the words following, to wit: Who was to make that compensation to Sallie P. Winston? You say, "My husband, I suppose. The estate was bound for this payment until she was made equal." Did you understand, and so intend it to be understood, that R. M. Winston was to pay the said compensation out of his own means, or that the payment was to be made out of the profits of the estate. Please state fully what you meant by said answer?

The plaintiffs excepted to this question, because the answer referred to is so plain as to admit of but one construction; and therefore requires no explanation; and upon the further ground, that the question is a leading one.

Answer. I answered this question without thinking on the subject. It is an absurdity to suppose that Mr. R. M. Winston was bound for the said payments, as his only means were a small salary paid him by his mother, Mrs. Jane D. Winston, for his services rendered on the farm. Mrs. Jane D. Winston received all the profits of the estate, and there is no question or doubt that she meant herself to make advancements to her daughter, as she had done to her son.

The bond and deeds referred to in this case were executed at the house of Mrs. Jane D. Winston. It appears that James Lyons, Esq., who had been counsel and friend of her husband in his life time, 115 was employed by *Bickerton L. Winston to prepare these papers; and he having prepared them, sent them to Bickerton L. Winston, who took them to the house of Mrs. Winston, accompanied by Dr. L. B. Price, who was the friend of Mrs. Winston, and sometimes her adviser. Mr. Robert O. Doswell, the clerk of the County court of Hanover, was also there. The papers were read to Mrs. Jane D. Winston and Sallie P. Winston, in the presence of these gentlemen; and were executed by the parties; Mrs. Winston and her daughter Sallie P. Winston asking no explanations, and receiving none. On this bond, Mrs. Winston paid the interest regularly up to January 1866; and she made partial payments up to August 1868.

On the question as to the time of the execution of these papers, all the parties and witnesses who speak on the subject, concur in the fact that they were executed on the

same day on which the personal property of Richard M. Winston, deceased, was appraised; this personal property being at the house of Mrs. Winston. Several witnesses say that this was in March, and some of them refer to circumstances as confirming them in their recollection. But Mr. Lyons' note, sending the papers to Bickerton L. Winston, is dated January 12th; a receipt given by the appraisers of the property, to Bickerton L. Winston, for their fees for appraising it, is dated the 16th of January, and two of them say they were paid on the day the appraisement was made; and there are two receipts of R. O. Doswell, the clerk of the court and also a notary, in one of which, under date of the 16th of January 1863, he charges B. L. Winston, adm'r of R. M. Winston, for taking the acknowledgment of said B. L. Winston, to the deed to Miss S. P. Winston, and also the deed of trust from her to B. L. Winston; and under the same date he charges B. L. Winston, adm'r, &c., of R. M. Winston, to tax

116 on the deed of trust from *Sallie P. Winston. The engagement between Thomas L. Gregory and Miss Sallie P. Winston occurred on the 20th of January, and their marriage took place on the 22d of April 1863. His attentions to her appear to have become known in December 1862.

The cause came on to be heard on the 12th day of March 1870, when the court held that the title to the several interests in remainder in the bill and proceedings mentioned, except the interest of Sallie P. Winston, as to which the court reserved its decision, was in Richard M. Winston, at the date of his will, and at his death; and that there was no trust or equity therein, resulting in favor of Jane D. Winston. That Bickerton L. Winston, as adm'r with the will annexed of Richard M. Winston, deceased, had full authority to sell and convey said interest, on the 16th of January 1863, and that his deed executed on that day, bearing date the first of January 1863, vested a complete title to the said interest in Sallie P. Winston, now Sallie P. Gregory; and that the bond and deed of trust were fairly executed, and for valuable consideration; and were executed without any intention to defraud her intended husband, Thomas L. Gregory; and are therefore legal, valid and binding contracts, and not in fraud of the marital rights of said Gregory. And reserving the question whether the bond should not be credited as of its date, with the amount of the bond given by R. M. Winston and Jane D. Winston, for Mrs. Gregory's interest in remainder; and having a statement made, showing that there would be due of interest on the bond, up to January 1869, if Mrs. Gregory's interest was credited on the bond, the sum of \$893, the court dissolved the injunction as to that sum.

From this decree Thomas L. Gregory and Jane D. Winston applied to this court for an appeal; which was allowed.

117 *Young, for the appellants.

Griswold and Winn, for the appellees.

STAPLES, J. The complainants, who are the appellants here, base their claim to relief upon two distinct grounds, which will be considered in the order in which they are presented.

The first ground applies exclusively to Mrs. Jane D. Winston. Her position is, that Richard M. Winston was her general agent and manager; and as such, obtained control of her funds; that he used her credit and money to the amount of twelve thousand five hundred and fifty dollars and seventy-five cents, in the purchase of the several interests in remainder in the "Poplar Springs estate;" and having taken the deeds in his own name, he held the legal title subject to a resulting trust in her favor, to the extent he had so used her credit and money; and to that extent there is a failure of consideration in the bond which is the subject of controversy.

On the other hand, it is claimed by the defendants, that four of the interests in remainder were purchased by Richard M. Winston, with his own means, or upon his own individual credit. As to the other interests, it is admitted they were paid for with money furnished by Mrs. Jane D. Winston; but it is insisted, the money thus furnished was given to Richard M. Winston by way of advancement. In support of these respective pretensions, the depositions of many witnesses have been taken, including the parties to the controversy. This testimony is conflicting and wholly irreconcilable. As might have been expected, a bitter and protracted family feud is the result. I do not propose to discuss this testimony. Discarding entirely the depositions of the parties, and also the evidence of the witnesses where there

118 *is any conflict, I shall base my conclusions upon admitted or well established facts.

It may be safely assumed, that Mrs. Jane D. Winston, before the sale to her daughter, Miss Sallie P. Winston, was appraised of the contents of Richard M. Winston's will. She knew he claimed "Poplar Springs" estate in remainder, as his property; that he had authorized his executor to sell it; and she knew the terms upon which the sale was to be made. With this knowledge, she made no objection, when Miss Sallie P. Winston notified the executor of her wish to make the purchase upon the terms proposed. The papers were read over by her, or to her, at her own house, before they were signed and executed by the contracting parties. She knew all the facts; she was perfectly acquainted with the whole arrangement. And yet she never intimated to the executor or to any one else, so far as this record discloses, that "Poplar Spring" belonged to her in remainder; that it was purchased with her money; and that her son had violated his duty and his contract in taking the deeds to himself. So far from it, she united with her daughter in the bond given for the purchase money;

and she saw, without objection or complaint, the deeds executed by the parties, acknowledged and placed on record. Now, supposing that Mrs. Winston did not at the time fully comprehend the nature and bearing of the deeds and the effect of what she had done, she certainly did so afterwards. She had an interview with Mr. James Lyons, for what precise purpose does not appear, and he explained to her the nature of the several papers prepared by him. She tells us, however, she was no better satisfied than before. And yet after this, she insisted upon paying the executor a part of the bond in Confederate currency,

not because she desired to rid herself
119 of a burdensome obligation upon *the easiest terms, but for the reason, as she states, it was her understanding the debt was contracted with reference to that currency. The interest was also paid by her in like currency to the close of the war. After the war was ended, it was paid in United States currency until August 1868. The various payments thus made by her, amounted to more than three thousand dollars. During all the time between the death of R. M. Winston, in 1862, to the filing of this bill in 1869, we do not hear of any claim asserted by Mrs. Winston to the estate in question, or to a resulting trust in her favor. No complaint is made, no dissatisfaction expressed, with what had been done.

Against this imposing array of facts and circumstances what have we? A single unguarded statement made by Mrs. Rosalie S. Winston, in her deposition, is relied on to annul the deliberate contracts of the parties evidenced by instruments of the most solemn nature, and an acquiescence of seven years. Upon her examination she stated, it was part of the arrangement that compensation should be made by her husband, Richard M. Winston, to Miss Sallie P. Winston, by paying her an interest on an estimated principal beginning at the same age, as such advancements were made to Richard M. Winston, until an equal amount of principal should be given to both. I do not attach the slightest importance to this statement, because it is obvious the witness did not understand the drift of the question asked her, or of the answer she gave. Before the examination was concluded, she fully explained her meaning. In her answer to the bill, she states, with great particularity, her understanding of the whole arrangement, and all the facts connected with it. And it is apparent that she did not intend, as a witness, to contradict the statements made in the answer.

Besides all this, the fact supposed
120 *to be proved by Mrs. Rosalie S. Winston, is no part of the case made in the bill. The plaintiffs' claim to relief is not based upon any supposed arrangement for the benefit of Miss Sallie P. Winston, but upon the ground that there is a resulting trust in favor of Mrs. J. D. Winston, because the estate was purchased with her money and upon her credit.

It is also insisted, that Mrs. J. D. Winston was, at the time of the execution of the bond and deed, without counsel and ignorant of her rights. But, whose fault is it she was without counsel? She had ample opportunity of procuring such advice and assistance as she needed. Her friend and adviser, Dr. Price, was present at the time, invited there by the executor because he occupied that relation. She did not consult with him; she did not ask for delay. Now, if the most solemn acts of parties are to be avoided upon averments of this sort, what contracts can ever be enforced? How is such an averment to be answered? How are the courts to define the degree of intelligence competent to a valid contract made in the absence of counsel and without sufficient information? No one, I think, can question Mrs. Winston's purity of character and integrity of purpose. This record shows that she is a lady of great intelligence and of high social position. But these considerations cannot overcome the difficulties in her way. To maintain the claim now asserted, she must establish that her own son, in violation of his duty and his promises, appropriated her means and money; that he caused deeds to be made to himself for property rightfully hers; that she was entirely ignorant of his proceedings for years afterwards, although the deeds were executed by members of the family and duly placed upon the public records of the county.

She must satisfactorily explain why she expressed no disapproval of the purchase
121 chase made *by her daughter; why she united in executing the bond given for the purchase money; why it was she punctually paid the interest for so long a period without objection; and why it was, for more than seven years, she not only acquiesced in, but actually admitted the claims asserted by Richard M. Winston and his representatives. This record contains no explanation, or even attempted explanation, of these matters.

It is very manifest that Mrs. Winston desired and intended that her son should become the owner of the "Poplar Springs estate," after her death. To this end she advanced him the means to purchase the interests in remainder. She was amply able to do so, out of the profits of her estate. She intended also to advance her daughter; and but for the war, she would easily have accomplished that purpose also. The losses she sustained, in common with many others, have prevented the fulfilment of these generous intentions. It is greatly to be deplored. But this change of circumstances cannot convert into a loan that which was simply a gift; nor raise a resulting trust in opposition to the acts and uniform declarations of the parties for a long series of years.

Under all these circumstances, satisfied as I am that the facts do not sustain Mrs. Winston's claims, I do not deem it necessary to consider the questions of law relating to resulting trusts, so elaborately discussed by the learned counsel.

The second ground of relief applies exclusively to Dr. Thomas L. Gregory. It is insisted that the execution of the fourteen thousand dollar bond, by Miss Sallie P. Winston, pending a treaty of marriage between her and Dr. Gregory, without notice to him, was a fraud upon his marital rights; and such bond is therefore invalid as to him.

122 *There is no question that before the marriage the husband can have no right to any portion of his wife's property. She is at liberty to dispose of her fortune in such manner as she pleases, provided it is done with proper motives, and without an intention to deceive her intended husband. As was said by the Master of the Rolls in *England v. Downs*, 2 Beav. R. 522, 528: "The equity which arises in cases of this nature depends upon the peculiar circumstances of each case, as bearing upon the question whether the facts proved do or do not amount to sufficient evidence of fraud practised on the husband."

In the *Countess of Strathmore v. Bowes*, 1 Ves. jr. 23, Lord Thurlow said: The question which arises upon all the cases, is whether the evidence is sufficient to raise fraud. See also the same case reported in 2 Cond. Eng. Ch. R. 33, where the same principle is affirmed. In this country, as in England, it is universally agreed that the ground upon which such transactions are invalidated, as against the husband, is the fraud of the wife. *Cole v. O'Neill*, 3 Mary. Ch. R.; 1 Story's Eq. 273; Schoule's Domestic Relations, 269.

In this State the point has never been decided; though the case of *Fletcher v. Ashby*, 3 Gratt., leads to the conclusion, that in the opinion of the court the distinct ground of relief in all this class of cases, is the meditated fraud practised by the wife upon the intended husband. Judge Allen, speaking for the court, places the decision upon the ground "that the evidence in the record did not show that the deed executed by the wife, prior to the marriage, was executed with intent to commit any fraud upon the marital rights of the husband."

As to what is sufficient evidence of fraud in such cases, the authorities are not agreed. *Goddard v. Snow*, 1 Russ. R. 485; *Loader v. Clarke*, 2 Macn. and Gor. 382; 123 *1 Lea. Cas. in Eq. 449; *St. George v. Wake*, 7 Eng. Ch. R. 610. But it is agreed, that although the settlement is voluntary and not disclosed to the intended husband, it is not, therefore, necessarily fraudulent. The courts will consider the nature of the provision, the situation of the husband in point of pecuniary means, and any other facts which tend to show that no fraud was intended. *King v. Cotton*, 2 P. Wms. 674; *Anonymous*, 34 Alab. R. 435.

It is also clear that an obligation founded on a valuable consideration, executed pending a treaty for marriage, cannot be set aside merely because it is concealed from the husband. The case of *Blanchet v. Foster*, 2 Ves. sen. 264, recognizes the distinction between such an obligation and a

mere voluntary settlement. There a bond was given by a woman about to marry; and at her request it was concealed by the obligee from the intended husband. It was held, nevertheless, he could not be relieved against it. Lord Hardwicke said: "If a woman about to marry parts with a portion of her property, or gives a security or assignment, they are relievable against in this court; but where a debt is contracted for valuable consideration, though concealed from the husband, it is no fraud on the marriage." The decision in *Crumps et als. v. Dudley*, 3 Call 439, obviously proceeded on this ground, though the reasons of the court are not given. In these cases the transaction must of course be bona fide. For, if the wife meditates a fraud, and the other party is aware of it, the obligation would be void as to the husband. With this limitation the husband, so soon as the marriage takes place, becomes bound for all the outstanding debts of the wife, *dum sola*, of whatever amount. She may owe large sums at the time of the marriage, and have nothing to offset them. She may have studiously concealed their existence from her affianced husband. But none of these considerations can avail him. When married, she is married with all her debts as well as her fortune.

Let us see how these principles affect this case. I do not deem it necessary to discuss at length the much controverted question, whether the contract for the purchase of "Poplar Springs," by Miss Sallie P. Winston, was made on the 16th of January 1863, as claimed by the appellees, or in the month of March thereafter, as asserted by the appellants. I am satisfied, however, that the 16th of January is the true period. The letter of Mr. Lyons, enclosing the papers to be executed by the parties, bears date the 12th of that month. The evidence shows they were within a few days thereafter taken by the executor to the house of Mrs. Winston, and there formally executed. Again, it is conceded by all, that the papers were signed the day of the appraisement of R. M. Winston's estate. There is no controversy upon that point. We have the receipt of the appraisers, showing the payment made them by the executor for their services; and this receipt bears date the 16th of January 1863. Now, the appraisers and the executor all agree that the appraisers were paid and the receipt given the same day the appraisement was made. Besides this, we have the receipt of the notary, who was present and took the acknowledgment of the parties, for the fee paid by the executor; and this receipt is also dated 16th of January, 1863. The same officer, in his capacity of deputy clerk, gave a receipt for his fee, in admitting the deeds to record; and this receipt corresponds in date with the others. Neither the appraiser, nor the notary, nor the appellants, suggest or even hint at any erasure or alteration of the papers. The original receipts are filed with the record; and there is nothing on the face of them to cast the slightest sus-

125 picion upon their correctness. It is impossible to overcome such facts by the testimony of four or five witnesses, speaking solely from recollection. And I am satisfied the papers were signed, and the contract completely executed, on the 16th of January 1863; and not in March.

And now as to the engagement or treaty for the marriage. Dr. Gregory tells us, he first addressed Miss Winston the latter part of December 1862. She, however, did not give him a definite answer until the Saturday after the 20th of January 1863; at which time the engagement was formed. It is clear, then, that there was no treaty of marriage when the purchase was made and the bond executed by Miss Winston. Now, it is well settled, that the equity in favor of the husband does not arise, unless it can be clearly made out that at the time of the conveyance of her property by the wife there was an engagement of marriage between them. *Kerr on Frauds and Mistake*, 219.

It may be conceded, however, that the bond and deeds were executed in March 1863, during the treaty for the marriage. Does the record furnish evidence of any such fraud as invalidates the bond, as to Dr. Gregory; or indeed of any fraud whatever? It is unnecessary to enter into any extended discussion of the evidence bearing upon this point. A very brief consideration of the facts will dispose of this question.

The will of Richard M. Winston was admitted to probate early in the spring of 1862. At what period its contents were first made known to Mrs. Winston and her daughter is a matter of controversy. Miss Winston, however, in the summer of that year, stated to a friend she expected to become the owner of "Poplar Springs," that she had promised her brother Richard to take it in case of his death. It is very certain, that before the close of that year, the parties had agreed upon the sale

126 and purchase, and that Mr. James Lyons, as a mutual friend, should prepare the necessary papers. Mr. Lyons was consulted, and promised to have them ready by the first of January, 1863. The papers were, however, not prepared until the 12th, and were antedated by the draughtsman, to correspond with the time first agreed on. Now, whether the contract was executed in January, or whether it was executed in March, it was executed in accordance with an agreement entered into and fully understood by all the parties, before any treaty of marriage, and indeed before Dr. Gregory had made any declaration of his intentions. Under these circumstances, it would seem impossible that any fraud upon his marital rights could have been meditated. See *Waller v. Armistead's adm'r*, 2 Leigh, 11.

Again: It appears that the deed of the executor, conveying the property to Miss Winston, and the deed of trust executed by her, were acknowledged before the deputy clerk, and admitted to record on the same day they were executed, or certainly within a few days thereafter. The deed of trust

recites the bond, its date and amount, and all the facts and circumstances of the transaction. If, then, the month of March be regarded as the period of entering into the contract, according to the pretensions of the appellants, it appears that the parties, more than a month before the marriage, placed their deeds upon the records of the county; where they were open to the inspection of the intended husband and the entire community. I do not mean to say that this registration is to be regarded as constructive notice to Dr. Gregory. Whether it would have that effect under our statutes, it is unnecessary now to decide. But clearly the promptness displayed in placing the conveyances upon the record, does not indicate any expectation or desire to keep the transaction concealed from the intended

127 *husband. *O'Neill v. Cole*, 4 Maryl. R. 107. Another circumstance deserves consideration in connection with this question of fraud. It would seem to have been the earnest desire of Mrs. Winston and her children to retain "Poplar Springs" in the family. With this view, Richard M. Winston became the purchaser of all the interests in remainder; his mother assisting him in paying the purchase money. In the event of his death, Richard M. Winston desired that his sister should become the owner; and in his will he offered the estate to her upon substantially the same terms he had purchased it. Miss Winston, with the consent of her mother, accepted the offer. Mrs. Winston's determination, no doubt, was to advance the daughter to the same extent she had advanced the son. She expected to pay the interest accruing upon the bond, as indeed she did pay it down to August 1868. As to the principal of the debt, that would ultimately belong to her or her daughter; and in this way be extinguished. But if this expectation should not be realized, the estate itself was bound for the debt under the deed of trust, and constituted ample security for its payment. As the parties were then situated, with means and resources they then commanded, these were very reasonable calculations. The contract was such as they might reasonably expect to perform without inconvenience or loss to themselves or others. And I have no idea that either of them, or any of the parties to this family arrangement, ever entertained a thought that Dr. Gregory could in any way be injured or affected by the obligation given for the purchase money. It is very clear there is not the slightest ground for the imputation of fraud upon any one connected with the transaction.

The only remaining question to be considered is, whether the bond in controversy was, according to the 128 *understanding of the parties, to be discharged in Confederate notes. There is no proof in the record of any understanding on the subject. As usual the parties differ in their construction of the contract. We must, therefore, look to their conduct and the other circumstances of the

case to ascertain the meaning of the obligation they have executed. There is no doubt but that the price agreed to be paid by Miss Winston, estimated in a sound currency, is an extravagant one. It is, however, about the same Richard M. Winston paid the devisees for their interests in remainder. By his will, executed in 1861, he (Richard M. Winston) offered the estate to his sister upon the same terms at which he had purchased it. It is very certain he did not mean Confederate currency, as no such currency was in existence when the will was made. Miss Winston, in accepting the offer, must be regarded as doing so upon the terms proposed. The executor was not authorized to suggest or accept any other. Indeed it was no part of the executor's duty to propose terms; but solely to make them known. He was not negotiating a sale, but consummating one proposed by his testator.

It is also to be borne in mind, that the principal of the debt was only to be paid at the death of Mrs. Rosalie S. Winston—an uncertain event. It is hardly presumable that the executor would receive, or agree to receive, a sum thus payable and well secured, in a currency subject to a daily depreciation. Nothing in the record gives the least countenance to such inference or conclusion.

It is true that Mrs. Winston made a tender of five thousand dollars, some time in the year 1864; which was refused by the executor. The bond was not then due, and there was not the slightest pretence of right in the tender. But after this, and after Mrs. Winston had consulted
129 *counsel on the subject, she continued to pay the interest punctually during the war in Confederate currency. And after the close of the war she paid in the present currency the interest for three years upon the whole amount of the bond. These circumstances—all the facts of the case, lead irresistibly to the conclusion that the bond was executed without reference to Confederate currency, and was to be paid in the circulating medium of the country, at the period of its maturity.

For these reasons I am of the opinion there is no error in the decree of the Circuit court, and that the same should be affirmed. In considering the case I have not deemed it important or necessary to pass upon the exceptions to the depositions. These exceptions present novel and difficult questions, only to be decided after a very deliberate consideration, which the court has not been able to give in this case. My opinion is based upon facts fully established, without reference to the testimony given by the parties. If we should, however, consider that testimony, it would not change the result. To say the least, it is very conflicting; and being so, the undisputed acts and declarations of Mrs. Jane D. Winston and her daughter, Mrs. Gregory, the instruments executed by them of the most solemn nature, must be regarded as conclusive of the controversy.

ANDERSON, J. Even if the testimony of Dr. Gregory and his wife, and of Mrs. Jane D. Winston, is excluded, and the case is to rest upon the testimony of the appellees, I think it is evident that the money which R. M. Winston received from his mother, to purchase the interests in remainder in the "Poplar Springs" farm, was advanced to him with the understanding that his sister should be equally advanced; and then, and not until
130 *then, it was to be his absolute property. I think this is shown by the testimony of Mrs. Rosalie S. Winston, the widow of Richard M. Winston, whose interest is directly opposed to this theory; and her testimony should, therefore, be taken most strongly against her. And there is nothing in her answer, or in the testimony of the other witnesses, in conflict with it.

She says the first payments were made by R. M. Winston, with his own money. Afterwards they "were made with the money loaned him by Mrs. Jane D. Winston. It was also a part of the arrangement that compensation should be made to Mrs. Sallie P. Gregory, by paying her an interest on an estimated principal, beginning at the same time—at the same age, I mean—as such advancements were made to her brother, until an equal amount of principal should be given to both."

There seems, then, to have been an arrangement or agreement between Mrs. Winston and her son and daughter, as to the terms or conditions upon which she would loan or advance money to her son, to buy up the remainders; and this before he received one dollar of her money for that purpose. And the witness seems to give here an unvarnished representation of what that arrangement was. It is, in effect, that the mother would loan money to her son for that purpose, upon condition that his sister was to be made equal, when it was to be his absolutely. And until that could be done, the mother was so intent upon exact equality, that she made it a condition that her daughter, when as old as her brother was when advanced, should receive interest upon the same amount which should be loaned or advanced to him.

The money she proposed to allow him to use in the purchase of these shares, was hers, and was not to be his, until his sister was made equal. The annual profits
131 of *the estate was hers also; and the whole was to be bound, to make the daughter equal with her brother. This, I think, is deducible from the answer as given, but is made clearer by her answer to the next question, to wit: "Who was to make that compensation to Sallie P. Winston?" The answer is: "My husband, I suppose." This she immediately qualifies thus: "The estate was bound for this payment until she was made equal." What estate? The estate of Mrs. Winston. And this very money, which she proposed to advance to her son, upon the terms that her daughter was to be made equal to him, and

which had not yet been advanced to him, was her property, and a part of her estate, and was to be loaned and advanced to him on those terms. This is the simple and unvarnished testimony of the witness, when examined in chief, on her own behalf, by her own counsel. And I cannot doubt its truth. And upon it I think the appellant might safely rest his case. But her counsel, seeing its bearing against her, and the importance of breaking the force of it, after playing off for some time on other subjects, returns to this, and propounds to her the 37th question, which is in these words: "You state in answer to the 24th chief question, that the first payment he (meaning R. M. Winston) made with his own money; the payments afterwards were made with the money loaned him by Mrs. Jane D. Winston." State whether the money thus obtained from Mrs. Jane D. Winston was understood to be an advancement to the said R. M. Winston, or merely loaned by her to him, to be repaid by him?" This question is objected to by the appellants' counsel, as leading. It seems to me that it clearly suggests to the witness what answer was desired, and ought strictly to be rejected. But, what is the answer? It is: "As advancements, certainly." As

I view it, it matters not whether it
132 was an advancement *or a loan; it having been made, as testified by this witness, pursuant to an arrangement previously made, that the daughter was to be made equal. The advancement was to be made upon a stipulation or condition, which was for the benefit of Sallie P. Winston; and it matters not by whom she was to be made equal; if that was not done, the advancement did not vest in her brother an absolute property. Suppose the arrangement had been in terms thus expressed: "You may take the money with this understanding: that your sister is equally advanced; and that after she attains your age, she is to receive interest upon the same amount you get, until she is made equal;" could that be held to be any thing but a conditional advancement? And could it change the effect of it, that the daughter was to be made equal out of the estate of her mother? I think not. If for any cause the daughter was not made equal; as, for instance, by the death of the mother, which terminated her estate; or the loss of her estate in her life time, whereby she was unable to make her daughter equal, there would be a failure of the condition upon which the gift was to be absolute. And the money having been given to him for a special purpose, to buy up the interests in remainder in the "Poplar Springs" farm, the investment would be subject to the same condition. Only to this extent, and in this sense, was it a loan by Mrs. Winston to her son. It is not claimed that it was to be repaid by him, except only so far as it might be necessary to make his sister equal. And whilst this answer of the witness is, that the money which she had previously described as a loan to her husband from his mother, was an advancement, she does not otherwise

negative the alternative branch of the inquiry: "or merely loaned by her to him, to be repaid by him?" The answer can properly be only understood to mean
133 *that it was an advancement only in the sense that it was not "a loan to be repaid by him." Nor is it contended by the appellant, that it was a loan in that sense. I do not regard this answer as conflicting in substance with her answer to the 24th question.

Her counsel then propounded the 38th question, in these words: "You further state, in answer to the 24th question: It was also part of the arrangement that compensation should be made to Miss Sallie P. Gregory, by paying her an interest on an estimated principal;" and in answer to the 25th question, which is in the words following, to wit: "Who was to make that compensation to Sallie P. Winston?" you say: "My husband, I suppose. The estate was bound for this payment until she was made equal." "Did you understand, and so intend it to be understood, that R. M. Winston was to pay the said compensation out of his own means, or that the payment was to be made out of the profits of the estate? Please state fully what you mean by said answer?" This question is also excepted to, upon the ground that it is leading, &c. Considering the relation in interest which the witness stood to the cause, if the question is not illegal, the manner in which it is propounded is calculated to weaken the force of the answer. But if we give it all the credit which the circumstances would warrant, it seems to me that it does not change the effect of her previous unembarrassed testimony. Her answer is: "I answer this question without thinking on the subject. It is an absurdity to suppose that Mr. R. M. Winston was bound for the said payments, as his only means were a small salary paid him by his mother, Mrs. Jane D. Winston, for his services rendered on the farm." She had said, payment was to be made by her husband. I do not think she meant that

it was to be paid by him out of his small
134 salary, which she now so *triumphantly negatives. But she had immediately qualified what she did say, by adding, "the estate was bound." I do think she meant that the whole estate was bound for it; and as her husband had it in his hands, and the management of it, he could make the payments to his sister, to equalize her with him, out of the profits. So that she was not far wrong, when she supposed that the compensation was to be made by her husband, not out of his small salary, which would have been absurd indeed. But to say that the whole estate, including the large sums which were to be advanced by the mother to her son, being part of her estate, should be bound, to make her daughter equal, (which she virtually asseverated in her answer to the 25th question, when she said "the estate was bound,") involves no absurdity; and she has not retracted it in this, her explanation, and no where in her deposition.

She answers further: "Mrs. Jane D.

Winston received all the profits of the estate; and there is no question or doubt that she meant to make advancements to her daughter as she had done to her son." But at that time, when this agreement or arrangement was made, she had made no advancement to her son; and what she then agreed to advance to him was her property, and she had a right to advance it with that limitation or condition. But that Mrs. Winston intended to make advancements to her daughter I doubt not is true. But her daughter has received no advancement; nor has she received the interest on the sum which her mother advanced to her brother. We have seen that those advancements were made to him on terms, as testified by his widow. Those terms have not been complied with. His sister is entitled to be equally advanced with him; and until that is done, she is entitled to interest on a sum equal to the amount he received. There

is no estate in the possession
 135 *of Mrs. Jane D. Winston, out of which she can be paid. The profits of her estate are barely sufficient for her scanty support. As matters are, Richard has received all, and there is nothing left, wherewith to make his sister equal with him. But he received it, with the understanding and agreement that his sister was to be made equal. That can only be done by his paying over to her a part of what he had been over advanced.

It is most manifest, if there is one thing certain in this cause, it is, that it was the fixed purpose and determination of Mrs. Jane D. Winston, that her son and daughter should share equally in her estate. But it is said, that in her circumstances and condition the amount she gave her son was not an unreasonable advancement, and was not at all inconsistent with that purpose; that she had an estate which yielded an income of five or six thousand dollars annually, and that when she advanced the several sums to her son, amounting in the aggregate to about 12,650 dollars, there was a reasonable certainty that she would be able to make her daughter equal. But is this so? The proof is, that her annual income had been very variable; that it had been as low as 3,000 dollars, and had reached as high as 6,000 dollars in a year. But the estate from which she derived her income was principally a life estate; it terminated with her life. If she lived long enough, and her affairs were as prosperous as they had been, she might be able to advance her daughter equally. But the condition she made, that her daughter was to be paid interest, upon a sum equal to that which she agreed to let her son have, for the special purpose before adverted to, until she was made equal to him, shows not only her purpose of exact equality between them, but also that she herself calculated that it might be many years before she could

136 advance *from her income enough, if at all, even if she lived, to make her daughter equal. Her ability, then, to make advances to her daughter, equal to the large

advances she contemplated making to her son, was suspended upon the brittle thread of life, and upon its continuance for many years. What is more uncertain? It was natural, then, when Mrs. Winston determined to make these large advances, to purchase the interests in remainder in the "Poplar Springs" farm, which she intended for her son, that she would do so on terms which would secure to her daughter, in any event, that equality which was her fixed purpose and the wish of her heart; and those terms, though perhaps not fully, are sufficiently disclosed in the testimony of Mrs. Rosalie S. Winston.

I have given her testimony on this point, in detail, and have dwelt upon it, because, in my opinion, the whole case turns upon it. And as I understand it, it harmonizes, in substance with the testimony of Mrs. Jane D. Winston. She says explicitly, as the remaindermen were disposed to sell, her son bought them out with her money; and that it was distinctly understood between us that my daughter was to be made equal with him in every particular. And she regarded herself as the owner of the remainders, purchased with her money, until her daughter was made equal. On cross-examination she says, when her son made up to her daughter the sum which she advanced, then the place was to be his, at her death. It was understood that the land was to be Richard's, at her death, if he could make an equivalent for Sallie, out of the farm, of the money she advanced for the purchase of the interests in remainder in the land; for, she says, she "hadn't it to give her then, unless he could make it out of the farm." "It was a sort of family arrangement."

137 *But her testimony is excepted to, because she was a party to the contract with her son; and he is not living. The ground of exception is predicated of a contract between her and her son, pursuant to which she gave him the use of her money. If so, it was not a general, unqualified, and unconditional advancement; but was made on terms. Though there was a contract, she was not a party in interest to it; but in the matter was acting both for son and daughter, as the equal protector of their interest; and they were equally the objects of her bounty. But Mrs. Rosalie S. Winston, who is as deeply interested in the result of the suit as any one, insists upon excluding her testimony, as well as Dr. Gregory and his wife's. whilst she gives her own. But if Mrs. Gregory's testimony is excluded, Bickerton L. Winston's is inadmissible. I am not prepared to say that Mrs. Jane D. Winston was incompetent. But, let the whole of the appellants' testimony be excluded, and let the case rest upon the one-sided testimony of Mrs. Rosalie S. Winston and her witnesses, and it seems to me that the evidence still preponderates in favor of the proposition that it was not a general, unqualified advancement to the son, but was made upon terms or conditions, that it was to be his, when

his sister was made equal to him. Doubtless it was expected that this could be done out of the profits of the estate, if life was spared and they encountered no extraordinary difficulties. But he took the money with the understanding that his sister was to be made equal to him; and as a consequence, if that could not be done from any cause, he would have to refund, and the investments he made would be chargeable.

The testimony of E. T. Winston and Bickerton L. Winston, (if his testimony can be considered,) are not in conflict with the testimony of Mrs. Rosalie S. Winston, as it is plainly to be understood. They 138 both say that *Mrs. Jane D. Winston spoke to them of having made advancements to her son. And so she did. But they were made with conditions and limitations, which it was not incumbent on her to have mentioned to them, unless she undertook to disclose to them fully and in detail the arrangement made between her and her son, to which Rosalie S. Winston testifies; but this does not appear.

Nor is the testimony, as understood, in conflict with Mrs. Rosalie S. Winston's answer. She admits in her answer the general agency of R. M. Winston for Mrs. Jane D. Winston, in her business affairs; but denies that he purchased the remainders "acting as her agent, for her use and benefit." This it is not necessary to controvert to make good my position. But she admits in her deposition, indeed asseverates, all that is necessary to maintain it.

Nor is the conduct of R. M. Winston, in having the deeds for the remainders executed to himself; nor by his will, disposing of these remainders; nor is the election of Sallie P. Winston, to take his interest in the land, on the terms he proposed; nor the payment by Mrs. Winston, of interest upon the bonds given by her daughter for the consideration of that purchase, repugnant to this view of the case.

I propose briefly to remark on these several assumptions, in conclusion. The mother expected the deeds for the remainders to be made to her. The son had them executed to himself, I am persuaded, not doubting that the whole arrangement would be carried out, that his sister would be made equal to him; and that as it was the wish and intention of his mother that he should have the land, and his sister should be made equal with money, her purposes would be fully accomplished by having the conveyances made to himself at once. All these transactions, as well as the making

139 of his will by *R. M. Winston, were prior to the war between the States, and were all done by him with the understanding, intention and expectation, that the whole arrangement respecting his sister would be carried out to the letter, and that she would be made equal with him. And after the death of Richard M. Winston, in 1862, his mother and sister, hoping and expecting that the whole arrangement with respect to his sister could and would be carried out, and that she would be made

equal to him—without meaning to surrender any part of her right thereto, or to release the estate of R. M. Winston from his obligations thereto—concluded to acquiesce in what the said Richard had done. And Sallie P. Winston agreed to take the interest vested in him in the land by the deeds which had been executed to him by the remaindermen, on the terms which the said Richard proposed in his will; and to this end, executed the papers which they were told were necessary and proper. What else could they do? Mrs. Winston was desirous of retaining the old homestead in her family, which, in the then state of things, could only be done by resisting the will of her son, upon the ground that it was in fraud of his sister's rights, which she knew was not his design; or to acquiesce in what was done. And unless Sallie accepted his interest in the land, the executor was required to pass it to any one who would take it. And so the homestead would pass out of the family forever. And they could not see that by the execution of the papers which had been prepared for them, Sallie would be debarred from her right to be made equal, agreeably to the arrangement on which the money had been advanced by her mother to buy out the interests in remainder. They doubtless both confided in the administrator, who was a near relative, and in the lawyer, by whom they were informed the papers were 140 prepared; and executed them, *not doubting that it was necessary and proper that they should execute them. I apprehend, however, if they had taken legal advice, they would have required an express stipulation, to the effect that the interests which the representative of R. M. Winston claimed for him in the land, were subject to the right of Sallie P. Winston to be made equal with him. I am very confident that if they had had the benefit of good legal advice, the papers which they executed are not precisely such as would have been executed by them. But still I do not think that there is any thing in them, either expressed or in effect, which amounts to a surrender on the part of Sallie P. Winston of her right to equality; and to hold the interests purchased by her brother in the land, with his mother's money, bound to make good that equality, and the interest on the same amount he had received, until she was made equal. She doubtless indulged the hope and expectation, as did her mother, that the arrangement which had been made with Richard M. Winston, upon the faith of which he was allowed to use his mother's money in buying up the remainders, might be carried out without requiring any part of the money to be refunded, which had been advanced to him with that qualification. But neither the mother, nor her daughter, by agreeing to carry out the will of R. M. Winston, intended that Sallie P. Winston, by the acceptance of his interest in the land, on the terms proposed by his will, should surrender her right to be made equal with him, and to receive interest on

the amount which R. M. Winston had received, until she was made equal; and to hold the interests in the land, which he purchased with his mother's money, bound for it, if it should become necessary.

Nor can I perceive any thing in the act of Mrs. Jane D. Winston, in paying
141 interest on the bond executed by *Sallie P. Winston, and herself repugnant to this view of the case. That was done in perfect consistency with the purpose and motive attributed to Mrs. Winston and her daughter, in acquiescing in and carrying out the will of R. M. Winston. They then expected that the income from the estate would be sufficient to make Sallie equal and pay interest to her, according to the arrangement, until she was made equal. And as long as Mrs. Winston had any hope of being able to do it, she paid full interest to her daughter-in-law, upon the price at which Sallie had agreed to take the estate in remainder, and did not allow her daughter to go back on the advances she had made to her son in order to be made equal to him. She paid the whole of the interest during the war, and until 1866. Afterwards she found it utterly impossible to continue to pay the interest and carry out the arrangement as to the daughter, upon the faith of which she had made the advancements to her son; and that her daughter, in order to get the benefit of that arrangement, would have to fall back upon the property in which the money so advanced to her brother had been invested. According to the original design, R. M. Winston was not required to refund, unless his sister was not otherwise made equal. The money advanced to him, Mrs. J. D. Winston says, was to be his, when his sister was made equal. When she could not be made equal, therefore, he must refund. The payment of interest by Mrs. Winston, therefore, until it was understood that her daughter could not be made equal without going back upon the advancements to her son, is not at all repugnant. After 1866 she paid a part of the interest; a part being due her after deducting the interest due to Mrs. Gregory.

This was a family arrangement; and, the way I view it, is consistent with the
142 amiable, refined and honorable *character ascribed by the counsel on both sides to the parties concerned. It is consistent with the filial devotion and paternal affection and honorable character of R. M. Winston. It is consistent with the circumstances of Mrs. Jane D. Winston; the tenure by which she held her estate; and her equal affection for her son and daughter; and her known wish and purpose that they should share equally in her estate; and it substantially reconciles the seeming discrepancies and contradictions of all the witnesses who testified in the cause. On the other hand, it seems to me that the opposing view cannot be taken without discrediting much of the testimony of most respectable and intelligent witnesses, and without giving an effect and operation to the acts of R. M. Winston, his mother and sister, which

neither of them ever contemplated or designed, but which thwarts the intentions and purposes of them all, living and dead, and works the most flagrant injustice to both Mrs. Jane D. Winston and her daughter.

If the view which I have taken of the case could be carried out, Mrs. Gregory would be entitled to receive interest on the one-half of the amount advanced by her mother to his brother, including the price she was to receive for the share in remainder which her father devised to her; and to have the same deducted from the interest accrued and accruing on her bond to the adm'r of her brother. The balance of the interest on the said bond, the widow of her deceased brother is entitled to receive, during her life or widowhood. In this way she would receive a comfortable support; and the arrangement, on the faith of which the money to purchase the interests in the land was advanced to her husband by his mother, would be carried out.

But, upon the opposing view of the case, the whole profits of the estate of Mrs.
143 Jane D. Winston, after *yielding her a meager support, would fall far short of paying the interest on the bond to the adm'r of R. M. Winston; and according to the terms of the deed of trust, the estate in remainder being liable to be sold for default in payment of interest, will most probably be sold; and it is likely will be absorbed in the payment of interest. Sallie P. Winston, instead of being made equal to her brother, would get nothing; not only so, would lose the devise made to her by her father; and her aged mother would be reduced from circumstances of great comfort to indigency, whilst the widow of her son holds a gripe upon them both, which it would cost, perhaps, every stiver worth of property they own to unloose. Such an effect and operation to his acts and his will could never have entered the brain of R. M. Winston. Could he rise from his grave, to learn that the living of his beloved and venerated mother and his confiding sister were spirited away from them, and vested in his widow, by the effect and operation given to his will and the transactions of his life, which he honestly intended should work no injustice, but believed would result in carrying out his beloved mother's intentions of equal beneficence to himself and his sister, he would be overwhelmed with grief and amazement.

Whilst it is my duty to give effect to the law, I take no pride or pleasure in doing so when it works injustice. I confess it is always my wish, if the case will bear the interpretation, to take a view of it which enables me to do justice in the particular case, whilst I give effect to the law.

The view which I have taken of this case, although not clearly presented by the pleadings, I think is deducible from the averments made therein and the proofs in the cause, and reasonably comports with the conduct and probable intention of the
144 parties, and with *the plain and pal-

pable demands of justice, and does no violence to the law of the case. If I doubted, I think Mrs. Jane D. Winston and her daughter are, in such a case, entitled to the benefit of my doubts.

Upon the whole, I am constrained to dissent from the opinion of the court.

The other judges concurred in the opinion of STAPLES, J.

Decree affirmed.

145 *Farmer v. Yates & Wife.

January Term, 1873. Richmond.

Absent, BOULDIN, J.*

1. **Creditor's Bill—Assets in Hands of Administrator—Decree for Payment to Receiver.**—In a creditor's suit by Y. against F., in his own right and as administrator of A., Y. claims to be a creditor by judgment against F., as adm'r of A.; and F., in his answer, admits he owes his intestate's estate for land purchased in intestate's life time, \$1,100. On the filing of this answer, the court may make a decree, that F. shall pay said \$1,100 into court, or to a receiver; and this, though F. is one of the next of kin of A.

2. **Same—Same—Same—Rules.**—For the rules governing in such cases, see the opinion of *Moncure, P.*

In September 1869, Clayton H. Yates and Sarah F. his wife, suing for themselves and all other creditors of Archer Farmer, deceased, who might elect to come in and contribute to the costs of the suit, filed their bill in the Circuit court of the county of Halifax, against Obadiah Farmer, administrator of the said Archer Farmer, and the heirs of the said Archer, of whom the said Obadiah was one, and the said Sarah F. was another; the said Archer having died intestate, unmarried and without issue, leaving real and personal estate. The plaintiffs, in their bill, claimed to be creditors of the said Archer Farmer, originally by a promissory note given by him to the said Sarah F., then Sarah F. Farmer,

146 *who afterwards intermarried with the said Clayton H. Yates; charged that the plaintiffs instituted suit upon the said note, and recovered judgment thereon, in the said court, against the said administrator; that the said administrator had possessed himself of the personal estate of his intestate, and wasted the same, and rendered no account thereof; that the said Obadiah was himself heavily indebted to

the said Archer, at the time of the latter's death; of which debt the said Obadiah had paid no part, nor rendered any account; and that said claim of the plaintiffs still remained wholly due and unpaid; and praying that the proper accounts might be taken, and they might receive satisfaction of their said claim, out of the said estate, and for general relief.

A copy of said judgment was filed as an exhibit with the bill; the said judgment having been rendered on the 13th day of October 1866, and being for the sum of \$815, with interest from the 21st day of March 1863, and costs \$7 05.

In October 1869 the defendant, Obadiah Farmer, in his own right and as administrator aforesaid, filed his answer; in which he stated that he had settled one administration account, which would show what he then owed the estate, and was willing to make a further settlement, showing his transactions since, and his indebtedness thereon; that in 1859 or 1860 he had purchased of his intestate 130 acres of land, for which he was to pay \$1,100, all of which still remained due and unpaid, except the interest thereon for one year; the bond for the said amount being then in his hands, as administrator; that he had paid on the plaintiff's judgment three years' interest; and that the estate of his intestate had paid a debt of \$77, for which the plaintiffs were liable, and which respondent believed

147 should be credited on *said judgment. The plaintiffs replied generally to the said answer.

There was filed in the suit, no doubt as an exhibit with the said answer, a copy of the administration account referred to therein, showing that the administrator was indebted to the estate of his intestate, on the 26th day of December 1866 in a balance of \$137 27. The debt due by the administrator to his said intestate, for the purchase of land as aforesaid, is not credited to the estate in the said account, nor is any notice taken of it in the report of the commissioner. It does not appear from the record when the intestate died, nor when his said administrator qualified. The first item in the account bears date September 2, 1865, and it is probable the intestate died shortly before that date. The commissioner's report bears date June 8th, 1869, and states that the administrator having laid before him a statement of his receipts and disbursements as such, together with his vouchers, he, the commissioner, on the first day of the April term of the said court, in the year 1867, advertised in the manner prescribed by law, &c. It also states that "the commissioner has examined the official bond of the administrator, and finds it proper in form and in a penalty, and with surety deemed sufficient to secure the accountability of the administrator for the estate, though it may not be sufficient to cover the penalty of the bond in full, as that was taken in December, 1864, when the estate was doubtless valued at Confederate rates. It is proper to state, however, that the bond is not stamped.

*He had been counsel in the case.

†See principal case cited in *Thurston v. Sinclair*, 79 Va. 112; *Aller v. Shriver*, 81 Va. 185.

In *Davis v. Chapman*, 88 Va. 74, 1 S. E. Rep. 472, the court quoted and approved the following words, used by *MONCURE, J.*, in the principal case: "In a creditor's suit, especially, it seems to be fit and proper that the court should have power to call in the assets from the hands of a personal representative. In such a suit the court, in effect, becomes the personal representative, has control of the assets, reduces them into possession, and applies them in due course of administration."

The infant defendants answered the bill, by a guardian ad litem, assigned by the court.

On the 8th day of October, 1869, the cause came on to be heard, on the bill taken for confessed as to the defendants, except those who had answered as aforesaid,

148 *and on the said answers and exhibits; when a decree was made, that the said Obadiah Farmer pay to the plaintiffs \$815, with interest from the 21st of March 1863, subject to a credit of three years' interest paid thereon, and \$7 05 costs thereon; it appearing by the admission of the said Obadiah Farmer, administrator of Archer Farmer, as aforesaid, as stated in the said decree, "that he is indebted to the estate of which he is administrator \$1,100, by bond executed in 1860, with interest," &c.

On the 12th day of May, 1870, a motion was made and a petition filed in said court, by the said Obadiah Farmer, (of which motion due notice was given to the plaintiffs,) to reverse and set aside the said decree, for the following, among other alleged errors therein, viz: "Because it was error to have rendered any decree until there was an account of the assets and liabilities of the estate of Archer Farmer, jr." And in the said petition the following statement is made: "Your petitioner feels that it is due to the other creditors of Archer Farmer, dec'd, that they should have an opportunity of proving their claims, and participating in the distribution of the assets; and for the purpose, as well as for his own protection, he prays that the 'said decree' may be set aside, and an order made for an account of the debts due and owing by his intestate, with the priorities thereof." Whereupon, on the same day and year last aforesaid, the cause came on to be further heard, on the papers formerly read, and on the motion and petition aforesaid; on consideration whereof, the court being of opinion that the said decree was erroneous, reversed and set aside the same; and proceeding to give such decree as, in the opinion of the court, ought to have been given, decreed that a commissioner of the court should take: 1st, an account of the administration of the estate of Archer Farmer, jr., dec'd, by

Obadiah Farmer, his administrator; 149 *2dly, an account of the assets, real and personal, belonging to the estate of the intestate, including all judgments and choses in action due the same; and 3dly, an account of all the debts due and owing, by the said intestate or his estate, and the priorities thereof; and make report to the court, &c. And the decree then proceeds as follows: "And it appearing to the court that the defendant, Obadiah Farmer, administrator of Archer Farmer, dec'd, has in his hands a balance due on a settlement of his account as administrator aforesaid, of \$137 27, and that he is indebted to the estate of his decedent in the sum of at least \$1,100, with interest thereon from the first day of January 1861, on account of a bond executed by him to said decedent in his life time; and it also appearing that the ad-

ministration bond executed by said Obadiah Farmer, at the time of his qualification, was given at a time when the estate was valued in Confederate money, and when the penalty of said bond was fixed with reference to that currency, while the balance aforesaid ascertained to be due from said Obadiah Farmer, is payable in lawful currency; and the debt aforesaid of \$1,100, with interest as aforesaid, having been contracted prior to the late war, was also payable in good money; with a view to securing and protecting the rights of the creditors of said decedent, doth adjudge, &c., that the said Obadiah Farmer do pay to Henry Edmunds and N. T. Green, who are hereby appointed receivers for the purpose, the sum of \$1,100, with interest thereon at the rate of six per centum per annum, from the first day of January 1861, till paid; and that the said receivers do deposit the money so directed to be paid, as soon as they collect the same, &c., in one of the national banks in the city of Richmond, which will pay interest on such deposit, taking a certificate,

150 &c., in their own names, as receivers in this cause, *and file such certificate, with a report of their proceedings to the court. But said receivers shall not be at liberty to collect said money, nor sue out execution thereon, until they, or some one for them, shall enter into bond, with security, before the clerk of this court, in the penalty of \$3,000, payable to the commonwealth of Virginia, and conditioned for the faithful discharge of the duties of their office or trust."

From the said decree of the 12th day of May 1870, an appeal was prayed for, and allowed to this court.

Barksdale, Daniel & Daniel, for the appellant.

Jones & Bouldin, for the appellees.

MONCURE, P., after stating the case, proceeded: The only question involved in this appeal is, as to the propriety of the decree for the payment of the amount of the debt due by Obadiah Farmer to the estate of his intestate, Archer Farmer, into court, or to the receivers appointed to receive and dispose of it as directed by the said decree.

The following appear to be the well settled doctrines of the law on this subject. I quote from 2 Lomax on Executors, 492 marg.; but I might quote to the same effect, and almost in the same words, from all the elementary works on the subject; for they all speak almost in the same language; and there appears to be no conflict among them. According to the present practice in England, the court will immediately, upon the coming in of the answer of an executor or administrator, order so much as he admits to have in his hands, of the property of the deceased, and after all deductions or claims against the estate, to be paid into court; though it was formerly thought necessary for the plaintiff to show that 151 *the executor or administrator had

abused his trust, or that the fund was in danger from his insolvent circumstances. The same order may be obtained where the executor or administrator admits a balance in his hands in his examination, or on the master's report. An executor who had admitted a large balance of the personal estate to be in his hands, was ordered to pay the whole into court, although he stated that an action at law was pending against him for a debt to a considerable amount due from the testator, but with liberty, in case the plaintiff in the action should recover, to apply to the court to have a sufficient sum paid out again. Where an executor admits himself to have been a debtor to the testator at the time of his death, this is held to be a clear admission of assets in his hands to the amount of the debt, and he is compelled to pay it into court accordingly—which is precisely such a case as we now have before us. In this case the person to pay, and the person to receive, being the same, the court assumes that what ought to be done, has been done; and orders the payment, not as of a debt by a debtor, but as of moneys realized in the hands of the executor. Where an executor admits that he has received a sum belonging to the testator's estate, but adds that he has made payments, the amount of which he does not specify, the court will allow him to verify the amount of his payments by affidavit, and order him, on motion, to pay the balance into court. Where money was admitted by an executor to be in the hands of his partner, it was considered in his own hands, for the purpose of being ordered to be paid into court. Where the executor admits that a certain amount of assets has come to his possession, he may discharge himself from the payment of it into court, wholly or partially, by taking credit for sums which he shows a right to retain for his own

152 debt, due from the testator, *or to have allowed him on any just ground, or which are undisputed. The general rule as to payment of money into court is, that the plaintiff must be solely entitled, or have such an interest jointly with others as to entitle them, on behalf of themselves and of those others, to have the fund secured.

These, I believe, are the most material principles that have been settled on the subject; and I have stated them thus fully, in order to show what the law in regard to it is, in the various cases to which it may be applicable. The authorities, or most of them, cited in support of these principles respectively, by the learned author to whose work I have referred, are as follows: *Strange v. Harris' ex'or*, 3 Bro. C. C. 365; *Blake v. Blake*, 2 Sch. and Lef. R. 26; *Rutherford v. Dawson*, 2 Ball. & B. R. 17; *Mortlock v. Leathes*, 2 Meriv. R. 491; *Rothwell v. Rothwell*, 2 Sim. and Stu. R. 218; *Richardson v. Bank of England*, 4 Myl. & Cr. R. 165; *Anon.* 4 Sim. R. 359; *Johnson v. Aston*, 1 Sim. & St. R. 73; *Middleton v. Poole*, 2 Colly. R. 246; *Roy v. Gibbon*, 4 Hare's R. 65; *Nokes v. Seppings*, 2 Phill. R. 19.

In *Strange v. Harris' ex'or*, the modern English practice is clearly, though briefly announced; and in a note to Perkins' ed. of Bro. C. C., the works on Chancery Pr., both English and American, which treat of the subject, are referred to.

In *Blake v. Blake* it was urged by the Solicitor General, for the guardian and executor, that as the testator had committed the estate to his management, and as there was no imputation of insolvency or misconduct on his part, the court ought not to take the fund out of his hands. But the Lord Chancellor, Redesdale, said: "Certainly the old law was as stated at the bar, but modern decisions are different; and it cannot be doubted that the alteration was very

153 much for the benefit of all *parties.

Wherever there are no debts, or the debts are all paid, and no purpose for which it is to be left outstanding, the present practice is, to have the money lodged in court. When there, it is always ready for those entitled to it, when the time comes for paying it to them; and the executor is discharged from any responsibility about it. In England, the good consequences of this alteration of the law are universally felt and acknowledged. I remember the case of a minor entitled to a large personal fortune; part of it was ordered into court, and another part allowed to remain with the executor, who was of acknowledged credit. The result was, when the minor attained his full age, he had 80,000 C. stock assigned to him by the accountant-general; but the sum that was left with the executor was forever lost." "I make the order in this case," proceeded the Lord Chancellor, "on the general principle, without the least imputation upon the executor." In this case, it will be observed, the suit was brought by the testator's children; and the motion was to have the personal fund paid into court and laid out for their benefit, the debts of the testator being discharged. This accounts for the language of the court as to there being no debts, or the debts being all paid. If the plaintiffs had been creditors, entitled to the fund, it would have been paid into court on their motion, and for their benefit. In *Rutherford v. Dawson*, 2 Ball. & Beat. R. 17, the plaintiff sued an executor for an account of his testator's assets and payment of a legacy. The defendant, in his answer, admitted assets in his hands, equal to the payment of the legacy; but claimed to retain it for the purpose of satisfying debts still due and owing by his testator. There was no allegation that the defendant was insolvent, or in bad circumstances; but that he was engaged in trade. The plaintiff moved for an

154 order to pay the *money into court;

but the Lord Chancellor Manners refused to make the order, saying: "The executor is never called on to lodge money in court, except when there is an allegation and affidavit of insolvency, or where he admits having in his hands a clear balance after payment of all debts;" and that was Lord Redesdale's opinion in the case re-

ferred to—of *Blake v. Blake*. Here no such balance is admitted, and the motion must be refused." In this case, too, let it be observed, that the plaintiff sued for a legacy, and not for a debt; which explains the meaning of what was said by the court.

In *Mortlock v. Leathes*, 2 Meriv. R. 491, the bill was for an account by a residuary legatee against an executor, who, it was averred, was himself indebted to the testatrix in a sum of £450. The answer of the executor admitted that there was an unsettled account between him and the testatrix, upon which a balance, to the amount of £368 8s. 6d. remained due to the estate; but it went on to state that the debts of the testatrix were not all paid, and that there were several then outstanding, to which he, the executor, was, to the extent of assets, including that balance, liable. The plaintiff moved to have the said balance paid into court; which motion was resisted, on the ground above stated. The Chancellor, Lord Eldon, inquired when the testatrix died; and being answered, in March 1814, (which was three years before,) said that all the debts ought to have been paid; and made the order. In our case, the intestate had been dead nearly five years, and the debt of the administrator to the estate had been due ten years, when the order was made for its payment into court. But a more important difference between the two cases is, that then the plaintiff was a residuary legatee; while here the plaintiff was a creditor of the estate, suing for himself and all the other creditors.

155 *In *Richardson v. The Bank of England*, 4 Myl. and Cr., 18 Eng. Ch. R. 165, in which the principles on this subject were reviewed by Lord Ch. Cottenham, he remarked: "It was ingeniously attempted to assimilate this case to that of an executor who is ordered to pay a balance of assets into court; although, as a legatee, he may be afterwards entitled to receive part of it back. I see no analogy between the two cases. The executor holds the assets, as a trustee for creditors, who have an interest in the fund; and his claim, as legatee, is in a subordinate and totally different character," &c.

Now, let us apply these principles to this case, and see whether the court below was authorized by them to make the order it did, for the payment of the money into court, or into the hands of the receivers, which is the same thing. The suit was a creditors' suit, for an account of the debts due by the estate, and of the estate, real and personal, and for payment of the debts out of the estate. In the very nature of the suit, it was at least a doubtful question whether the personal estate would be sufficient for the payment of the debts. There was due to the plaintiffs alone a debt of \$815, with interest from the 21st of March 1863, for which a judgment had been recovered. This debt, of itself, was much more than one-half of the whole fund ordered to be paid into court. A decree was made for the payment of the said debt by the administrator, out of

the money which he owed to the estate. But, instead of making such payment, he had that decree set aside, upon the ground that it was erroneous to have rendered it until there was an account of the assets and liabilities of the estate of his intestate; and at his instance, a decree was made for an account of the said assets and of all the debts due and owing by the said estate, and of the priorities thereof. This was in effect a declaration of the administrator

156 *that the assets in his hands, or with which he was chargeable, were insufficient to pay the whole amount of the debts due by his intestate; and would have, therefore, to be apportioned among the creditors, or applied in a due course of administration, according to the legal priorities of the said debts. Had the said assets been certainly sufficient for the payment of all of the said debts, it would have been the duty of the administrator to have made such payment accordingly, and especially to have paid the debt for which the plaintiffs first obtained a judgment at law and then a decree in equity against him. Instead of doing that, the administrator waited ten years, without paying a dollar of the debt which he owed to his intestate, or even bringing it into his administration account; and, so far as the record shows, he made no disclosure in regard to it, until he was compelled to do so in his answer to the plaintiffs' bill.

How, then, can he complain of being required at last to pay this money into court? Has he not had an opportunity, for a long time, for a series of years, to apply this money in a due course of administration? And has he not wholly failed to do so? In one case, we have seen, that Lord Eldon said, after the testator had been dead three years, that all the debts ought to have been paid; and therefore he ordered the fund to be paid into court at the suit of a residuary legatee, although it appeared that, in point of fact, all the debts had not been paid. How much more might such an order be made in this suit, which is a creditors' suit, and where the intestate has been dead nearly five years; and about ten years have elapsed since the debt became due by the administrator to his intestate. The case comes directly within the principles before laid down; and the court below, in my opinion, undoubtedly had the power to call in 157 the *fund. I cannot say that it was an improper exercise of the judicial discretion of the court to do so, even if it can be considered proper in this court to control such discretion in any case. It is an eminently conservative power, as we have seen, especially in one of the cases before referred to. If any inconvenience or hardship should result from it, such effect would be the consequence of neglect or breach of trust on the part of a fiduciary. In a creditor's suit, especially, it seems to be fit and proper that the court should have power to call in the assets, from the hands of a personal representative. In such a suit, the court, in effect, becomes the personal

representative, has control of the assets, reduces them into possession, and applies them in a due course of administration. The institution of such a suit, or, at all events, a decree for an account therein, puts an end to the power of the personal representative to administer the assets, and operates as an injunction of all suits against him by the individual creditors of the estate.

If the money of the estate, in the hands of the administrator in this case was not more than enough to pay its debts, as his conduct plainly implied, then, of course, it was right to require him to pay it into court. The money in that case belonged to the creditors, and to them alone. If it was more than enough to pay the debts, so that a surplus would remain for the next of kin, then it was the duty of the administrator to have paid the debts and distributed the surplus among the next of kin. He no doubt well knew how much was due by the estate, and to whom it was due. He had ample time to inform himself on that subject, as it was his duty to do. It is not probable that his intestate owed many debts, or that they were of a complicated nature. It does not appear that he had been a merchant, or engaged in any business which was

likely to involve the settlement of his estate in difficulty. If the administrator had rendered to the court below a satisfactory account of the amount of debts remaining due by the estate, that court would, doubtless, have required such amount only to be paid into court; leaving the balance in his hands for distribution, as the distributees were not complaining, nor asking for a decree against him. Instead of that, he rendered no such account, but asked that an account of the assets and liabilities of the estate should be taken by a commissioner of the court; and the natural consequence was, the money having already remained so long in his hands, that he was required to pay the whole amount into court. An administrator has no right to use the assets of the estate he represents for his own benefit; though he often seems to think he has; or at least acts as if he had such right. When he does so, he commits a breach of trust, and is tempted to postpone the payment of the debts of the estate, the settlement of his administration account, and the distribution of the surplus among the next of kin. And, to effect his selfish ends, he will even involve the creditors and distributees of the estate in an expensive and protracted litigation. A salutary remedy for these evils often is, to call the money into court, and then proceed with the necessary settlement. When the money is in court, all parties are interested—even the administrator himself—in having the settlement made, and the suit ended as soon as possible.

I am, therefore, of opinion, for the reasons aforesaid, that there is no error in the decree appealed from. I deem it unnecessary to notice what is said in the decree about the administration bond or the penalty thereof; or the currency, in reference to

which the penalty was fixed or the personal estate was valued; being of opinion, without reference to those considerations, that there is no error in the decree.

I have taken no notice, in the foregoing opinion, of a petition to set aside the said decree, which is copied at the end of the record. The said petition is not a part of the record; and even if it was, the matters therein stated, though proved to be true, would not affect the propriety of the decree.

I am for affirming the decree.

The other Judges concurred in the opinion of Moncure, P.

Decree affirmed.

160 *Moore v. Luckess' Next of Kin.

January Term, 1873, Richmond.

1. **Arbitration—Plain Mistake of Law—Relief.**—Where an order is made in a pending cause, submitting the matters in dispute therein to arbitration, and the arbitrators have before them the pleadings and exhibits, duly consider them, and return them to court with their award, if it appears from an inspection of the whole, that the arbitrators have made a plain and palpable mistake of law, there can be no valid ground for refusing relief in such cases.

2. **Same—Case at Bar.**—L.'s executor sues M. upon his bonds executed to L., and M. pleads payment, and files an account of set-off, consisting of charges for services rendered to L., running through fourteen years. Pending the suits, the ex'or and M. agree to refer the matters in dispute to arbitration, the submission to be entered of record in said causes. The arbitrators return their award, by which they, 1st, ascertain that M. is indebted to the ex'or in the amount of the bonds; and 2d, that M. is entitled to the credits he claims for the five years before suit brought, specifying the amount in each year. The ex'or declining to oppose the confirmation of the award, the next of kin of the residuary legatee of L., file their bill to set it aside, on the ground that the arbitrators intended to decide the case according to law, and had mistaken it. The arbitrators say in their testimony that they intended to decide the case according to law, and apply the statute of limitations to the account of M.; and they had before them the papers in the causes, the account of M. and the depositions filed, and returned them with their award to the court. **Held:**

1. **Same—Mistake of Law as to Statute of Limitations.**—Though the award does not refer to the papers, yet they are so identified that the court will consider them in connection with the award; and it being apparent that the arbitrators took the institution of the actions, instead of the filing of the plea, as the date from which the statute would cease to run, the court will correct the error.

2. **Same—Same—Equity Jurisdiction.**—A court of equity, alone, has jurisdiction to correct the error; and the ex'or declining to oppose the

*See foot-note to Willoughby v. Thomas, 24 Gratt. 521; foot-note to City of Portsmouth v. Norfolk Co., 81 Gratt. 727. 4 Minor's Inst. (3d Ed.) 170 et seq.

confirmation of the report, the next of kin may maintain the suit.

3. **Same—Setting Aside Award—Jurisdiction of Common Law Court.**—Under the statutes, an award cannot be set aside in a common law court, except for error apparent on the face of the award, or unless it has been procured by corruption or other undue means, or misbehavior in the arbitrators.

4. **Same—Correction of Arbitrators' Errors.**—The error of the arbitrators may be corrected, without setting aside the award, by striking out from it the credits allowed him, to which the statute applies, dating from the filing of the plea.

This case was argued in Staunton at the August term 1872, of the court, and was decided at the present term of the court in Richmond.

It was a suit in equity in the Circuit court of Rockbridge county, brought by the next of kin of Wm. Luckess, jr., who were infants, to set aside an award made in three actions of debt pending in said court, brought by the executors of Wm. Luckess, sr., against N. G. Moore. Wm. Luckess, jr., was the residuary legatee of Wm. Luckess, sr.; and it appeared in proof as well as by the answer of one of the executors, that the estate of Wm. Luckess, sr., would pay all his debts and special legacies and leave the amount involved in said suits to pass to the residuary legatee, and that the condition of the estate of Wm. Luckess, jr., was such as that his next of kin would be entitled to the fund. The bill alleged that the executors of Wm. Luckess, sr., declined to oppose the confirmation of the award. The bill admitting the integrity of the arbitrators, stated several objections to the award, among which, one was that the arbitrators intending to decide the case according to law, had mistaken it, and so had erred.

162 *Wm. Luckess, sr., was a wealthy old bachelor, without any known kin. He lived for fourteen years in the house of N. G. Moore, who kept a house of private entertainment in the county of Rockbridge, and he died there in September 1859. He had a special written contract with Moore, which was renewed every year, specifying how much he was to pay and for what; and receipts for the amount were regularly given by Moore.

Whilst so living in Moore's house Wm. Luckess, sr., lent to Moore money at several times, for which he took his bonds and became the assignee of another; the whole amount being \$5,740 28; and on these bonds the interest had been settled up to a short time before his death. In June 1857 he made his will, by which he gave many legacies; to each of Moore's seven children a legacy amounting together to \$14,000.

In 1860 the executors of Wm. Luckess, sr., brought three actions of debt upon the bonds aforesaid, against Moore; and he pleaded payment, and filed an account by way of set-off; the charges, with two exceptions of small amount, being for extra services rendered to Luckess and his slaves,

from 1845 to 1859, and amounting altogether, with interest to 1859, to \$10,818 60.

There seems to have been a trial of the causes in 1861, when the jury failed to agree, and were discharged and nothing further was done until August 1866, when the executors of Luckess and Moore entered into an agreement under seal, to refer them to the arbitrament of John Letcher and R. C. McCluer, Esqrs., with power in them to choose an umpire; and it was agreed that the submission should be entered of record in said actions at law.

Before proceeding to hear the case the arbitrators selected Daniel Brown as the umpire, and they all sat together; and in

May 1867 they made their award. In 163 *this award they commence by saying, 1st; We have ascertained that Moore is indebted to the executors in the sum of \$5,740 28, with interest thereon from May 21st 1859; 2d, we have ascertained that the said Moore is entitled to the following credits, viz: a credit of \$1,225, with interest thereon from the first of January 1855; and they thus set out the different credits allowed him, extending from January 1855 down to the death of Luckess in 1859; allowing him all his charges between these dates except one which is reduced. They do not, however, make any calculation of interest, or statement showing how much the credits amount to; but they in fact amounted to upwards of \$500 more than the amount of the bonds. The arbitrators were examined as witnesses; and upon their testimony, it appeared that they had before them the papers in the common law causes, including the pleadings, the bonds, the account of Moore, and several depositions filed in said causes; all of which were returned to the court with their award, though not referred to in it. And they say that they intended to exclude all the items of Moore's account barred by the statute of limitations.

The cause came on to be heard on the 17th of June 1870, when the court held that no sufficient cause had been shown for setting aside the award; but being satisfied there was such error in the application of the statute of limitations, by the arbitrators and umpire, to the account of set-off filed by the defendant Moore, in the suits at law, as required correction, decreed that the award be amended, so as to exclude the credits allowed to Moore anterior to five years from his entering his plea in the cases at law. And a statement having been made by a commissioner, showing that the credits, principal and interest, on the 1st of May 1859, amounted to \$4,016 89, leaving a balance of \$1,723 39 due to the

164 *Luckess estate, upon the bonds sued on, it was ordered that a judgment be entered in the cases at law upon said award for the said sum of \$1,723 39, with interest from the 1st of May 1859, and their costs. And thereupon Moore applied to a Judge of this court for an appeal; which was allowed.

Brockenbrough and H. W. Sheffey, for the appellant.

Baldwin & Cochran and Anderson & Walker, for the appellees.

STAPLES, J. It may be considered as well settled, that arbitrators, being judges of the parties' own selection, have rightfully the power to decide and finally adjudicate the law and the facts of the case submitted to them.

They may disregard the law entirely, and decide upon principles of equity and good conscience exclusively. If, however, they mean to conform to the law, and they plainly mistake it, such mistake is sufficient to invalidate the award.

There is no controversy in regard to these principles. The real difficulty lies in determining the effect of a mistake of law made by the arbitrators, not apparent on the face of the award or some paper incorporated with and constituting a part of it.

The question is, may such mistake be established by extrinsic evidence?

It is said by Judge Story, in 2 Eq. Jur., 1455, "If the arbitrators mean to decide strictly according to law, and they mistake it, although the mistake is made out by extrinsic evidence, that will be sufficient to set aside the award."

In support of this proposition he cites a number of cases; which, however, do not sustain the proposition in the unqualified terms thus asserted. See also 9 John. R. 263; Kyd. on Awards, 350; 3 Atk. R. 462, 492.

On the other hand there is a great weight of authority in favor of the doctrine that there must be something on the face of the award, or some paper connected with it, to show that the arbitrators have proceeded on grounds not sustainable in point of law.

The courts, however, while professing to maintain this latter rule, have in many cases of real or supposed hardships, allowed exceptions and modifications, which make it very difficult to deduce any established principles from these decisions. Thus, relief has been given where the mistake was clearly established by reference to some authentic document accompanying, though not expressly referred to in the award. See cases cited in Moore on Arbitrament and Award, 336. The reason of this exception is apparent. The rule which excludes testimony to impeach an award for mistake of law or fact, is a mere rule of evidence founded upon considerations of public policy, the repose of society, and the end of litigation.

If the court, however, has before it evidence of such mistake, plain and palpable, equally authentic and satisfactory as that furnished by the award, there is no valid reason why such evidence should not be received and considered. Thus, where the order of reference is made in a pending cause, and the arbitrators have before them the pleadings and exhibits filed in the case, duly consider them, and return them to the court with their award; and if it appears from an inspection of the whole that the arbitrators have made a plain and palpable

mistake of law, there can be no solid ground for refusing relief in such cases. No court that I am aware of, has ever held that a mistake so made out cannot be relieved against.

166 *This case furnishes a most apt and striking illustration of the necessity and wisdom of this doctrine.

The facts briefly stated are as follows: In the year 1860 three actions of debt were instituted in the Circuit court of Rockbridge county against the appellant, by the executors of Wm. Luckess, upon various bonds executed by the appellant to Luckess. The appellant pleaded payment, and filed with his plea an account of set-offs. These actions remained on the docket until the year 1866, when all the matters in litigation were referred to the decision of two arbitrators, or their umpire. When the cases came on to be heard before the arbitrators, the executor relied on the statute of limitations in bar of a large portion of appellant's account; and he submitted to the arbitrators a written statement of his construction of the law governing the case. The arbitrators have testified it was their purpose to disallow all items of the account barred by the statute. The presumption is, they intended to do so, because the claim is against the estate of a decedent, and the statute plainly prescribes the rule in such cases.

Independently of the statements of the arbitrators and of any presumptions on the subject, it is apparent from the award itself, the pleadings and exhibits filed in the actions at law, that the arbitrators have only intended to allow so much of the account as was not affected by the operation of the statute. The award finds for the executors all the bonds, amounting in the aggregate to \$5,746 28. It then proceeds to dispose of appellant's account of set-offs, which, in fact, was the only matter in controversy.

It will be observed that the award does not allow a single item of the account previous to the year 1855; but, with the exception of an abatement in one charge, it does allow all the items subsequent to that period. It enumerates these items, sums and dates, all corresponding, and allows interest upon each from the period charged.

This account is, therefore, as unmistakably identified by the award as if it had been incorporated in and made a part of it. It is the identical paper filed in the actions at law, relied on before the arbitrators and made the basis of their award.

It is equally clear that the arbitrators, in applying the statute, have mistaken the law, and allowed a large portion of defendant's account, which ought to have been rejected. This is apparent from the award, the account, and the pleadings in the actions of debt. There is no pretence of any such promise by Luckess, in his lifetime, as will remove the bar of the statute. The ground taken by the appellant, before the arbitrators, was, "that his account was a continuous debt running from the 17th of May

1845, until the death of Luckess, being based on promises and inducements held out from time to time by Luckess, to make some provision in his will for appellant," which proved to be false; and which fact could not be ascertained until Luckess' death."

But, clearly, this was insufficient, and was very properly disregarded by the arbitrators. It is very clear their mistake originated in the belief that the institution of the suits by the executors, arrested the running of the statute, as to appellant's account; whereas the period of filing that account was the proper one to be considered in fixing the time when the statute ceased to operate. Indeed it was conceded in the argument, that the arbitrators had plainly mistaken the law, in allowing those items of the account within the operation of the statute of limitations. It was said, however, they were misled by the executor, and the estate must bear the loss.

168 *It is true, as a general rule, that mere mistakes of law afford no ground of relief in courts of law or equity. This rule, however, has no application to this case.

It is impossible to maintain that a mere mistaken admission of the law by a fiduciary can revive, as against the estate he represents, a debt barred by the statute, when his express promise can have no such effect. Such an admission would not justify an arbitrator, in disregarding the law, any more than it would avail in a court of justice.

If the arbitrator intends to conform his award to the law, but fails to do so, and such mistake plainly appears, I take it the courts would grant the necessary relief in favor of infant distributees, however much the executor may have contributed to the mistake.

The next question to be considered is, as to the jurisdiction of a court of equity to grant relief in the present case.

Independently of, and prior to our statutes on the subject, there is no question that the common law courts had the same supervision and control of awards in pending suits, and could give as extensive relief in vacating such awards, as courts of equity. Our statutes have, however, considerably restricted this jurisdiction of the common law courts. Awards cannot now be set aside in those courts, except for errors apparent on their face, unless indeed they were procured by corruption or other undue means, or for misbehavior in the arbitrators. As the mistake in this case is not apparent on the face of the award, and as no corruption or improper conduct on the part of the arbitrators has been proved, or even charged, it is difficult to see how the common law court could have afforded any relief.

This would seem to be so, even if the executor, who was the party on the record, 169 had resisted the confirmation *of the award. However this may be—and it is unnecessary to decide the point—the executor has declined to contest the award before any court.

The question now arises, whether the distributees of the estate have any claim to relief. As a general rule I admit the distributees cannot interfere in a controversy between the executor and a debtor to the estate, unless there be collusion or fraud. The legatee or distributee must look to the executor for any loss or damage he may sustain.

But there are exceptions to this rule; and I think this case furnishes one of them. In the first place, it is very questionable whether these distributees would, in any event, have any remedy against the executor. Even at common law an executor or administrator was authorized to submit to arbitration demands for or against the estate; and in such case the award was binding upon the creditors, and good against legatees and distributees. If any loss was thereby sustained, the executor was responsible, as for a devastavit. Our statute, however, declares that an executor or administrator shall not be responsible for any loss sustained by an award, unless it was caused by his fault or negligence. It is impossible that the executor in this case can be held responsible either by reason of the nature of the award, or because of his failure to contest its validity. And yet a case of more grievous injustice has been rarely seen in a court of equity.

Consider for a moment the facts of the case. Wm. Luckess, an unmarried man, without family, was a boarder in the family of the appellant for a considerable period, under a written contract plainly prescribing the terms and conditions of such boarding. This contract was regularly renewed from year to year; the stipulated compensation regularly paid, and receipts 170 *punctually given. During this period the appellant became indebted to Mr. Luckess to the amount of more than \$5,000, for which the latter held his bonds.

It seems that Mr. Luckess was in bad health, and required a good deal of attention. In consideration of which he, in a general way, promised or informed the appellant he should never lose any thing. Accordingly, in his will Mr. Luckess handsomely and liberally provided for the family of the appellant, in the way of legacies to his children to the amount of \$14,000. After the death of Mr. Luckess the appellant was called on to pay the bonds he had executed. Then, for the first time, he exhibited an account against the estate, amounting to the enormous sum of \$10,818 00, for extra services rendered the testator. A more extraordinary claim was never exhibited in a court of justice. I will hazard the assertion that the records of no court on this continent furnish a parallel to it. Some of the items are very curious: "Extra services rendered you during the year ending 1st January 1855, \$5 per day, amounting to \$1,825. Services rendered boy John, who was sick of fever from July 15th to Aug. 20th, \$360. Extra services from May 27th till June 4th, during last illness, \$17 20 per day." These are in keeping with the other

charges. And yet all these charges, supposed not to be barred by limitation, were allowed, the entire amount of the bonds extinguished, and the estate brought in debt to the appellant more than \$500.

And we are told there is no remedy against such injustice, notwithstanding the award fails to conform to the real judgment of the arbitrators, and palpably violates the law.

The executor does not choose to interfere, for reasons satisfactory to himself. And the courts of equity are to be closed against the infant heirs, whose little inheritance ¹⁷¹ance *has thus been taken, without their consent, and without the slightest misconduct or default on their part. Surely the courts will not extend the sanctity of awards so far as to permit injustice so grievous.

If awards are to be considered as too sacred to be impeached at all; if, notwithstanding the most glaring mistakes have been made, every door is to be closed against the court's interference, these domestic forums may be regarded as instruments of oppression and wrong to the estates of the deceased, rather than as convenient and proper tribunals of justice. It will be to say, that whatever injustice may be done by the palpable mistakes of arbitrators, the courts must approve or give validity to those mistakes, if the referees are cautious enough not to spread them upon the face of the award.

Fortunately, in this case, the law may be vindicated and the right enforced, without violating precedents or well established principles. Here, at least, law and justice go hand in hand.

The next and only remaining question to be considered, is, whether the court may amend or correct an award, in part, and affirm it as to the residue; or whether, if any part of it is illegal, it is bound to reverse it altogether. It is now well settled, that an award may be bad in one part, and yet good and binding in another part. If the bad part is clearly separable in its nature, the residue of the award may be good. The general rule is, that the general validity is alone impaired when, by the particular defect, a mutuality of interest and advantage appearing evidently to have been intended by the arbitrators to be given, is destroyed, or when the general substance of the award and the real justice of the case are affected.

If, however, notwithstanding some part of the award may be void, the remaining part embrace a final and ¹⁷²certain determination of every question submitted, the valid portion may be maintained, though the void part be rejected. Moore 454. Thus in *Aubret v. Maze*, 2 Bos. & Pul. R. 371, where an arbitrator directed payment to a defendant of a sum of money, as the balance of a general account, and also of another sum, stated on the face of the award to be due to the defendant on account of illegal insurance partnership transactions between him and the plaintiff,

the award was held bad, as to the latter sum only." *Russel on Awards* 258.

Tested by these principles the point suggested does not present the slightest difficulty. The sum claimed by the executor is found due him by reason of the bonds executed by the appellant. About this there is no controversy. The award then finds, not a separate or aggregate sum, but certain items of the account of the appellant, with interest thereon from the respective periods when they arose or were contracted. Such of these items as are barred by limitation may be stricken out without impairing the general validity of the award, or without interfering with any principle of mutuality which may have been contemplated by the arbitrators. The court merely does what the arbitrators themselves would have done had they been correctly advised with regard to the statutory law governing the rights of the parties.

For these reasons I think the Circuit court was right in expunging from the award the items barred by limitation, and affirming it as to the residue.

The appellee does not complain of this proceeding, and the appellant receives all he was entitled to receive under the most favorable aspect of the case for him.

The other judges concurred in the opinion of Staples, J.

Decree affirmed.

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**Garland v. Brown's Adm'r.*

January Term, 1872, Richmond.

1. *Statute—To Prevent Sacrifice of Personal Property at "Forced Sales"—Constitutional.*—The act of May 28, 1870, *sep. acts* 1869-70, p. 162, to prevent the sacrifice of personal property at forced sales, which requires the officer selling personal property, for a debt contracted before the 10th of April 1865, when required by the debtor, to sell upon a credit of twelve months, is not unconstitutional, as impairing the obligation of the contract, or as being in violation of s. 4, article 11, of the State constitution, prohibiting the enactment of a stay law.

2. *Same—Same—Forth-Coming Bonds.*—The bonds taken at sales under this act are in the nature of forth-coming bonds; and the creditor is not bound to receive them as so much paid on his debt.

In 1870 H. J. Smith, administrator of Alexander Brown, deceased, obtained a judgment upon a scire facias in the Circuit court of Lynchburg, against James Garland, for the sum of \$3,451, with interest from the 30th of September 1859, and costs, subject to several credits for payments made from April 1860 down to March 1864. In April 1871 an execution was issued on this judgment, which went into the hands of George H. Burch, the sergeant of the city, and was levied on the library of Garland. Garland, thereupon, gave Burch notice in writing that he was required to sell the property upon a credit of twelve months; and the sergeant having advertised the sale upon that credit, Smith applied to the judge of

the Circuit court of Lynchburg for a mandamus to the sergeant to sell for cash.

Upon the rule to show cause why a mandamus should not issue, *the sergeant returned that he was about to sell the property for cash, when he received a notice from Garland to sell upon a credit of twelve months, under the law passed to prevent the sacrifice of personal property at forced sales; and as the debt was one embraced by that act, he had advertised the sale accordingly, and should so sell it, unless forbid by the court. To this return of the sergeant, Smith demurred; and the court sustained the demurrer, and directed a peremptory mandamus to issue. And thereupon Garland, who had been admitted a defendant, applied to this court for a writ of error, which was awarded.

J. A. Jones and J. Daniel, for the appellant.

J. H. Lewis, for the appellee.

BOULDIN, J., delivered the opinion of the court.

This is a writ of error to a judgment of the Circuit court of the city of Lynchburg, awarding, at the instance of the defendant in error, a peremptory writ of mandamus to the sergeant of said city, requiring him to sell, for cash, certain personal property of the plaintiff in error, which had been seized by the sergeant under a writ of fieri facias issued from said court. The debt had been contracted prior to the 10th of April 1865, and the plaintiff in error had required the sergeant to sell the property seized, on a credit of twelve months, in pursuance of the act of Assembly, approved March 28th 1870, entitled "an act to prevent the sacrifice of personal property at forced sales."

In accordance with the requisition thus made, the sergeant advertised that he would, in pursuance of the act aforesaid, proceed to sell the property on the credit named; and Brown's administrator applied to the

Circuit court for a writ of mandamus, 175 to compel the sergeant *to disregard the act aforesaid, and to sell the property for cash. The case was regularly matured for hearing; and the Circuit court being of opinion that the act of May 28th, 1870, was in violation of both State and Federal constitutions, and therefore void, awarded a peremptory writ of mandamus, as prayed for.

To this judgment of the Circuit court, Garland obtained a writ of error from a judge of this court; and the case comes before us upon the following assignment of errors:

1. That the writ of mandamus was not the proper remedy—the defendant in error having other plain and adequate legal remedies.

2. That the act aforesaid of March 28th, 1870, is a valid act, contravening neither the State nor the Federal constitution; and that the court erred in holding otherwise.

We shall consider only the last assignment of error.

Is the act aforesaid of March 28th, 1870, unconstitutional and void?

It is insisted by the defendant in error that it is.

First: Because it impairs the obligation of contracts.

Secondly: Because it is in effect a stay law—the passage of which is forbidden by the 4th section of the 11th article of the State constitution.

We will enquire, in the first place, whether the act in question impairs the obligation of contracts.

That provision of the Federal constitution which forbids the States to pass any law impairing the obligation of contracts, we deem wise, salutary and conservative. "Bills of attainder, ex post facto laws, and laws impairing the obligations of contracts," (said Mr. Madison, in the 44th number of *The Federalist*), "are contrary to the first principles of the social compact, and to every principle of sound legisla-

176 tion;" and, he goes on to say, "very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights." Events then recent strongly suggested the propriety of erecting this bulwark. This restriction upon the legislative power of the States, said Ch. Justice Marshall, *Fletcher v. Peck*, 6 Cranch's R., 87, 137-8, had its origin in a determination on the part of the people of the United States to shield themselves and their property from "the violent acts which grow out of the feelings of the moment," * * * "from the effects of those sudden and strong passions to which men are exposed." And the same learned and upright judge, in *Sturgis v. Crowninshield*, 4 Wheat. R. 122, 205, tells us, that the mind of the convention was directed to the subject by "a general dissatisfaction with that lax system of legislation which followed the war of the revolution;" not the least prominent feature of which, we will add, was a tendency to relieve debtors by varying the legal effect of their contracts. To meet these evils, "the convention appears to have established a great principle, that contracts shall be inviolable. The constitution, therefore, declares that no State shall pass 'any law impairing the obligation of contracts.'" And so important did the several States regard this barrier against loose and unsound legislation—against "the effects of those sudden and strong passions to which men are exposed," especially in democratic governments, that many of them, not content with the shield of the Federal constitution, have severally adopted the same restriction as part of their State constitutions; thus giving to it an additional sanction. The tendency of the State Legislatures, in times of trouble and pecuniary pressure, to fall into the lax and unsound system of legislation which gave rise to the restriction under consideration, must have been manifest to every intelligent and observing

177 *mind, and clearly proves its wisdom; and this court will be prepared, hereafter as heretofore, to give it, in all proper cases, a fair and fearless application, without regard to the passions and prejudices of the times. We do not think, however, that the case before us is such a case; because, in our opinion, the act of March 28th, 1870, which merely prescribes the terms on which property seized on execution in certain cases, may be sold, relates purely to the remedy—to the process of the court—and does not affect the obligation of the contract, or alter its terms in the least particular.

It is not our purpose to enter upon the discussion of the question so often considered, as to what constitutes the obligation of a contract, or to what extent the remedy may be varied or modified without impairing the obligation. The distinction between the obligation and the remedy has been long and well established; but it must be conceded that the line is somewhat shadowy. Any discussion of the general question, however, would be wholly out of place here, after the recent able and exhaustive opinions of Judge Christian, in the *Homestead cases*, and of Judge Rives, in *Taylor v. Stearns*, 18th Gratt. 244; in which cases all the authorities are reviewed. We will say, however, that in all the cases, the distinction between the obligation of the contract, and the remedy to enforce it, is clearly recognized. Whilst the former cannot be impaired by legislation, the latter, as a general rule, is always subject to modification or amendment, at the will of the Legislature; even though such change may, to a certain extent, incidentally affect the interest of the parties to the contract.

Such modifications of the remedy have always been made at discretion by the legislative power, and have been held by the courts not to impair the right. It was,

178 *as we have seen, a wholesome restriction on the legislative power of the States, to prevent them from letting any parties lose from their contracts; whether such parties be States, corporations, or individuals. But it would have been a most unfortunate restriction, to forbid them to alter or amend remedies by suit, or to mould and to modify judicial process. Such a restriction would be a complete bar to all progress and improvement; would require all succeeding Legislatures to be utterly blind to the times and circumstances in and under which they may be called to act; that when sales of property are to be made under the mandate of the law, such sales are not to be regulated, as to terms, by an enlightened legislative discretion; but that one unchangeable iron rule must be applied, at all times and under all circumstances, without regard to the financial state of the country, the pecuniary condition of the people, or the interest of either creditor or debtor. Such a restriction on the legislative power would at all times be peculiarly unfortunate and unjust; but especially so in times like the present. But, happily alike for creditor and debtor,

it has not been imposed. If the creditor be not deprived of his right to obtain a judgment against his debtor, or of the execution of that judgment, the mere form and mode of executing it has ever been varied at the will of the Legislature. The various forms of execution existing at the date of the contract, do not enter into and form a part of its obligation. Any one, or all of them, may be modified or amended, or may be abolished altogether, and others substituted, having in view, in good faith, the enforcement of the judgment.

In *Sturges v. Crowninshield*, 4 Wheat. R., 122, the body of a debtor had been taken in execution under a writ of *capias ad satisfaciendum*, and by virtue of a State insolvent law he was released from custody, 179 and the debt declared *to be discharged. So much of the State insolvent law as declared the debt to be discharged, was adjudged to be unconstitutional and void, as impairing the obligation of the contract; but the release of the debtor's body from execution was held lawful—that particular form of execution although existing at the date of the contract, forming no part of its obligation. Ch. Justice Marshall said—p. 200: "Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it; but the State may refuse to inflict this punishment, or may withhold this means, and leave the contract in full force. Imprisonment is no part of the contract; and simply to release the prisoner, does not impair the obligation." And with the same reason we may say here, that a sale of the debtor's property for cash, under a writ of *fieri facias*, is no part of the contract, any more than the imprisonment of his body was, under a writ of *capias ad satisfaciendum*, when allowed by law; and merely to require, under circumstances of strong necessity, that the officer of the law shall sell the debtor's property, (all that he has, if necessary,) on a reasonable credit, and not for cash, does not impair the obligation of the contract. On the contrary, the obligation of the contract remains intact; and the object and effect of the law is to enforce it, in a mode beneficial alike to creditor and debtor as a class. It only requires that to be done by the law officer which every prudent man in the State would do, were he to sell his own property at such a period.

But it is argued that the obligation of the contract is impaired by the statute, because the debtor is thereby released from all liability to his creditor, and the judgment against him discharged by the payment to the creditor of bonds instead of money. If that were so, and the payment were 180 forced on him against his will, *there would be much force in the objection; but it is founded on a misapprehension of the terms and effect of the law. The bonds taken by the sheriff under the act, are in all respects like forthcoming bonds in their effect. They constitute only a temporary and quasi satisfaction of the judgment.

They are not required to be endorsed as credits on the execution, unless the creditor shall himself elect to receive them; in which event he endorses the credit himself; and if the judgment be thereby discharged, it is by his own voluntary act, of which he cannot complain. Unless he shall think proper to do this, he holds his original judgment undischarged, with cumulative security of the bonds taken by the law officer, supported by the guaranty of that officer and his sureties that the obligors to the bonds were solvent at their date—that they were good for the debt. Should these bonds not be paid at maturity, execution will be awarded as in the case of a forthcoming bond; and the amount collected will be a credit to the original judgment. Should there be a deficiency, the judgment will only be discharged pro tanto.

It will thus be seen, we think, that the interest of the creditor is sedulously and effectually guarded by the law. And we think, furthermore, that however defective the statute may be in its details, it is in principle eminently just and salutary; and at the time it was enacted, was imperatively demanded by the state of the country and the impoverished condition of the people.

It is unquestionably true, that the interest of the creditor is, to some extent, affected by every change of the remedy for the recovery of his debt; but such effect has never been regarded as impairing the obligation of the contract, in the sense of the constitution.

The writ of *capias ad respondendum*, with the privilege on the part of the creditor by endorsement thereon, of requiring bail, was, until within a comparatively recent period, the original process in all suits in this State on notes and bonds, and was a very efficient means of compelling a dishonest debtor (if able) to pay his debt. He was required thereby to give bail or to go to jail, unless he preferred to pay the debt or to confess judgment. This process was abolished by law, and a simple summons substituted, affecting sometimes very seriously the interest of the creditor; but no one has contended that the act was unconstitutional, because no one supposed that the form of original process entered into or was part of the contract of the parties.

Again: The writ of *capias ad faciendum*, by which the body of the debtor was, after judgment, taken in execution, was not only a most efficient mode, but at times was the only mode of making the debt. This, too, which was part of our own law until a recent date, has been abolished in Virginia, as in other States; and none have been heard to question the validity of the act; because none supposed that any particular form and character of execution constituted a part of the contract of the parties. Yet the interest of the creditor is often gravely affected by the absence of such a remedy.

The period of limitation existing at the date of the contract may be materially diminished by legislation; and by means

thereof, through ignorance of the change or inadvertence, the creditor may lose his debt. Yet such laws have been invariably held to relate only to the remedy, and not to impair the obligation of the contract. And so with respect to registration laws. By a failure to observe them, titles to property which, in the absence of such laws would be unassailable, may be wholly divested. All such laws necessarily affect more or less the interest of parties; "but the changes in these laws are not regarded as necessarily affecting the obligation of contracts. Whatever belongs merely

to the remedy, may be altered at the will of the State; provided the alteration does not impair the obligation of the contract. And it does not impair it, provided it leaves to the party a substantial remedy, according to the course of justice as it existed at the time the contract was made." *Cooly on Constitutional Limitations*, p. 285, and cases cited.

The course of justice, at the time the contract in this case was executed, allowed the creditor to proceed to judgment against his debtor, and in divers modes to subject the property of the latter to the payment of the debt. The rights of the creditor in that respect are preserved, although the remedy is to some extent varied in form by the act under consideration. There is no obstacle interposed in the way of obtaining his judgment; and every particle of the debtor's property subject to execution, may be seized and sold without delay, to satisfy the judgment. And the remedy is not the less efficacious, because, in the exercise of a sound and humane discretion, the Legislature has required the property to be sold on credit, when a sale for cash would result in a ruinous sacrifice. Such a provision is no more a violation of the contract, nor more unjust to the creditor, than the statutory requirement that personal representatives shall sell the estates of decedents on reasonable credit. On the contrary, we hold, as said above, that a sale on credit, under such circumstances, is alike beneficial to creditor and debtor, as a class.

We are of opinion, therefore, that the act of May 28th, 1870, entitled "an act to prevent the sacrifice of personal property at forced sales," does not impair the obligation of contracts, and is not for that reason unconstitutional and void.

Nor do we regard it as violating the 4th section of the 11th article of the State constitution, which provides that "the General

Assembly is hereby prohibited from passing any law staying the collection of debts commonly known as stay laws." The laws commonly called stay laws, always stay for a time the hand of the creditor, and give indulgence to the debtor. They suspend, or stop for a time, legal proceedings against him; they prevent the creditor, for the time, from enforcing his judgment; and the debtor, during the stay, is left in the possession and enjoyment of his property. Proceedings against him, for the time being, are absolutely sus-

pendent. No such effect is produced by the law under consideration. Judgment is obtained as usual; execution issues instant; the property of the debtor, his entire personal estate subject to execution, if necessary, is liable to be seized without one moment's delay, and is sold as before, for the satisfaction of the judgment. He secures not one moment's indulgence; but as to him the judgment is liable to be enforced promptly and vigorously; the only change being, that the property may, if required by the debtor, be sold on terms which will prevent its sacrifice, and will, as a general rule, more effectually secure the debt.

We are of opinion, therefore, that the act of Assembly under consideration is not only constitutional and valid, but was a wise, humane and salutary exercise of legislative discretion.

The judgment of the Circuit court, awarding the writ of mandamus must be reversed, with costs to the plaintiff in error; and judgment should be entered for him, discharging the rule for a mandamus, and for his costs incurred in the Circuit court.

Judgment reversed.

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*Glass v. Davis & als.

March Term, 1873, Richmond.

1. **Public Warehouse—Statute—Construction.**—Under the first proviso to the 2d section of the act of April 29, 1867, in relation to inspection of tobacco, Sess. acts 1866-67, p. 967, the owners of a public warehouse may close it as such, at any time, in the mode therein prescribed. And thereupon the authority of the Inspector ceases, and their lease of the warehouse terminates.

2. **Same—Same—Same.**—The owners of a public warehouse may close it on a day certain, and open it on the same day, as a private warehouse, where every thing is to be done as in the public warehouse, except the inspection of tobacco.

This is an appeal from a decree of the corporation court for the city of Lynchburg, made in a suit in which Robert H. Glass was plaintiff, and Davis and others, owners of Friend's warehouse, in said city, were defendants. The plaintiff filed his bill on the 30th of September 1872, in which he states that in 1871 he was appointed and commissioned inspector of tobacco, on the part of the State, at the aforesaid warehouse, for the space of one year, beginning on the 1st day of January 1872, and ending on the 31st day of December of said year; that he was duly vested with the title to said office and its emoluments, and was legally entitled to hold and enjoy the same under section 11 of chapter 87 of the Code, as amended by act of 29th of April 1867, which, alluding to the appointment to said office, as hereinbefore described, provides that "the terms of office of said inspectors shall commence on the 1st day of January next succeeding such appointment, 185 and continue for one *year, and until their successors are qualified;" that

about the same time the plaintiff received his commission as aforesaid, Robert L. Dudley was appointed and commissioned inspector at said warehouse, on the part of the owners; that after the plaintiff and said Dudley received their commissions as inspectors, as aforesaid, the said owners leased the said warehouse to them for the space of one year, commencing the 1st day of January 1872, and ending the 31st day of December of said year—the said owners being required by law so to let the said warehouse to the plaintiff and his associate inspector, under a penalty of \$1,500; that the said owners have disregarded his official rights, to which he is entitled by his commission aforesaid, and the lease to him and his associate, of the said warehouse, for one year, which is yet running; and have conspired together to oust him of his said office, and deprive him of the fees and emoluments thereof; that they have caused an advertisement to be inserted in the Lynchburg News, a paper published in Lynchburg, addressed "to whom it may concern," whereby they are warned to take notice, that the said owners "intend, upon Tuesday the 1st day of October 1872, to close said warehouse as a place established by law for the inspection and storage of unmanufactured crop tobacco;" such notice purporting to have been made under authority of the 2d section of the act of Assembly of April 29th, 1867; but that there is appended to said notice an additional notice, addressed "to the public," and declaring that on and after the said 1st day of October, the said Friend's warehouse will be opened by them "as a private warehouse, for receiving, storing, selling, weighing and delivering tobacco;" and it is distinctly announced in said notice, that "breaks will be held as heretofore, under the supervision of Mr. Powhatan E. Haynes and Robert L. Dudley, who will 186 *have charge of said warehouse for the owners;" and the plaintiff avers

and charges that the said owners are acting in fraud of the law, and in fraud of his rights, in thus designing to oust and divest him of his official and contracted rights and privileges; that he is duly performing, and has ever duly performed, all his duties as inspector aforesaid; that the said owners are endeavoring to displace him as the representative of the State and to take upon themselves the right which is vested alone in the Governor of the commonwealth, to put another person in said position as inspector, to wit: Powhatan E. Haynes; that the said owners have no power to close said warehouse at any such time as will interfere with his official and contracted rights; and that even if they possessed the right to close said warehouse, the said notices bear upon their face the proof that no intention to "close" it exists; that the publication of said notices, and the attempt to change the character of the warehouse as aforesaid, have produced and tend further to produce irreparable injury to the plaintiff, in diminishing the patronage drawn to said

warehouse by its public character, and decreasing the fees and emoluments of his said office, &c.; and that for the said injuries he has no full and adequate remedy at law. He therefore prays for an injunction, to prevent the defendants from closing, or attempting to close, Friend's warehouse, as a place established by law for the storage and inspection of tobacco; and for general relief. Copies of the notices referred to in the bill were filed as exhibits therewith. An injunction was accordingly awarded.

A few days after the bill was filed, to wit: at October rules 1872, the defendants demurred to and answered the same. In their answer they do not admit, but on the contrary deny, that after the plaintiff received his commission as inspector at Friend's 187 warehouse, they, as "owners thereof, leased the same to said plaintiff and R. L. Dudley, for the space of one year, commencing the 1st of January 1872 and ending on the 31st of December 1872; or that they were required by law to do any such thing; or that any such case actually exists, either by contract or by operation of law. They deny that they have conspired together to oust the plaintiff from his said office, and to deprive him of the fees and emoluments thereof. They say they do not regard said warehouse as being now, or as having been since the 29th of April, 1867, a place established by law for the inspection and storage of unmanufactured crop tobacco; as the 1st section of the 87th chapter of the Code, under which Friend's warehouse was established, and had continued as such a place of inspection and storage, was, upon that day, repealed by an act of the General Assembly. See acts of 1866-7, p. 967, s. 4. But while they held that belief, they submitted to the tax imposed upon the revenues of their said warehouse, by the annual appointment by the State; and they have conducted the said warehouse as though it was regularly established by law, and as though the Governor had due authority to appoint inspectors thereto. Said warehouse having been so treated by them, and so considered by others, they say they were advised that if they desired to make a change in its character, and to convert it into a private warehouse, with which the State should have no concern, and in which there should be no inspection, it would be better, out of abundant caution, to avail themselves of the provisions of the said act, passed April 29, 1867, and exclude all possible chance of said warehouse being still considered a place "established by law" for the inspection of tobacco, by closing the same as such, as provided in the 2d section of the said act. They, therefore, in strict conformity with the provisions of said

188 *act, caused the advertisement referred to in the bill to be inserted in a newspaper. They assert that they do not intend hereafter to use Friend's warehouse as a place "established by law" for the inspection of tobacco, or to cause tobacco to be inspected there; but they wish to use

said property for purposes that are legitimate. They deny that they have been acting, or intend to act, in fraud of the law, or in fraud of the plaintiff's rights, or that they have assumed the powers which are vested alone in the Governor; or that they have appointed, or intend to appoint, any inspector of tobacco. To this answer the plaintiff replied generally.

There was but one deposition taken in the cause—that of the said P. E. Haynes; which was taken by and on behalf of the plaintiff. He testified that the rent paid by the owners of the tobacco stored in said warehouse, to the proprietors, is a dollar a hogshead, when it weighs over 500 pounds net and remains under four months. After that, it is 10 cents a month additional; that the said warehouse was open on the first of October 1872, and that business there was conducted on that day in the same manner as before, except that the notes were signed "P. E. Haynes & Dudley," for the proprietors, instead of "Glass & Dudley." On cross examination the witness testified that the tobacco notes were so signed, ("Haynes & Dudley,") in pursuance of the published notice, and that the owners and managers of the warehouse resumed the former mode of doing business as soon as the injunction was served.

On the 8th day of November, 1872, the cause came on by consent, to be finally heard; when a decree was made, dissolving the injunction and dismissing the bill, with costs. From that decree the plaintiff applied for and obtained an appeal to this court.

189 *Jno. Daniel, for the appellant.

Blackford and Kean, for the appellees.

MONCURE, P., delivered the opinion of the court. After stating the case, he proceeded:

The first question which arises in this case, is, whether a court of equity has jurisdiction to afford relief in such a case, and whether the proper remedy of the plaintiff, if he be entitled to any, be not an action at law for damages. But as a decision that the plaintiff is entitled to no remedy at all, either at law or in equity, would put an end to all further controversy on the subject of the suit, we will proceed at once to consider the case on its merits.

The appellees contend that though "Friend's warehouse" was one of the places named in section 1, of chapter 87 of the Code, as the places at which it was thereby declared that the inspection and storage of unmanufactured crop tobacco, whether stemmed or unstemmed, should be continued; yet as that section was repealed by section 4, of the act passed April 29, 1867, (acts of Assembly 1866-67, p. 967,) the said warehouse cannot properly be regarded as having been, since the 29th of April 1867, a place established by law for the inspection and storage of unmanufactured crop tobacco. But as the said warehouse has been

so treated by them, and so considered by others, since that day; and as they contend that, supposing the said warehouse to have continued after that day to be a place for the inspection and storage of tobacco, as aforesaid, they closed it for that purpose on the first day of October 1872, as they had a right to do, in the mode prescribed by section 2 of the said act of the 29th of April 1867. We will, therefore, assume, for the purposes of this case, that prior to the said first day of October 1872 the said
190 warehouse was "a place established by law for the inspection and storage of tobacco as aforesaid, and proceed to enquire whether it ceased to be so on and after that day, as contended by the appellees.

The first proviso of section 2, of the said act of the 29th of April, 1867, under which this question arises, is in these words: "Provided that the owner or owners of warehouses established by law shall have the right to close his or their warehouses at pleasure, after giving to the owner, or his agent, of each hogshead stored therein, sixty days' notice of such intention; or after publishing such intention for four weeks in some newspaper published in the city or county in which such warehouse is established."

The owners in this case did publish such intention for four weeks, in a newspaper published in the city of Lynchburg, in which the said warehouse is situated. But it is contended by the appellant, 1st: That the right of the owners to close their warehouse as a place for the inspection and storage of tobacco, is subordinate to the right of the appellant to be an inspector at the said warehouse for the whole year for which he was appointed as such, and to his right of possession as a lessee thereof during that year; and 2dly, that the said notice of the owners, and what was done by them in pursuance thereof, were not bona fide acts, but acts done in fraud of the law, and in fraud of the rights of the appellant as inspector and lessee as aforesaid. Let us proceed to consider these two positions in the order above stated: And,

1st: As to the right of the appellant to be inspector at the said warehouse, and to the possession thereof, as a co-lessee, for the whole year of 1872—notwithstanding any act which might have been done by the owners to close the said warehouse on
191 the 1st day of October 1872—"and though such act may have been in strict pursuance of the said second section of the act of April 29, 1867.

Certainly, section 9 of that act does provide that "the Governor shall annually, in the month of August or September, or as soon thereafter as practicable, appoint one inspector of tobacco for each warehouse established by law in any county or corporation," &c.; and section 11 does provide that "the terms of office of said inspectors shall commence on the first of January next succeeding such appointment, and continue for one year, and until their successors are

qualified;" and sec. 3 of chap. 87 of the Code, (which still remains in force,) does provide that "the proprietors of any such warehouse for the inspection of tobacco, shall let the same to the inspectors, at the rent fixed by law." All of which would seem to indicate an intention on the part of the Legislature that inspectors of tobacco should hold their offices for at least a year; that is, from the first of January to the 31st of December inclusive, and should, during that period, be lessees of the warehouses at which they are inspectors. And such, indeed, is generally the case; but not always. We must remember that the office of tobacco inspector is instituted for the public good, and not for the individual benefit of the officer. And we must construe the whole law together, and not the different sections separately. If we look at the 2d section of the act of April 29, 1867, we will find the language just as plain as that of the three sections just before referred to; and it expressly provides, "that the owner or owners of warehouses established by law, shall have the right to close his or their warehouses at pleasure, after giving" notice as therein mentioned. It is not here provided that the inspector at such a warehouse shall continue to hold his office and the possession of the warehouse until the end of the year;

nor that the closing of the warehouse
192 shall "not take effect until the end of the year; but it is simply declared that the owner shall have the right to close it "at pleasure;" of course without any limitation or restriction as to time, except what is made necessary by the notice which is required to be given. Construing, then, all these sections together, the obvious meaning is, that while, generally, an inspector is appointed for a year, and holds his office and possession of the warehouse, as lessee, for a year, yet his right is subject to the condition, that the warehouse be not closed by the owner during the year, in pursuance of the 2d section of the said act of April 29, 1867; in which case, his term of office and his right of possession of the warehouse then immediately expire. His right of possession as lessee is a mere incident to his office, and of course expires with it. When, therefore, the Legislature engrafted on the inspection law of the State the 2d section of the act of April 29, 1867, the effect was to make section 11 of chapter 87 of the Code read thus: "The terms of office of said inspectors shall commence on the first day of January next succeeding such appointment, and continue for one year, and until their successors are qualified; unless the warehouse be sooner closed by the owner, in pursuance of section 2 of the act of April 29, 1867; in which case the term of office of the inspector shall then immediately expire." Since the passage of that act, inspectors of tobacco have accepted their offices subject to the proviso contained in the 2d section as aforesaid.

We are, therefore, of opinion that the appellees had a right to close their warehouse on the first day of October 1872, in the mode

prescribed by the said 2d section of the said act; and that if they did so close it, the appellant then immediately ceased to be inspector at the said warehouse, or to have any right of possession *thereof, either as lessee or otherwise. And now we have only to enquire:

2dly: As to the said notice of the owners, and what was done by them in pursuance thereof; whether they were bona fide acts; or, on the contrary, acts done in fraud of the law, and in fraud of the rights of the appellant as inspector and lessee as aforesaid.

It is not pretended that the notice of the intention of the owners to close their warehouse in this case was not in due form. It is short, but full enough, and directly to the point; and is certainly all sufficient. It is addressed "to whom it may concern," and runs thus: "Take notice, that the undersigned, owners of Friend's warehouse in the city of Lynchburg, intend, upon Tuesday the first day of October, 1872, to close said warehouse as a place established by law for the inspection and storage of unmanufactured crop tobacco. This notice is given in accordance with the second section of an act of the General Assembly, passed April 29th, 1872." It would be impossible to add to, subtract from, or change a word in that notice, to advantage. And if it had stood alone, there would certainly have been nothing in it to which the least objection could be made.

But the said notice was accompanied by another, which was addressed "To the Public," and runs thus: "The foregoing notice is given in accordance with the Act of Assembly, to enable us to change our warehouse from one established by law to a private warehouse, which will be under our exclusive control, and for the proper conduct of which we will be responsible. A similar change has been made in all the warehouses in Danville, and has given great satisfaction; and the change we propose, will, we believe, be beneficial to ourselves and our customers. We have,

therefore, determined, on and after the first of October 1872, to close *our public warehouse, and open the same as a private warehouse, for receiving, storing, selling, weighing and delivering tobacco. All the commission merchants will sell at this warehouse. Breaks will be held as heretofore, under the supervision of Mr. Powhatan E. Haynes and Mr. Robert L. Dudley, who will have charge of this warehouse for the owners, and will attend to receiving, storing, opening, weighing and delivering the tobacco of our customers." Signed "Proprietors of Friend's Warehouse."

This latter notice, the appellant contends, shows that the owners of this warehouse intended, not bona fide, to close it as a public warehouse established by law, but only to pretend to close it as such, while they would continue to carry it on, in effect, as it had been carried on before. And this, he contends, is in fraud of the law, and of

his rights as inspector and lessee as aforesaid, and makes the pretended closing of the said warehouse null and void.

Now, whether this be a sound argument or not, depends upon whether the owners of this warehouse, after the first day of October 1872 intended to use it in any way in which only a public warehouse established by law could be used; or intended to use it only in a way in which a private warehouse could lawfully be used. It is not pretended that they intended to use it after that day as a place for the inspection of tobacco. There is nothing in the notice to warrant the inference of such an intention; and they expressly declare in their answer that they had no such intention. In fact, they could not so use it, unless it were a place established by law for the inspection and storage of unmanufactured crop tobacco; for at no other place can there be an inspector. Then, the question is, whether the use which they proposed to make of their warehouse, after the 1st of October 1872, was such a use as might lawfully be made of a private warehouse?

They proposed, on and after that day, to close their public warehouse, and open the same as a private warehouse, for receiving, storing, selling, weighing and delivering tobacco. They further stated, in their notice to the public, that "all the commission merchants will sell at this warehouse. Breaks will be held as heretofore, under the supervision of Mr. P. E. H. and Mr. R. L. D., who will have charge of this warehouse for the owners; and will attend to receiving, storing, opening, weighing and delivering the tobacco of our customers." Where is the law which prohibits any one of these acts?—which prohibits the owner of a private warehouse from making such a use of it?—which prohibits the producers of tobacco from bringing it to a private warehouse, for such purposes?—for the purpose of being received, stored, opened, weighed, sold and delivered? We know of no such law. That law ought to be plainly written, (if it would be valid at all,) which would prohibit an owner of property from using it to the best advantage to himself, consistently with the rights of others and the public welfare. The only law which now exists, requiring an inspection of tobacco, is section 62 of chapter 87 of the Code, page 458, which declares that "No unmanufactured tobacco, whether stemmed or unstemmed, shall be exported, or put on board of any vessel or boat for that purpose, unless the same be packed in hogheads or casks, and unless it shall have been inspected and marked or branded by inspectors of tobacco, in the manner prescribed by law. If any person shall ship or export any tobacco, contrary to this section, he shall forfeit one dollar for every pound of tobacco so shipped or exported. And the commanding officer of any such vessel or boat on which any such tobacco is *found, shall forfeit \$20 for every hundred weight of such tobacco, and a proportionate sum for a less quantity." Tobacco may

be sold and consumed in the State; and any other use may lawfully be made of it, with out having it inspected, except to export it, if it be unmanufactured tobacco. Tobacco may be manufactured without being inspected; and when manufactured, it may be exported without being inspected. The only necessary purpose of a tobacco inspection now, seems to be, to prepare unmanufactured tobacco for exportation. And as many other uses are now made of tobacco, it is not generally found necessary to have it inspected. If it should be desired by any of the owners of tobacco which may be carried to, and manipulated at, Friend's warehouse, according to the invitation contained in the notice to the public aforesaid, to export such tobacco, they will of course have, first, to carry it to a public warehouse and cause it to be inspected. But they may make any use of it they please, without having it inspected, except to export it in its unmanufactured state.

If the owners of Friend's warehouse, after closing it as a public warehouse in the mode prescribed by law, had on some future day opened it as a private warehouse, or had at some other place opened a private warehouse, it is presumed that no person could have questioned the lawfulness of such act. Can it make any difference that at the same time and place of closing their public warehouse they opened a private warehouse? We think not.

There is much less occasion for inspections of tobacco now than there formerly was. Tobacco was at one time, and for a long time, by far the most important staple of the country. It was long used as the currency of the country, in which public and private debts were contracted and paid.

There is no subject upon which there
197 *has been more legislation in the colony and the State of Virginia than the subject of tobacco. It is curious to trace the course of this legislation through all the volumes of Henning's Statutes at large and the various revisals of our statute law. A reference to most of them may be found in a note to ch. 220, 2 R. C. 1819, p. 134, being an act passed March 6, 1819, entitled "An Act to reduce into one the several acts now in force concerning the inspection of tobacco." The statute law on the subject has been gradually diminishing in extent for a great many years past, though many provisions, no doubt, were long retained after they ceased to be of practical importance. The chapter on the subject, in the Code of 1819, being ch. 220, is a very long one, extending from p. 134 to p. 176 of the 2d vol. The public warehouses enumerated in the 2d section of that act are very numerous. The chapter on the same subject in the present Code, being ch. 87, is not near so long; and there are comparatively few public warehouses for "the inspection and storage of unmanufactured crop tobacco" enumerated in it. The act of April 29, 1867, before referred to, amends many of the sections of ch. 87 of the Code, repeals many others, and makes

many radical changes in the tobacco inspection law. Among the sections repealed, are sec. 1, continuing the public warehouses enumerated therein; and section 55, declaring the State responsible for the indemnity of the owner of any tobacco received in any warehouse for inspection and damaged therein by fire within a year from the date of its being so received. And among the other radical changes made by the said act, is that made by section 2, which contains the proviso aforesaid, giving to owners of warehouses established by law a right to close them at pleasure. To be sure, that same section declares "that the justices of any county or corporation, all the
198 *justices having been summoned for

that purpose, and a majority being present, may authorize the erection of warehouses by owners thereof, or may establish the same;" and such warehouses then and thus become public warehouses, subject to all the regulations prescribed by law in regard to the same, including such as relate to the appointment and duties of inspectors. But an owner of property cannot establish therein or thereon a public warehouse, without being authorized by justices as aforesaid, even though he may be willing that inspectors should be appointed for it; and much less if he is unwilling that such appointment should be made. If, therefore, he establish "a private warehouse for receiving, storing, selling, weighing and delivering tobacco," it does not thereby become a public warehouse for the inspection of tobacco. Such a warehouse can only be established in the mode prescribed by law; and until so prescribed, it cannot become a place for the inspection of tobacco.

We are, therefore, of opinion, that the said notice and acts of the appellees were not given and done in fraud of the law, or of the rights of the appellant, but were bona fide and valid acts, and had the effect of closing the said warehouse as a public warehouse, &c.

Upon the whole, we think there is no error in the decree, and that it ought to be affirmed.

BOULDIN, J., dissented. He concurred in the opinion as to the right of the owners of a warehouse to close it; but not to change it from a public to a private warehouse. A warehouse is one thing, the inspection of tobacco is another. The act authorizes warehouses to be closed; but it does not authorize it to be closed as a place of
199 inspection and to be kept *open as a warehouse. In this case every thing is to go on after the closing as it did before, except the inspection.

Decree affirmed. _____

200 *Byrne & Wife v. Edmonds.

March Term, 1873. Richmond.

1. Error of Court of Appeals—Accident—Equity Jurisdiction.—S., a married woman, makes her will

*Decree Obtained by Fraud, Accident, etc.—Equitable Jurisdiction—Relief Granted.—A court of equity has

under a power. On her death her will is admitted to probate; and then a suit is brought to set it aside as not executed according to the power. It is set aside in the Circuit court; but upon appeal that decree is reversed, and a part of the will is established; and this is recited in the decree. In fact by some accidental mistake in printing the record in the court of appeals, the will is changed, so that a devise of land given, subject to pay an annuity to another, is given absolutely; the annuitant not being a party in the cause. A court of equity has jurisdiction on the ground of accident, to correct the error of the court of appeals, establish the true will, and enforce the payment of the annuity.

2. *Same-Same-Same-Laches.*—The decree of the court of appeals was in 1857, and the bill filed in 1866. Under the circumstances of the case and the condition of the country, the plaintiff is not barred of relief by the delay in bringing her suit.

This was a suit in equity in the Circuit court of Fauquier county, afterwards transferred to Culpeper county, instituted in February 1866 by Celia Edmonds against

jurisdiction to impeach or correct a judgment or decree where it is obtained by fraud, surprise, collusion, accident, or in case there is any other ground for the interference of a court of equity, provided there has been no laches on the part of the plaintiff.

In *Baxter v. Tanner*, 35 W. Va. 64, 13 S. E. Rep. 1096, the court, citing the principal case, said: "That equity will for accident or mistake impeach and set aside decrees is well settled." See also, *Erwin v. Vint*, 6 Munf. 267, where a decree by default was set aside on the ground that the defendant was prevented by mistake and accident from filing his answer, though he could not have obtained relief by a bill of review; *Callaway v. Alexander*, 8 Leigh 114, which admits equity jurisdiction to relieve against a decree obtained by accident and surprise, but refuses relief on the ground of laches; *Knifong v. Hendricks*, 3 Gratt. 215, relief in equity against judgment obtained by surprise; *Foushee v. Lea*, 4 Call 279, equitable relief from judgment obtained by surprise or inadvertence; *Rust v. Ware*, 6 Gratt. 50, "Judgment at law enjoined on the ground of mistake by the jury, ascertained by after-discovered evidence"; *Holland v. Trotter*, 23 Gratt. 136, relief on ground of surprise. See also, *Mason v. Nelson*, 11 Leigh 227; *foot-note* to *Holland v. Trotter*, 23 Gratt. 126, where many cases are collected.

In *Holland v. Trotter*, 23 Gratt. 136, the court at page 141, said: "They [Courts of Equity] have always granted relief, however, when it is shown that the reason why the defense was not made, was founded in fraud, accident, surprise, or some adventitious circumstance beyond the control of the party."

Same—Equitable Relief Refused—Off-Sets.—In *Hudson v. Kline*, 9 Gratt. 379, the first headnote reads: "In an action at law the defendant is prevented by unavoidable accident from setting up off-sets which he held against the plaintiff, these off-sets being in no way connected with the debts sued upon. He has, however, a plain remedy at law for the recovery of his claims. Held, he is not entitled to enjoin the judgment and set up his off-sets against it, but must pursue his remedy at law for their recovery."

Same—Same—Negligence.—See *foot-note* to *Wallace v. Richmond*, 26 Gratt. 67.

Same—Same—Laches.—In *Holland v. Trotter*, 22

Albert C. Byrne and Evelina C. Byrne, his wife, and others, to correct a decree of the Court of Appeals, relating to the will of Celia Shearman, deceased. The case is fully stated in the opinion of Judge Christian. There was a decree in favor of the plaintiff; and Byrne and wife applied to the District court of appeals at Fredericksburg for an appeal; which was allowed; and that court affirming the decree, they obtained an appeal to this court.

201 *Tucker, for the appellants.

Forbes, for the appellee.

CHRISTIAN, J., delivered the opinion of the court.

On the 9th day of October, in the year 1857, a paper purporting to be the last will and testament of Celia Shearman, a married woman, the wife of Thomas Shearman, was duly admitted to probate in the County Court of Fauquier county. The validity of

Gratt. 140, the court said: "That a court of chancery will not entertain a party seeking relief against a judgment which has been rendered against him in a court of law, in consequence of his default upon grounds which might have been successfully taken in the court of law, unless some reason founded in fraud, accident, surprise, or some adventitious circumstance beyond the control of the party, be shown, why the defense was not made in that court, is a proposition which has been so repeatedly affirmed, that it has become a principle and maxim of equity, as well settled as any other whatever. It has been acted upon and recognized in very numerous cases in this court, as well of ancient as of recent date, so numerous are they, and so familiar, that it is deemed entirely unnecessary to cite them here.

This rule has its foundation in wisdom and sound policy. It springs out of the positive necessity for prescribing some period at which litigation must cease. A court of equity will not grant relief merely because injustice has been done. To entitle himself to relief, the party must show that he has been guilty of no laches, but that he has done every thing that could reasonably be required of him to render his defense effectual at law. A court of equity will never, whatever the hardship, relieve a party from the consequences of their own negligence, and inexcusable laches. To do so would be to hold out direct encouragement to such conduct. Diligence and vigilance would cease to be the rule, and we should destroy all certainty in the results of judicial proceedings. The cases in which courts of equity have refused relief, have been cases where the failure to make defense in a court of law has resulted from the laches or negligence of the party setting up his demands in a court of equity."

Same—Mistake of Law.—The first headnote to *Meem v. Rucker*, 10 Gratt. 506, reads: "An injunction to a judgment at law will not be sustained where defendant at law has failed to make his defense at law, from ignorance of the nature of the proceeding against him, and a misapprehension of the steps it was necessary to take in order to subject him."

See principal case distinguished in *Hall v. Virginia Bank*, 15 W. Va. 340.

this paper, as a will, was contested by the heirs at law of the said Celia Shearman, by a bill in chancery, filed by them in the Circuit court of Fauquier. Upon an issue devisavit vel non, directed in that suit, the jury found a special verdict, in which they find that the paper writing, purporting to be the last will and testament of Celia Shearman, and proved as such before the County court of Fauquier county, at its October term, 1851, is in the proper handwriting of the said Celia Shearman; that she executed said writing at the date thereof, but not in the presence of any witnesses; and that she was, at the time of executing the paper, a feme covert, and so continued until the time of her death." They also set out in their said special verdict, certain deeds, one of which is a deed in which one John Timberlake conveys to Thomas Shearman and Celia Shearman, his wife, certain real estate, and which contains the following provision: "And the said Thomas Shearman doth hereby covenant and agree to and with the said Jno. Timberlake and Celia Shearman, that she, the said Celia Shearman, shall have the privilege, whether she chooses to execute it during the coverture or not, to nominate by last will and testament, or power of appointment in the presence of two witnesses, such person or persons as she may designate, for her heir or heirs to the property aforesaid, after the death of the said Thomas Shearman."

202 *Upon this special verdict the Circuit court, being of opinion "that the presence of two witnesses was imperative in the case of a will as in the exercise of the power of appointment," held that the law was with the plaintiffs; and accordingly entered its decree, declaring that the paper writing which had been admitted to probate, was not the true last will and testament of the said Celia Shearman, and that the same was void and of no effect, and that the probate thereof be set aside and annulled. On an appeal to this court, this decree of the Circuit court of Fauquier was reversed. In that case, which is in the name and style of "Shearman's adm'r & al. v. Hicks & als., and reported in 14 Gratt. 96, this court held that the deed from Timberlake to Shearman and wife above referred to, conferred on the wife a valid power of appointment, and that the power was well executed by her olograph will. Judge Samuels, delivering the opinion of the majority of the court, concludes by saying "that Mrs. Shearman's will passed the title to the land over which she had a power, and in which she had a fee simple estate; and that the sentence of the Circuit court, revoking the probate of the whole will, is erroneous as to the land conveyed by Timberlake, and should be reversed, and the probate of the will as to that subject be held valid and binding."

This court then proceeding to pronounce such decree as the Circuit court of Fauquier ought to have pronounced, decreed and ordered that the probate of so much of Celia

Shearman's alleged will as is in these words: "I, Celia Shearman, of the county of Fauquier and State of Virginia, being of sound mind and disposing memory, praised be to God, and knowing the uncertainty of this life, do make, ordain, publish and declare this my last will and testament, in manner following, to wit: I give and bequeath to Kimble G. Hicks, jr., son

203 *of Kimble G. Hicks, sr., after the decease of my husband, Thomas Shearman, the plantation he now holds; and lastly, I hereby constitute and appoint my beloved husband, Thomas Shearman, executor to this my last will and testament. In testimony whereof," &c. Signed "Celia Shearman, [seal,]" be held good and valid in law; and that "so much of the bill as seeks a revocation thereof be dismissed," &c. &c. The foregoing is a brief history of the case of "Shearman's adm'r & others v. Hicks & others," which is necessary to be thus referred to, in order to a proper understanding of the points now to be decided in the case before us.

It appears from the record in the case we are now considering, that by some strange and unaccountable mistake or accident, the will of Celia Shearman, which was presented to the court of appeals, upon the printed record, was so changed, by mere accident or mistake of the printer, as to make it altogether a different will from that which the testatrix executed, and which was construed by the Circuit court of Fauquier, and passed upon by the jury in their special verdict.

The will which was admitted to probate was in these words (leaving out the formal commencement): First—I give and bequeath to Kimble G. Hicks, jr., son of Kimble G. Hicks, sr., after the decease of my husband, Thomas Shearman, the plantation he now holds a life estate in, given to him by my father, Kimble Hicks, as well as a lot of land adjoining the town of Paris, held under a lease, &c. &c., provided he or his guardian pays over annually to my niece, Celia Edmonds, in current money, the sum of one hundred and fifty dollars during her natural life, &c. &c.

In the will, as printed, the paragraph above set forth is broken and divided into two distinct clauses. By this division the first is made to terminate with the words "he now holds;" after which comes a full stop or period; and the second paragraph is made to begin with the words "A life estate;" and the word "in," following these last quoted words, is improperly printed "is." So that the will, as presented to this court, in the printed record, is converted by this mistake or accident of the printer, (in dividing the final paragraph into two, and the conversion of the word "in," used appropriately by the testatrix, into the word "is,") into a very different paper from that executed by her and admitted to probate in the County court of Fauquier.

The printed document reads as follows: "I give and bequeath to Kimble G. Hicks,

jr., son of Kimble G. Hicks, sr., after the decease of my husband, Thomas Shearman, the plantation he now holds.—(Here is a period, and then commences another paragraph.)—A life estate is given to him by my father, &c., &c., provided he or his guardian pays over annually to my niece, Celia Edmonds, the sum of one hundred and fifty dollars during her natural life," &c.

This latter paragraph thus disconnected by the printer, and the single word "in" converted into the word "is," becomes unintelligible jargon; while if read as the whole paragraph is written by the testatrix, there can be no mistake as to its meaning. By the will, as it was written by the testatrix, there was devised to Kimble G. Hicks, jr., (after the decease of Thomas Shearman,) the plantation said Shearman held a life estate in, but upon condition that the said Kimble G. Hicks, jr., or his guardian, should pay over annually to Celia Edmonds, the niece of the testatrix, the sum of one hundred and fifty dollars. It is plain, that under the true will, as written, the real estate devised to Kimble G. Hicks, jr., was charged in his hands with the annuity of one hundred and fifty dollars. As the will

205 was changed by the *printer, and presented to and passed upon by this court, in the year 1857, it simply devised the real estate to Kimble G. Hicks, jr., without any charge whatever in favor of Celia Edmonds. In other words, the will set up and established by the decree of this court (reversing the decree of the Circuit court of Fauquier,) was not the true will of the testatrix; but by mere accident, another paper was substituted, and which made altogether a different disposition of the property from that made by the testatrix. In the case of "Shearman's adm'r v. Hicks, &c.," in which this proceeding was had, and in which a false and fictitious paper was set up as the will of the testatrix, Celia Edmonds was not a party, and was not represented by counsel. There was no question made as to the annuity to her; and indeed could not arise upon the paper presented as the will in the printed record. But two questions arose and were decided in that case. 1st: Did the deed executed by John Timberlake to Shearman and wife, confer on the wife a valid power of appointment? And 2d: If it did, was the power well executed by the olograph will? The court below held that the power was not well executed; because, upon its construction of the deed conferring the power, the will ought to have been executed in the presence of two witnesses. This court reversed the decision of the Circuit court of Fauquier, and held that the power was well executed by an olograph will; and accordingly set up and established the paper presented in the printed record, so far as that paper disposed of the real estate conveyed in the deed from John Timberlake; but without the conditions annexed to the devise in the true will of the testatrix, charging the real estate, in the hands of the devisee, Kimble G. Hicks, jr., with the annuity of one hundred and fifty dollars to Celia Edmonds.

The mistake or accident by which 206 a different paper *was substituted by the printer, was not discovered until some months after the adjournment of the April term 1857; and this is accounted for from the fact that the counsel who appeared in the court of appeals were not the same who managed the case in the court below. The counsel here argued the case upon the will presented in the printed record, (and Celia Edmonds not being a party to this appeal, and with no counsel to represent her here,) there was nothing to call attention, either of counsel or the court, to the fact that the paper presented was not the true will of Celia Shearman. When the mistake was discovered it was too late to have it corrected by this court. The court had then adjourned to the next regular term, and its decree certified down to the court below. The latter court, manifestly, had no authority, in that case, to make the correction. In this state of things, it seems that the appellee, Celia Edmonds, was advised to apply to the Legislature for relief, in the shape of an enabling act, to confer jurisdiction on the Circuit court of Fauquier, where the land was located and the parties resided, to correct the mistake and relieve against the accident, by which, in the proceedings had in this court, she had been deprived of the annuity secured to her by the will of her aunt Celia Shearman. Accordingly, an act was passed by the Legislature, on the 2d of April, 1861, entitled "An act for the relief of Celia Edmonds," (Sess. acts 1861, p. 300,) which, after sundry recitals, setting forth in substance the facts above detailed, enacted "that the Circuit court of Fauquier county have power and jurisdiction (if it does not already possess it, which is doubtful,) notwithstanding the said final decree of the said supreme court of appeals, upon an original bill in equity, filed in said court by said Celia Edmonds, making all persons interested parties, to hear and deter- 207 mine her complaint *touching the premises, and grant her such relief therein as it shall deem just and equitable, and the provisions of said will may entitle her to."

At February rules, in the year 1866, Celia Edmonds filed her bill in chancery, in the Circuit court of Fauquier, reciting the facts above referred to, and setting forth the act of Assembly above recited, and making parties defendant to said bill the heirs at law of said Kimble G. Hicks, jr., (who had departed this life,) together with the personal representative and heirs at law of Celia Shearman, and insisting that "so much of the will of said Celia Shearman as bestows upon the said Celia Edmonds the annuity of one hundred and fifty dollars per annum, during her natural life, and charges the land devised to Kimble G. Hicks, jr., with the payment thereof, may be declared valid and effectual, as part of the same; and that the said land may be declared subject to, and liable for, the payment of said annuity," &c., &c. Such proceedings were had under this bill, that at

the June term of said court, in the year 1867, a decree was entered, in which the said court, "not modifying or changing the said decree of the Supreme court of appeals, entered on the 23d of November 1857, in the case of *"Shearman's adm'r v. Hicks & others,"* further or otherwise than by relieving against the consequences of the accident or mistake referred to," &c., "doth adjudge, order and decree, that the mistake complained of being established and made manifest to the court, that the true last will and testament of Celia Shearman, dec'd, is in the following words and figures"—and then follows a copy of the true will, as executed by the testatrix—"except so much thereof as disposed of a lot of land in the town of Paris, held under a lease by Josiah Murray; as to which, said will is void and inoperative, (the said testatrix having no

power to dispose of said lot by will,
208 "and that the same, with the exception aforesaid, be and the same is hereby established as the true last will and testament of the said Celia Shearman, dec'd, and that probate thereof, with the exception aforesaid, be held good and valid in law." And it was further decreed that Celia Edmonds was entitled, during her life, to the annuity of one hundred and fifty dollars per annum, from the death of Thomas Shearman, specified in the last will and testament; and that said annuity was chargeable upon the real estate devised to said Kimble G. Hicks, jr., other than the lot of land adjoining the town of Paris, which did not pass by said will. And a commissioner of the court was directed to enquire, among other things, (not necessary here to notice,) what amount of money, principal and interest, was due to said Celia Edmonds on account of said annuity.

On the return of the commissioner's report, showing the balance due Celia Edmonds, on account of said annuity, the said Circuit court entered another decree, directing "that the defendants, Albert C. Byrne and Evelina his wife, which said Evelina is the sole surviving heir of Kimble G. Hicks, jr., deceased, do pay to the plaintiff, Celia Edmonds, the sum of two thousand six hundred and fifty-two dollars, being the amount of principal and interest due on the 10th of May 1867 to the plaintiff, on the annuity falling due on the 10th day of May in each year since the death of the said Thomas Shearman," &c.; and further adjudged and decreed that the real estate devised to Kimble G. Hicks, jr., and in the hands of Byrne and wife, (except the lot in the town of Paris,) is bound and chargeable with the payment of the annuity of one hundred and fifty dollars, during the life of the said Celia Edmonds.

From these two decrees an appeal was allowed to the District court at Fredericksburg; which affirmed the
209 *decrees of the Circuit court; and from that decree an appeal was allowed to this court.

We do not deem it necessary, in our view of this novel and curious case, to enter upon

a discussion of the question so elaborately argued by the counsel for the appellant, as to the authority of the Legislature to pass the act of April 1861, to enable the Circuit court of Fauquier to take jurisdiction of the case, after the final decree of the Court of Appeals—whether such a law, acting retrospectively upon rights already vested under the decision of the appellate court of the last resort, is unconstitutional and void—or, whether that act, authorizing a court to re-open and re-hear a cause finally decided by the Supreme court of appeals, is an invasion of judicial power, and beyond legislative authority. These are interesting and difficult questions, which have been the subject of judicial investigation and discussion in this court, in the case of *Griffin's ex'or v. Cunningham*, 20 Gratt. 31. But, in the view we take of the case before us, these questions do not necessarily arise, and need not be here disposed of. We are of opinion that, independent of the act of April '61, the Circuit court of Fauquier had jurisdiction to hear and determine the case made by the complainants' bill—that no legislative act was necessary to confer such jurisdiction; but that under its inherent and original jurisdiction, as a court of equity, it had the power and authority to hear and determine such a case; and that no legislative sanction was necessary to confer such power.

Treating the case outside and independent of the act of Assembly, the bill must be regarded as a bill impeaching a decree based upon a fictitious or fallacious case, so made by accident or mistake, and for which the complainant was in no way responsible, and could not prevent. In a proceeding and
210 before a court, to which the appellee was not a party, and in which she was not represented by counsel, a will is established as the will of the testatrix, which was not her will, without any default or negligence on her part; but by mere accident or mistake in printing the paper—an accident which misled both the court and the counsel—there was established and substituted in the place of the true will, (under which the appellee was one of the principal objects of the testatrix's bounty,) another, and a fictitious will, which deprived her of all the benefits which her aunt, the testatrix, had been careful to secure to her.

It would be strange, indeed, if such a case, appealing as it does to every instinct of justice, could not be brought within the benign and far reaching powers of a court of equity.

One of the highest prerogatives, and one of the favorite subjects of equity jurisprudence, is to give relief against the consequences of mistake and accident.

The jurisdiction of courts of equity, arising from accident, is, says Mr. Justice Story, a very old head in equity, and probably coeval with its existence. By the term accident is included not merely inevitable casualty or the act of Providence, or what is technically called *vis major* or irresistible force, but such unforeseen events, mis-

fortunes, losses, acts or omissions as are not the result of any negligence or misconduct in the party. 1 Story's Eq., S. 78, Redford's edition.

Lord Cowper, speaking on the subject of accident as cognizable in equity, said: "By accident is meant, when a case is distinguished from others of the like nature by unusual circumstances." The definition would be more accurate, if he had added, provided such unusual circumstances had not arisen from the gross negligence or default of the party seeking relief.

After a thorough examination of 211 the leading cases on *the subject, Mr.

Justice Story thus announces the general principle by which cases of accident are governed: "Perhaps, upon a general survey of the grounds of equity jurisdiction in cases of accidents, it will be found that they resolve themselves into the following: That the party seeking relief has a clear right, which cannot otherwise be enforced in a suitable manner; or that he will be subjected to unjustifiable loss, without blame or misconduct on his part." 1 Story's Eq., § 109. See also Jeremy on Eq. Jur., Ch., p. 359; Bayard v. Norris, 5 Gill, 468.

Applying these well established principles to the case before us, we are of opinion that the Circuit court of Fauquier had jurisdiction to hear and determine the case presented in the appellee's bill. And we are further of opinion, that the appellee has not lost her remedy by any delay amounting to laches on her part. The novelty of the case requiring, as she was advised, the intervention of the legislative authority to give her relief; and the existence and continuance of the late civil war, and the interruption of judicial proceedings consequent thereon, sufficiently accounts for her delay in prosecuting her suit. It is enough that it was commenced within the period of the statute of limitations.

We are, therefore, of opinion that the decree of the said Circuit court of Fauquier be affirmed.

Decree affirmed.

212 *Harrison & als. v. Gibson & als.

March Term, 1878, Richmond.

1. **Laches—Account—Period of Demanding.**—The decided cases do not fix any period as limiting the demand for an account. If from the delay which has taken place, it is manifest that no correct account can be rendered, that any conclusion to which the court can arrive, must, at best, be conjectural, and that the original transactions have become so obscured by time and the loss of evi-

***Laches—Account.**—The rule laid down in the first and third headnotes of the principal case, was recognized as far back as 1806, *Randolph v. Randolph*, 1 H. & M. 181, and has been followed by a long line of subsequent decisions. See *Bolling v. Bolling*, 5 Munf. 334; *Coleman v. Lyne*, 4 Rand. 454; *Burwell v. Anderson*, 8 Leigh 348; *Corr v. Chapman*, 5 Leigh 176; *Hayes v. Goode*, 7 Leigh 452; *Wissler v. Craig*, 80

dence and the death of parties, as to render it difficult to do justice, the court will not relieve the plaintiff. If under the circumstances of the case it is too late to ascertain the merits of the controversy, the court will not interfere, whatever may have been the original justice of the claim.

2. **Bill by Husband and Wife—Bill of Husband.**—A bill by husband and wife, in right of the wife, is the bill of the husband; and the wife is only joined for conformity. The coverture of the wife is not, therefore, an excuse for delay in bringing the suit.

3. **Laches—Lapse of Fourteen Years.**—Though a delay of fourteen years after a right has accrued, does not create a statutory bar, it will, in connection with other circumstances, be very persuasive against the justice of the claim. Relief refused in this case.

By deed bearing date the 7th day of April 1808, and duly admitted to record in the clerk's office of the County court of Prince William county, Beverly R. Wagoner, of said county, and Margaret S. his wife, conveyed to John Gibson of Orange county, four tracts of land in Prince William and Fauquier counties, and eight slaves by name, two of them men, three women, and the three children of one of them, and all his other personal property, upon trust,

that Gibson shall in the first place, 213 *proceed to sell so much of the said estate, real and personal, as will be sufficient to discharge all just debts due from the said B. R. Wagoner, and that are due and recoverable from the estate of Benjamin Harrison, deceased; and shall allow unto him, during his natural life, a genteel support out of the proceeds of said estate; and the residue of the proceeds of said estate shall, during the life of the said Margaret S. Wagoner, be paid unto her yearly, and every year, for her use; and upon the death of the said Margaret S. Wagoner, the said Gibson, his heirs, &c., shall convey to the child or children she may leave, in fee simple, all the before mentioned estate, interest and property of every description, which may be living at the time of the death of the said Margaret S. Wagoner, by even or equal portions; or in case of the death of any child or children of said Margaret S. Wagoner, during her life, such child or children leaving issue, then on the death of the said Margaret S., to convey to such grand-child or grand-children the portion of said estate to which the father or mother of such grand-child or grand-children would have been entitled to under this instrument, had he or she survived the said Margaret S. Wagoner; reserving to the said B. R. Wagoner, in case of his surviving the said Margaret S., during his life, the support before mentioned.

Va. 22; *Griffin v. Birkhead*, 84 Va. 617, 5 S. E. Rep. 685; *Dismal Swamp Land Co. v. Macauley*, 85 Va. 20, 6 S. E. Rep. 697; *Stamper v. Garnett*, 31 Gratt. 550; and *foot-note* collecting many cases on this subject.

†**Bill by Husband and Wife.**—The proposition laid down in the second headnote was sustained in *Blackwell v. Bragg*, 78 Va. 529; *McCullough v. Dashiell*, 85 Va. 41, 6 S. E. Rep. 610.

Beverly R. Wagoner died in 1809. Gibson undertook the trust, and seems to have sold before 1816 three of the tracts of land and one of the male slaves. In April 1816 the County court of Prince William made an order by which J. Lawson, commissioner of the court, was directed to settle and report the account of John Gibson, as trustee under the deed from B. R. Wagoner; and in May of the same year the commissioner returned his report. In this report Gibson is charged with the price of the slave

214 *of land; though the deeds for the land are dated after the return of the commissioner's report, and express only the consideration of five shillings. Upon this settlement, Gibson is found to be in advance to the trust fund on the 31st of December 1815 \$267 39-100. The commissioner also reports a debt due to John Gibson, jr., of \$1,080.70, as of the 3d of April 1816. John Gibson, jr., was a lawyer, and the son of John Gibson, and he was employed by John Gibson, at a salary of \$100 a year, to attend to the business in the courts, in which there were suits pending against Harrison's estate, and he was also to attend to the management and sale of the trust property; and his debt consisted of charges for services rendered to B. R. Wagoner before the creation of the trust, a debt due by judgment against said Wagoner, and for his salary of \$100 a year for seven years, with interest. The commissioner states in his report that he submitted it and the statement of the account to Mrs. Wagoner and her son-in-law, Mr. Russell Harrison, as the present representatives of B. R. Wagoner, deceased, for their inspection and examination. No particular exception was by them taken thereto, except as relates to the salary of \$100 per annum allowed by the trustee to John Gibson, jr.; to which allowance they decidedly object.

At the May term of the court an order was made reciting that the account was returned to court and ordered to lay over; and at the June term, there was an entry, that the report, with the exceptions filed thereto, was taken up and argued by counsel; on consideration whereof the court doth overrule the exceptions, and confirm the report of the commissioner; and the report and account are ordered to be recorded.

Mrs. Wagoner had but one child, and she was married to Russell B. Harrison; 215 and by deed bearing date the *16th day of February 1817, John Gibson, Mrs. Wagoner and Harrison and wife, for the consideration of \$1,400 conveyed to John Gibson, jr., the remaining tract of land conveyed by the deed, which was called the Mansion house tract, and contained two hundred and eighty acres.

Both Mrs. Harrison and her husband died in the life time of her mother; the first dying in May 1823, and Mr. Harrison in November 1835; and they left four children, who were alive at the death of their grandmother, Mrs. Wagoner, in September 1840.

The only acts, so far as appears in this case, done by John Gibson, the trustee, after the settlement of his account in 1816, was that in December 1816 he enjoined the removal of the slaves out of the State by Mrs. Wagoner, and Harrison and wife. In this bill he charged that Russell Harrison had sold one of the slaves to a person who had removed her out of the State; and he said that Mrs. Wagoner was still young enough to have many other children. It was after this bill was filed that the deed last above mentioned was executed. And in 1830 Gibson sold eight of the slaves, one of them an old man purchased by Mrs. Wagoner for forty dollars. The slaves sold for \$1,189 60-100, and of the proceeds \$771 65 was applied to pay the amount of a decree recovered against Gibson as trustee; and of the balance all but \$98 45 was paid to or for Mrs. Wagoner. Gibson died in 1833, without having settled any further account of his actings as trustee.

At the death of Mrs. Wagoner her grandson, Wm. B. Harrison, was of the age of twenty-one years; one of the daughters was married in 1836, and another in 1838, both of them minors when they were married, but over twenty-one years in 1840; the youngest was married in September 216 1841, then a minor. After the death of Mrs. Wagoner these parties, or some of them, seem to have instituted actions at law against the persons in possession, to recover the land or some of it, sold by Gibson; and pending these suits, probably in 1846, John Gibson, jr., in a conversation with William F. Purcell, the husband of the oldest grand-daughter of Mrs. Wagoner, said to him—"I understand you intend to sue me or my father's estate, respecting these trust matters; if so, I wish you would do it at once, while I am alive and can defend it." He was dead when the suits were brought.

In April 1854 William B. Harrison, then living in the State of Ohio, William F. Purcell and wife and Bernard G. Hays and wife, then living in Washington city, filed their bill in the Circuit court of Prince William county, against the administratrix of John Gibson, jr., who had been one of the administrators of John Gibson, and the heirs of John Gibson, the elder, the administrator of J. C. Gibson, another administrator of John Gibson, the elder, and Thomas G. Murray and Julia his wife, the said Julia being the youngest grand-daughter of Mrs. Wagoner, in which they set out the deed of trust and the settlement made by the commissioner in 1816, and the deeds made by John Gibson. They insist that the commissioner was not authorized, by the order of the County court of Prince William, to settle or state the claim of John Gibson, jr.; and the statement was therefore unauthorized and not evidence; and that the claim itself was utterly unjust and unfounded; that John Gibson was allowed by the commissioner 5 per cent. on his receipts; and to allow this charge would make the expense of administering the trust near

twenty-five per cent. of the amount received; and they plead the statute of limitations to all but the four last items of the account. They refer to the three first deeds as *stating only a nominal consideration, and made after the settlement of the account in 1816. They say that the price of only three of the tracts and one slave is charged in that settlement; and neither Gibson, in his lifetime, nor his administrators, having made any other settlement, the plaintiffs are left uninformed as to what became of the fourth tract or its proceeds of sale, and the other slaves. They therefore pray for a discovery from the defendants, and a proper settlement of the accounts of the trustee.

By an amended bill, they say that the plaintiff, Wm. B. Harrison, resided in the State of Ohio in 1840, and had continued to reside in that state; and that at the death of Mrs. Wagoner the female plaintiffs were *femes covert* and continued to be so.

The defendants demurred to the bill; but the demurrer was overruled as to the administratrix of John Gibson, jr., and the administrator of J. C. Gibson, another administrator of John Gibson, the elder. And thereupon these parties answered separately. They both rely upon the lapse of time which had occurred since the death of John Gibson and Mrs. Wagoner, and the death of all the parties who could give any information on the subject; and they say that they know nothing themselves, and that the papers and books of their intestates do not enable them to give any information, except that the books of John Gibson, jr., contain an account of the sale of eight negroes, purporting to be the negroes conveyed in the deed of trust, a copy of which his administratrix files with her answer. This is the sale herein before referred to.

The plaintiffs took testimony to prove the value of the land sold by Gibson. Some of these witnesses speak of the value at the time of giving their evidence and there is nothing very definite as to the value
218 at *an earlier period. The cause having been removed to the Circuit court of Culpeper county, came on to be finally heard on the 17th day of June 1859, when the court made a decree dismissing the bill, with costs. And thereupon the plaintiffs applied to this court for an appeal; which was allowed.

C. Robinson and J. Alfred Jones, for the appellants.

Wm. Green, for the appellees.

STAPLES, J., delivered the opinion of the court.

This bill is filed against the heirs and personal representatives of a trustee. It complains of a breach of trust on the part of the trustee, the waste and misapplication of the trust subject; and it asks for a discovery and account. The transactions of which complaint is made occurred between

eighteen hundred and eight and eighteen hundred and eighteen, nearly sixty years ago, and more than forty years before the bill was filed. The complainants admit they are without any definite information in respect to the trust property; and they call on the defendants for a discovery. All the original parties are dead; and the defendants say they have no knowledge or information on the subject; nor have they possession of or access to documents or papers other than the records of the court, throwing any light upon the transactions of the trustee; and they rely upon the staleness of the demand and the lapse of time as a bar to any recovery in the case.

I think the defence is a good one, and ought to be sustained. I do not rely, however, exclusively upon the lapse of time or the laches of complainants. While the transactions are veiled in great obscurity, there is enough in the record to satisfy the mind that the trust property was neither
219 *wasted by the trustee or with his consent, nor converted by him to his own use; but was properly applied to the purposes contemplated by the parties to the trust.

By the provisions of the deed the trustee was not only authorized, but he was required to sell so much of the trust property, real or personal, as was necessary to discharge all the grantor's debts, and also the debts due and recoverable from "the estate of Benjamin Harrison dec'd; then to allow the grantor, out of the proceeds, a genteel support during his life; and the residue of such proceeds to be paid to Mrs. Margaret L. Wagoner, the wife, yearly and every year for her use, so long as she shall live." At her death the estate, or what remained of it, the trustee was directed to convey to the children then living and to the descendants of those that were dead. This deed was executed in April, 1808. The grantor died in 1809. Between the date of the deed and the 1st of January 1816, the trustee paid debts of the grantor, including an annual allowance to Mrs. Wagoner, amounting to \$2,653 38 cents. He also satisfied a decree against the estate of Benjamin Harrison, dec'd, amounting to 1,781 dollars. There was in addition to these debts a claim held by John Gibson, jr., amounting to \$1,080 for services rendered the estate, which was never paid by the trustee.

The trust deed originally embraced four tracts of land; one of these was sold in 1810 to French, another to Fox, another to Orem, and the proceeds applied in payment of the foregoing debts. Why the deeds executed to some of these purchasers expressed a nominal consideration only, it is impossible now to say; but this is not very material, as the purchase money was faithfully accounted for by the trustee. Indeed, the complainants concede in their bill that three of the tracts were sold and the proceeds properly applied; but they
220 *insist that no account has been given of the fourth, and by far the most

valuable tract. That will be the subject of consideration hereafter.

It appears that the accounts of the trustee, from the commencement of the trust to the first of January 1816, were referred to a commissioner of the County court, and were regularly settled by him. The affidavits and exhibits filed with the commissioner, show that all the transactions of the trustee were the subject of rigid investigation, and that the sales made by him were perfectly understood and acquiesced in as necessary and proper.

When the account was completed, it was submitted to Mrs. Wagoner and her son-in-law, Russel Harrison, for examination. No objection was made by either of them, except to the claim of John Gibson, jr., for services rendered the estate. That claim was excepted to and made the subject of a controversy before the County court, at the June term, 1816. The exception was overruled, and the report of the commissioner sustained and confirmed. The report thus confirmed showed a balance due the trustee of two hundred and thirty-three dollars and 39 cents, and the sum of one thousand and eighty dollars and 17 cents, due John Gibson, jr., as before stated. It was necessary to make some provision for the payment of these debts. This could only be done by a sale of a portion of the slaves, or of the only remaining tract of land known as the "Mansion house tract." The trustee was authorized to sell both or either. It is highly probable that Mrs. Wagoner and her daughter preferred to retain the slaves and surrender the land. Be that as it may, it appears that afterwards, on the 16th of February 1817 the trustee sold and conveyed this "Mansion house tract" to John Gibson, jr., at the price of fourteen hundred dollars.

This sum would have about satisfied
221 *the claims of the trustee and John Gibson, jr. It was probably so arranged and agreed by the parties, as we hear nothing of these debts at any time after this sale.

It may be, as insisted by complainants, that the fourteen hundred dollars was a very inadequate price for the land. It would be very difficult, in 1854, when this suit was brought, to fix the market value of 280 acres of land in the year 1817. That the transaction was perfectly fair and satisfactory to all the parties is proved by the fact that Mrs. Wagoner, the widow, Russel B. Harrison and his wife Mrs. Mary Harrison, united with the trustee in executing the deed of conveyance. Mrs. Wagoner was the life tenant, and Mrs. Harrison would, in all human probability, survive her mother, and thus become entitled to the estate in fee simple. They were then the only parties interested in the trust property. Mrs. Harrison, it appears, died in 1823, her husband in 1835, and Mrs. Wagoner in 1840. So far as this record discloses, neither of them made any objection to the claim of John Gibson, jr., after the decision of the County court; neither made any complaint of any waste or improper management, or

conversion of the trust property by the trustee, or by his connivance or consent.

And now as to the slaves conveyed in trust. There were eight originally; three men, two women, and three children. One of the men was sold by the trustee in 1816, and the proceeds applied in paying debts. In 1830 seven were sold by the trustee, to satisfy a decree against the estate of Beverly R. Wagoner. Of these seven, two only were embraced in the deed. What became of the others it does not appear. As five of them were grown in 1808, when the deed was executed, it is not difficult to believe that in the long interval between that period and the death of Mrs. Wagoner, in 1840, they may have died or become old and
222 worthless, or escaped *into a non-slaveholding State. There is not the slightest reason for believing that the trustee ever appropriated any of them to his own use, or ever permitted any one else to do so, without accounting for the proceeds. It is difficult to believe that Mrs. Wagoner, who was directly dependent upon the labor of these slaves for the support of herself and her grand-children, would have consented to such a violation of her right of property.

The female complainants were married respectively in 1836, 1838, and 1841. It is probable the youngest attained the age of maturity in the latter year. We hear nothing of any complaint on their part, or on the part of their husbands, until fourteen years after the death of Mrs. Wagoner, when this suit was brought. It is true that in 1846 John Gibson, jr., seems to have had some notification of the purpose of the complainants to institute a suit against him or against his father's estate; and he then requested one of the complainants, Judge Purcell, if such was their intention, to bring the suit at once, while he was alive and could defend it. They, however, did not think proper to pursue that course; they waited eight years longer, until after the death of John Gibson, jr., and the death of every other person who could throw any light upon these transactions. And now they call upon the courts, after the lapse of forty years, to set aside the decision of the County court in favor of John Gibson's debt, as coram non judice, to re-open for investigation the question of the validity of that debt, to enter into an inquiry touching the sale and conveyance of the real estate; and indeed to overhaul all the transactions of the trustee, upon vague charges and surmises of a violation of trust duties.

It is impossible that any such investigation can now be had; as the materials for it are not in existence. It is impossible

that justice can be done after this long
223 *lapse of time. The complainants are not entitled to the aid of a court of equity for any such purpose. They have slept upon their rights, if they ever had any. It is a familiar doctrine of courts of equity that nothing can call forth these courts into activity but conscience, good

faith and reasonable diligence. Where these are wanting, the court is passive and does nothing. I shall not undertake to review the cases, or to discuss the principles bearing upon this point. The whole subject has been repeatedly considered by this court, and the law well settled. The cases do not fix any period as limiting the demand for an account. If, from the delay which has taken place, it is manifest that no correct account can be rendered, that any conclusion to which the court can arrive must at best be conjectural, and that the original transactions have become so obscured by time and the loss of evidence and the death of parties, as to render it difficult to do justice, the court will not relieve the plaintiff. If, under the circumstances of the case, it is too late to ascertain the merits of the controversy, the court will not interfere, whatever may have been the original justice of the claim. 2 Lomax on Executors, 488, margin; Carr's adm'r v. Chapman's Legatees, 5 Leigh 164; 2 Story's Eq., lu. sec. 1520 a.; Perry on Trusts, sec. 869.

It is urged, however, that the female complainants were infants at the death of their mother; to which was superadded the disability of coverture. On the contrary, at that time they were all adults, with the exception of one, who arrived at maturity in 1841. It is true, they were *femes covert*, and so continued to the institution of this suit. But the bill in this case, though in the name of husbands and wives, is the bill of the former only; for it is well settled that every bill by husband and wife, jointly claiming in right of the wife, is the act of the husband, though in right of his wife. She is, however, joined for conformity. Dandridge v. Minge, 4 Rand. 397; Caperton v. Gregory, 11 Gratt. 505; Hillis v. Hambleton, adm'r, 10 Gratt. 300.

In this case the husbands were under no disability, and they could have filed this bill as easily in 1840 or 1841 as in 1854. At that time John Gibson, jr., was alive. He alone could explain the origin, character, and grounds of his claim against the trust estate. If that claim was valid, the sale and conveyance to him are satisfactorily explained, and the real estate fully accounted for. Indeed, the justice of this debt being conceded, there is really no ground for any serious controversy. The propriety and necessity of bringing the suit in the life time of John Gibson, as complainants were requested to do, are apparent. No record is given, no reason suggested for this delay. And although the time which has elapsed since the death of Mrs. Wagoner may not, of itself, constitute a statutory bar to the claim, still, the unaccountable neglect of the parties for fourteen years thereafter to prosecute any suit, when considered in connection with the other circumstances, is very persuasive against the equity and justice of that claim. I think they fully justified the court below in dismissing the bill.

For these reasons I am of the opinion the decree should be affirmed.

Decree affirmed.

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*Græme v. Adams.

March Term, 1873, Richmond.

[14 Am. Rep. 180.]

1. **Contract—When Usurious.**—A. contracts to build for G. in the city of Richmond, certain houses, according to a plan and specifications, for the sum of \$64,700, payable in annual instalments of \$12,000, to bear interest at the rate of *87 30 per cent. per annum*, to be secured by deed of trust on the property. If the interest was a part of the contract price of the buildings, the contract is not usurious. If it was for the loan of money or other thing, or for the forbearance of a debt due, it was usurious.
2. **New Contract—When Usurious.**—A. claims that he entered into another subsequent contract with G., which was to bear *six per cent.* interest. If the first contract was usurious, all the usury included in it must have been excluded from the second, or it is usurious.
3. **Same—What Necessary.**—To constitute a new contract the first must be rescinded and set aside by the parties to it, and the second adopted as a substitute for the first, with the intention to be governed thereafter by its terms.
4. **Same—When Usurious.**—The price under which the work was done under the second contract was just as much greater than that provided for in the first, as the difference of the interest on that first sum at *six and 87 30 per cent. per annum* for the whole time of the credit, viz: \$67,800; and when the work was completed, notes payable, as agreed on in the contract, were taken, bearing *six per cent.* interest from their date until the time of payment. If this addition to the first sum contracted for was for the loan of money or other thing, or for the forbearance of a debt due, the second contract is usurious; but if it was not for such loan or forbearance, it was not usurious.
5. **Forbearance—Definition of.**—Forbearance in the sense of the statute in relation to usury, is the giving a further day for the return of a loan when the time originally agreed on is passed; and if the rate of interest agreed on for such forbearance is *over six per cent. per annum*, it is usurious.
- 226 *6. **Contract—Payable in Instalments—Tender of Cash.**—If the contract for the price of the houses was payable in instalments bearing interest, that contract cannot be discharged by the tender of cash at the time when the buildings are completed. A debtor has no right to anticipate the payment of a debt payable at a future day, and bearing interest, without the consent of the creditor.

The case is fully stated by Judge Bouldin, in his opinion.

Lyons & Sterne, John Howard and Meredith, for the appellant.

Johnston & Williams, and Steger, for the appellees.

*See monographic note on "Usury" appended to Coffman v. Miller, 26 Gratt. 698; also, monographic note to Fred v. Dixon, 27 Gratt. 541, on "Interest."

BOULDIN, J., delivered the opinion of the court.

This is an appeal from a decree of the Chancery court of the city of Richmond, dissolving an injunction which had been awarded the testator of the appellant, and dismissing his bill with costs.

The bill charged that the transaction therein referred to was usurious, and prayed that the question might be tried by a jury; and, on motion of the plaintiff, a jury was empanelled to try at the bar of the court, "the issue, whether the transaction in the said bill alleged to be usurious be usurious or no." The trial of the issue was regularly had at the bar of the court; and on the 21st day of November 1870 the jury rendered a verdict in the following words: "We, the jury, find that the transaction in said bill alleged is not usurious." On the jury being polled, one of the jurors said that the verdict rendered was his verdict, "under the instructions of the court;" all the others as respectively called, said it was their verdict.

The plaintiff thereupon moved the court to set aside the verdict, and order a new trial of the issue; which motion was continued. On a subsequent day, to wit: on the 21st of December 1870, the court
227 overruled the *motion for a new trial and the evidence being conflicting, refused to certify the facts proved on the trial of the issue; to which opinion and action of the court the plaintiff excepted.

On the same day the court, approving the verdict of the jury, entered a decree dissolving the injunction which had been awarded in the cause, and dismissing the plaintiff's bill with costs, and from that decree Græme appealed to this court.

The Chancery court having refused, and we think properly refused, to certify the facts proved on the trial of the issue, because the evidence was conflicting, no question of fact is presented for the consideration of this court. We cannot enquire whether the finding of the jury is sustained by the evidence or not. The only question before us is, whether the Chancery court in giving or refusing to give instructions to the jury, or in opinions expressed in the progress of the trial, erred in propounding the law of the case.

It is contended for the appellant, that the court did err:

1. In refusing to give the instructions moved by appellant:

2. In giving other and different instructions in lieu thereof.

The questions arose as follows:

There was evidence in the cause showing, or tending to show, the following facts: That in July 1865, an agreement was entered into between John Græme and S. H. and J. F. Adams, by which the latter agreed to build for the former certain houses in the city of Richmond, according to plans and specifications, for the lumping sum of \$54,700, payable in annual instalments of \$12,000, to bear interest at the rate of 7 30

per cent. per annum, and to be secured
228 by a deed of trust on the *property; that afterwards, to wit, on the 18th of November 1865, a new contract was entered into between the parties, by which the contract price of the building was changed from \$54,700 to the sum of \$57,800, to be paid in like annual instalments of \$12,000, but bearing only 6 per cent. interest, instead of 7 30; that the sum of \$3,100, the difference between the contract price of July 1865 and that of November 1865, was the precise amount of the difference between the interest on the first contract price at 7 30, and the interest on the same sum at 6 per cent.; that in the progress of the work, extra work, to a considerable amount, had been done, for which a balance of \$2,200 was claimed as unpaid, in addition to the contract price; that on a final settlement between the parties, when the buildings were completed, the Adams claimed of Græme \$61,000; that Græme offered to settle at the lumping sum of \$60,000; which was promptly accepted; that the sum of \$57,800 mentioned in the contract of November 1865, and the balance claimed for extra work \$2,200, would amount to the exact sum of \$60,000 offered by Græme and accepted by the Adams; and that the same amount would be reached by taking the first contract price \$54,700, and adding thereto \$3,100, the difference between 7 30 and 6 per cent., and the \$2,200 claimed for extra work.

The plaintiff's counsel then asked the court to instruct the jury as follows:

"1. If from the evidence the jury shall believe that the defendant contracted to build the houses of the plaintiff upon terms of credit, the payments to bear interest at the rate of 7 30 per cent., such contract was usurious, although the defendant was ignorant at the time that it was usurious."

"2. If the defendants set up a new
229. contract subsequently *made, and seek to recover upon that contract, they must prove to the satisfaction of the jury, that such new contract was made and accepted by both parties; and that all the usury in the first contract was excluded from it, and no new usurious consideration included in it."

"3. That if the defendant, in making the new contract, knowingly included in it any sum of money over and above the true contract price of the work, as a compensation to him for loss of interest, then the said new contract is usurious."

"4. The question of fraud is not in issue before the jury. That issue is, was the transaction usurious or not? and if the jury shall be of opinion, from the evidence, that it was usurious, then it is void, whether it be fraudulent or not."

"5. To constitute a new contract, the jury must be satisfied that the first contract was abandoned and surrendered by the parties thereto, and that the contract of the 18th of November 1865 was executed and delivered by said parties as a substitute therefor. But if the jury shall believe that said contract of November 1865 was intended

by said parties to be a modification of the first contract, and made to assure its performance, then it is not a new contract."

"6. If from the evidence the jury shall believe that upon the final settlement of the accounts between John Græme and S. H. and J. F. Adams, the balance stated was made up of the contract price for the work and the price of extra work done by the Adams, (after crediting payments for extra work,) and a sum of \$3,100; which sum was the exact amount of the usurious interest upon the contract price for the whole term of credit, at the rate of 7 30 per cent. per annum, and for the balance thus ascertained, the said Græme executed

230 *his negotiable notes with interest at the rate of six per cent. per annum, then the transaction was usurious, and the jury must find for the plaintiff."

"7. A loan or forbearance of money to be paid at a future day for more than six per cent. is usurious; and if therefore the jury shall be satisfied by the evidence, that the defendants charged the plaintiffs more than six per cent. for the forbearance of the payment of the buildings, in the manner and to the extent expressed in the notes which were executed by the plaintiff to the defendants, then the transaction is usurious."

The defendants then moved certain instructions, which it is unnecessary to repeat, as no question arises thereon.

The court refused to give the instructions as asked for by the parties respectively, and gave the following:

"1. If from the evidence the jury shall believe that the defendants contracted to build the houses of the complainant Græme upon terms of credit, the payments to bear interest at the rate of 7 30 per cent., in such case the question whether such contract was usurious or not usurious will depend on the further question, whether the reservation of the rate of 7 30 per cent. was directly or indirectly for the loan or forbearance of money or other thing, or whether it was a part of the consideration for building the houses.

"If the jury believe from the evidence that it was for the loan of money or other thing, directly or indirectly, or for the forbearance of a debt due, then such contract was usurious, although the defendants were ignorant at the time that it was usurious.

"On the other hand, if they believe it was part of the consideration for building the houses, a part of the contract price, it was not usurious.

"2. If the defendants set up a new contract subsequently made, and seek to
231 recover on that contract, they *must prove to the satisfaction of the jury, that such new contract was made by the complainant and accepted by the defendants. And if the jury believe that the first contract was usurious they must be also satisfied that all the usury in the first contract was excluded from such new contract; and that no usurious consideration was included in such new contract."

"3. That if the defendants, in making

the new contract, included in it any sum of money over and above what the jury shall find to have been the amount of the true contract price of the work, and that the sum so included in such new contract, was intended to be a compensation to them for the loss of interest on a loan or for the forbearance of a debt due, and that the interest for such loan or forbearance was at a greater rate than six per cent. per annum, then such new contract was usurious.

"4. The question of fraud is not in the issue before the jury; that issue is, was the transaction usurious or not? If the jury shall be of opinion from the evidence that it was usurious, then it is void, whether it be fraudulent or not.

"5. To constitute a new contract, the jury must be satisfied that the first contract was rescinded and set aside by the parties thereto; and that the contract of the 18th of November 1865 was executed and delivered by Græme and Hunter and wife, and accepted by the defendants, as a substitute therefor; and that it was the intention of the parties to be governed thereafter by the terms of the said second contract.

"6. If from the evidence, the jury shall believe that upon the final settlement of accounts between John Græme and S. H. and J. F. Adams, the balance stated was made up of the contract price for the work and the price of extra work done by
232 the Adams, (after *crediting payments for the extra work,) and a sum of \$3,100; and the jury shall find that the sum of \$3,100 was the exact amount of interest upon the contract price for the whole term of the credit, at the rate of 7 30 per cent. per annum; and for the balance thus ascertained the said Græme executed his negotiable notes with interest at the rate of six per cent. per annum; then, if the jury further believe that the said sum of \$3,100 was for interest for the loan of money or other thing, directly or indirectly, or for the forbearance of a debt due, then such contract was usurious; but if the jury believe that said sum was not for such loan or forbearance, then the transaction was not usurious."

And then, at the instance of the plaintiff's counsel, who moved the court to explain the meaning of the word forbearance, as used in the instructions, the court gave to the jury the following explanation:

"The Legislature uses two words, 'loan,' 'forbearance.' It did not use those two words in the same sense.

"When the word loan was used, it meant 'a delivery of something to another for his temporary use, which he is to return to its owner at the expiration of his term.' 'A forbearance is the giving of a day for the return of the loan; or, more properly, signifies the giving a further day when the time originally agreed on is passed.'"

"The latter clause of this definition is referred to as more clearly indicating what in the view of the court; constitutes a forbearance." "When the time originally agreed on is passed, and another day is

given, that is forbearance; and if the rate of interest is above six per cent. it is usurious." "For instance, if A. lends B. \$100 for three months, at 6 per cent. interest, that is a lawful loan; if at or before the time the \$100 becomes payable, B. cannot pay, and further time is agreed on, 233 "that is forbearance; and if more than 6 per cent. is also agreed on, it will be usurious and void."

"When the houses were completed there was a present debt owing by Græme to S. H. and J. F. Adams, payable at a further day. There was no debt until the houses were completed. If there was an agreement to give a further day after the time originally agreed on was or should be passed, then if more than legal interest was charged it was usurious."

"What is the time originally agreed on, and whether or not there was an agreement for a further day, are questions of fact for the jury."

After the case had been argued and submitted to the jury, one of the jury asked the court to state what would be the effect of a tender of the money by the plaintiff to the defendants upon the completion of the buildings erected by the defendants for the plaintiff; and the court said:

"If the contract for the price of the houses was payable in instalments bearing interest, that contract could not be discharged by the tender of cash at the time when the buildings were completed."

To all of which opinions, instructions and action of the court, the plaintiff by counsel excepted.

It is insisted for the appellant, that the Chancery court erred in refusing to give the instructions asked for by his counsel, and in giving the instructions which were given by the court.

The instructions thus given seem to cover the whole case; and without entering upon a critical examination of the several instructions given and refused by the court, which we deem unnecessary, we are of opinion, that the instructions correctly propounded the law of the case, and that there was no error in giving them in lieu of the instructions moved by the plaintiff.

234 *Usury can only attach to a loan of money; or to the forbearance of a debt. It is well settled that on a contract to secure the price or value of work and labor done or to be done, or of property sold, the contracting parties may agree upon one price if cash be paid, and upon as large an addition to the cash price as may suit themselves, if credit be given; and it is wholly immaterial whether the enhanced price be ascertained by the simple addition of a lumping sum to the cash price, or by a percentage thereon. In neither case is the transaction usurious. It is neither a loan or the forbearance of a debt, but simply the contract price of work and labor done or property sold; and the difference between cash and credit in such cases, whether six, ten or twenty per cent. must

be left exclusively to the contract of the parties; and no amount of difference fairly agreed on can be considered illegal. It is confounding subjects and terms wholly dissimilar and distinct, to treat such contracts as usurious, as coming within the definition either of a loan of money or other thing, or the forbearance of a debt.

In all cases where property, goods or things in action, and the like are bona fide sold, or contracts are made for service, instead of for money or other thing advanced, "the courts hold that usury cannot attach for the want of a loan. There is, in such case, no element of a loan, nor any forbearance of a debt, in the sense of the statute. See Tyler on Usury, ch. 10, 11, pp. 110 to 143, inclusive, where the subject is fully treated, and all the authorities cited.

In the case of *Beete v. Bidgood*, 14 Eng. C. L. R. 8, Ld. Tenderton refers to the distinction we have been considering, and says: "The agreement was founded partly on what was considered its price if paid for at a future day. The only difficulty has been occasioned by calling the difference between these two prices interest; 235 *but it is our duty to look not at the form and words, but at the substance of the transaction." And he held the contract legal notwithstanding the increased price given for the credit was called interest, and exceeded the legal rate. This addition was regarded a part of the contract price.

The principle thus announced, will be found to be fully sustained by the authorities examined and cited by Mr. Tyler in his recent work on Usury, ubi sup.; and the same principle has been recognized by this court in the recent case of *Knaker v. Shields*, 20 Gratt. 377. There a sum of money called interest was added to the principal of the deferred instalments, and bore interest when due as a part of the principal. It was objected to as illegal. The objection was overruled, and the court said: "In fact the interest is part of the purchase money of the land, and in effect is principal; being thus a part of the purchase money of the land, and principal, not interest, no amount thus bona fide added as principal could make the debt usurious. That addition is, and of necessity must be regulated by the contract of the parties, and not by law. For the same principle see 5 Rob. Prac., p. 466-7, and cases cited. In *Hogg v. Ruffner*, 1 Black. U. S. R. 115, 118-19, Justice Grier delivering the opinion of the court, in an analogous case, says, after referring to *Crawford v. Johnson*, 11 Ind. R. 258: "But it is manifest that if A. propose to sell to B. a tract of land for \$10,000 cash, or for \$20,000 payable in ten annual instalments, and if B. prefers to pay the larger sum to gain time, the contract cannot be called usurious. A vendor may prefer \$100 in hand to double the sum in expectancy, and a purchaser may prefer the greater price with the longer credit; and one who will not distinguish between things that differ, may say with ap-

236 parent truth, that B. pays *a hundred per cent. for forbearance; and may assert that such a contract is usurious. But whatever truth there may be in the premises, the conclusion is manifestly erroneous. Such a contract has none of the characteristics of usury; it is not for a loan of money or forbearance of a debt."

We think the instructions of the court, touching the question of usury, taken as a whole, are in strict accordance with the principles announced, and there is no error therein.

But the appellant's counsel insist that the 6th instruction of the court is erroneous, unintelligible, and calculated to mislead the jury. We think there is nothing in that instruction of which the appellant has cause to complain. It was based on evidence in relation to the final settlement between Grame and the Adams, and was given as a substitute for the 6th instruction asked by the appellant; and, in substance and effect, it merely left it to the jury to determine whether the \$3,100 added to the original contract price of the work was usurious interest, or a part of the contract price of the buildings. In giving the instructions the Chancery court used almost identically the words of Judge Grier in *Hogg v. Ruffner*, defining usury. He says, p. 118: "To constitute usury there must be either a loan and a taking of usurious interest, or the taking of more than legal interest for the forbearance of a debt or sum of money due."

The instruction says: "If the jury further believe that the said sum of \$3,100 was for interest for the loan of money or other thing, directly or indirectly, or for the forbearance of a debt due, then such contract was usurious." The use of these words, "for the forbearance of a debt due," it is contended, renders the instruction ambiguous and unintelligible, and therefore erroneous, as calculated to mislead the jury. We 237 have seen that they *are, in substance, and almost to the letter, the same used by Judge Grier in defining usury; and we are of opinion, as applied to the case before the court, they were appropriate, and not calculated to mislead the jury.

It is further urged that the court below erred in saying to the jury, in reply to a question of a juror, that "If the price of the houses were payable in instalments bearing interest, that contract could not be discharged by the tender of cash at the time when the buildings were completed."

The opinion thus expressed we think unquestionably correct. A debtor has no right to anticipate the payment of a debt, payable at a future day, and bearing interest, without the consent of the creditor.

The court is of opinion that there is no error in the decree complained of; and that the same be affirmed, with costs to the appellant.

Decree affirmed.

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*Turpin v. Sledd's Ex'or.

March Term, 1873, Richmond.

1. Action of Debt—Bond—Payable in "Gold or Silver."—T. executes his bond to S. by which on demand he promises to pay to S. in gold or silver or the equivalent thereof, \$2,400. This is a promise to pay \$2,400 in gold or silver coin or the equivalent thereof; and debt may be maintained upon it.

2. Bond—Consideration—Usury.—The bond was dated in May 1866, and the consideration proved was a debt due before the war of uncertain amount, and \$1,670 in United States currency advanced at the date of the bond, when this currency was as 129 1-8 for gold and 131 for silver. As it does not appear what was the amount of the ante-war debt, usury is not proved.

This was an action of debt in the Circuit court of Powhatan county, brought in September 1869, by James V. Sledd's ex'or against Thomas J. Turpin. The action was founded on a bond, as follows: \$2,400. On demand, for value received, I promise to pay to James V. Sledd or his assigns, in gold or silver, or the equivalent thereof, the sum of twenty-four hundred dollars; and for the payment of which I bind myself, my heirs, ex'ors, &c., firmly by these presents. Witness, my hand and seal, this 8th day of May 1866. Thomas J. Turpin, (seal.) The declaration claims the sum of twenty-four hundred dollars, with legal interest from the 8th of May, 1866, in gold or silver, or the equivalent thereof; and it sets out the bond accurately.

The defendant demurred to the declaration; but the court overruled the demurrer; and he then filed the pleas of payment and usury; on which issues were made up.

239 *On the trial the jury found specially the facts of the execution of the bond and payment of interest thereon until the 8th of May 1868; and that the balance had not been paid. That at the time of the execution of the bond the defendant was indebted to James V. Sledd, the obligee, for a balance due upon a debt contracted some time before the war; that there was no evidence as to what was the amount of that indebtedness; that at the time of the execution of the bond Sledd lent to the defendant a further sum of money, amounting to about \$1,670 in United States treasury notes, or in National Bank notes; and that this last sum, together with the sum due as aforesaid, made the consideration of the bond; and the value of said notes at the time, as compared with gold and silver, was gold 129 1/8 and silver about 121. If upon these facts the law was for the plaintiff, then they found for the plaintiff the said sum of \$2,400, with interest from the 8th of May 1868 till paid; the same to be paid in gold or silver or its equivalent. If the law be for defendant, then, &c.

Upon this verdict the court rendered a judgment in favor of the plaintiff, that he recover against the defendant the sum of twenty-four hundred dollars, the debt in the said verdict ascertained, with legal interest thereon from the 8th of May 1868 till paid,

and his costs. And thereupon Turpin applied to this court for a supersedeas; which was allowed.

Mosby, for the appellant.

Tabb, Page & Maury, for the appellee.

ANDERSON, J., delivered the opinion of the court.

The court is of opinion that the bond upon which this suit was brought, is an obligation to pay a certain sum, that is 2,400 dollars, in money, that is to say, gold or silver, meaning gold or silver coin, not bullion. The *transaction shows this: It was not a sale of bullion, but a contract to pay a debt, ascertained—2,400 dollars—Not paper dollars, but gold or silver. In this obligation "gold or silver," is evidently named as the standard of value, and as such, gold or silver coin could only have been meant. For whilst the obligor is not absolutely required to pay in that coin, he is absolutely required to pay that or its equivalent. He must pay 2,400 dollars, gold or silver being the standard. He may pay it in either, but if not paid in one or the other, he may pay it in National Bank notes, or other currency, in an amount equal to twenty-four hundred gold dollars, or silver dollars, at his option. Such being the obligation of the plaintiff in error, it is a contract for a sum certain in money; and although he has the privilege to discharge it with an equivalent of bank notes or other inferior currency, debt will lie, as was held by this court in *Butcher v. Carlile*, 12 Gratt. 520. The court is, therefore, of opinion that the demurrer was properly overruled.

Upon the second assignment of errors, the court is of opinion that the judgment of the court below, on the special verdict, is correct. The doctrine is well settled, that upon the plea of usury, the onus lies upon the defendants. The statute of usury being highly penal, strict proof is required. *Brockenbrough's ex'ors v. Spindle's adm'rs*, 17 Gratt. p. 21. In this case the defendant has failed to show that the consideration of the bond, or any part of it, is usurious. And the defendant in error, by his counsel, having waived any right he may have to a judgment for gold or its equivalent; and having withdrawn his assignment of error, that the court below did not render such judgment, the court is of opinion that there is no error in the record for which the judgment should be reversed. Let it be affirmed.

Judgment affirmed.

241 *Perry v. Smoot & als.

March Term, 1873, Richmond.

Will—Investment in State Bonds.*—S. made his will in 1858, and died in July 1867. He gave to his daughters S. and C. each ten thousand dollars, to

*See principal case cited in *Cooper v. Cooper*, 77 Va. 203.

be realized out of his estate by sale or otherwise, as early as practicable after his decease; and directed his executors to invest the said legacies in the bonds of the State of Virginia, in the names of S. and C. The residue of his estate he gave to his two sons, who were his partners in business, and who he appointed executors. When S. died his daughter C. was over twenty-one years of age, and capable of understanding her rights. The executors did not invest the \$10,000 left to her, but retained it in their hands with her knowledge, and as they aver, by express agreement with her, and paid her the interest regularly upon it. **Held:** In the condition of the country from 1867 to 1870, the executors were well justified in not investing the money in State bonds.

Charles C. Smoot a citizen of Alexandria died in July 1867, leaving a will which was executed in 1858. For years before the date of his will and until his death he was engaged in a mercantile business, with his two sons Charles C. Smoot, jr., and John B. Smoot as partners. By his will he gave two houses and lots in the city of Alexandria to his daughter Mary Ann the wife of John Perry, and he gave to his two unmarried daughters, Susannah Adelaide, and Catharine Florence Smoot, each the sum of ten thousand dollars, to be realized out of his estate by sale or otherwise, as early as practicable after his decease; and he directs his executors to invest the said legacies in the stock or bonds of the State of Virginia, and in the names of his said daughters Susannah Adelaide and Catharine Florence severally, *which said legacies he gave to his said two daughters for their sole and separate use and property, free and exempt from the debts, liabilities, and control of any husband either of them may marry, with power of disposition either in their life time or by last will. He gave all the rest of his estate, both real and personal, to his two sons Charles C. and John B. Smoot; and he appointed them his executors.

In 1869 Catharine Florence Smoot having married Wm. Perry, a suit was instituted by them, and afterwards in the name of Catharine Florence by her next friend, against Charles C. and John B. Smoot, as executors of Charles C. Smoot deceased; and in the bill it was charged that the testator left an estate of not less than \$150,000; that the investment of the \$10,000 left the plaintiff might have been made within six months after his death; but the executors had chosen to retain the money in their own hands, paying her simply six per cent. interest upon it; that in failing to make the investment they had been unfaithful to the trust reposed in them, and had greatly injured the plaintiff. The prayer of the bill was that the defendants may be required to purchase for the plaintiff as much State stock as might have been purchased with 10,000, at the time the investment ought to have been made, and for general relief.

The executors answered the bill. They say that the estate of their testator was worth about \$60,000, instead of \$150,000.

That the devise to Mary Ann Perry and Susannah Adelaide who had married Thomas Perry, had long since been paid and satisfied. That the plaintiff at the death of their testator was twenty-three years of age, intelligent, and fully informed of her rights; that the respondents paid her the interest on the \$10,000 from the death of their testator, and she received the

243 *same in accordance with an agreement between them to that effect. It is true that they had not invested the \$10,000 as directed by the will; but this was because the plaintiff, after a full discussion of the subject, shortly after the testator's death, determined to leave it in the hands of the respondents on legal interest, until she should require it to be otherwise disposed of or invested; of which she agreed to give them reasonable notice. This notice came on the 1st of April 1869 in the shape of a demand from her husband about two months after his marriage with the plaintiff, for the payment of the money to himself; and his suit was brought in two days after that demand. They deny that the plaintiff has been injured by the non-investment of the said \$10,000 in Virginia stock. In 1858 when the will was made, State stock was considered a safe and profitable investment; but in 1867 when the respondents commenced executing the will, they did not, in view of the great changes that had taken place since the will was made, and of the depreciated and unsettled condition of such stock, feel authorized to invest \$10,000 in such unreliable and unprofitable property; and they were therefore gratified when the plaintiff, long prior to her marriage, agreed that the said money should remain in the hands of the respondents on legal interest. How it shall be invested they submit to the court.

In August 1869 and before the defendants had filed their answer, the court made a decree in the cause, directing a commissioner to settle the account of the administration of the executors, and to ascertain and report the amount of property of every kind that came into their hands, with the description thereof; the earliest practicable time after the death of the testator at which the sum of \$10,000 directed by the will to be invested in Virginia State stocks, for the sole and separate use of the plaintiff, could have been realized out of the

244 estate *of the testator by sale or otherwise; the market value of Virginia State stock at that time; the lowest market value of said stocks at any time between the periods at which the said \$10,000 could have been realized and the date of the decree; and what would have been the present value of \$10,000 worth of registered stocks of the State of Virginia if the same had been purchased as directed by the will of the testator, and what amount of interest would have been collectible on the same up to the date of the decree.

The commissioner reported that the estate of the testator consisted at his death of real estate \$42,900, of bonds of the State of Virginia and other stocks \$4,195 64, and

of his interest in the partnership \$15,000 = \$62,195 64; that the \$10,000 might have been realized and invested within six months from the death of the testator; that the market value of Virginia State stock at the end of six months from the testator's death, was thirty-seven cents; the lowest value up to the time of the decree was thirty-six cents; and assuming the lowest value as the proper basis of the settlement, he ascertained the amount of principal which the \$10,000 would have purchased, at \$27, 77 77; or in United States currency \$13,055 55, the interest paid by the State on that amount at \$791 67, and the interest placed to the credit of the bond holders at \$1,583 33 = \$2,375. And rejecting the claim of the executors for a credit for the succession tax on the \$10,000 of \$100, he stated their account with the plaintiff, showing them indebted for interest \$1,683 33, after crediting them with \$975 of interest paid by them to her.

The executors excepted to the report for the failure to credit them with the succession tax, and for fixing the amount of principal due the plaintiff at \$13,055 55 and interest at \$1,683.

245 *The cause came on to be heard on the 14th of February 1870, when the court sustained the said exceptions to the commissioner's report; and it appearing from a statement filed, that after the application of such credits as the defendants are entitled to, there was in their hands the sum of \$9,884 25 which should be invested in registered stock of the State of Virginia, it was decreed that they should make said investment in the name of the plaintiff for her sole and separate use, free from the debts and control of her husband, and that they should pay to her the balance of the interest then due to her, to wit, \$524 92, and the costs of suit \$57 42. And it appearing that the defendants had brought into court and delivered to the attorney of the plaintiff, the State bonds, and paid him the money as directed by the decree, the same was made a final decree in the cause. From this decree the plaintiffs applied to this court for an appeal; which was allowed.

Claughton, for the appellant.

Smoot, for the appellees.

STAPLES, J. The testator, Charles C. Smoot, died in the city of Alexandria on the 31st of July, 1867. By his will, bearing date February 16th, 1858, he devised to his daughter Mary A. Smoot, certain real estate in said city; to his daughters Susannah A. Smoot and Catharine F. Smoot he bequeathed the sum of ten thousand dollars each, to be realized out of his estate, by sale or otherwise, as early as practicable after his decease; and he directed his executors to invest said legacies in the stocks or bonds of the Commonwealth of Virginia. All the rest of his estate, real and personal, the testator devised and bequeathed to his sons Charles C. Smoot and John B. Smoot, whom he appointed his executors. The

246 *will was admitted to probate, and the executors qualified in October 1867. The legacy to Susannah A. Smoot has been paid or arranged by the executors. The whole controversy in this case grows out of the failure of the executors to invest the ten thousand dollars given to Catharine F. Smoot, according to the directions of the will.

It is insisted by the complainants, that the investment ought to have been made as soon as it was practicable after the death of the testator; and that it was practicable so, to do, at any time within six months after that period. Not having made the investment at the time they should have made it, the executors are answerable for any loss by the subsequent rise in the price of the stock. It is certainly true that where a trustee is required by the terms of the trust to invest in public securities funds in his possession, and instead of doing so, he appropriates them to his own use, or otherwise, unreasonably delays the investment, the cestui que trust has the option of charging him with the principal sum and its interest, or with the amount of stock he might have purchased with the money. And the same rule applies to an executor, who is also a trustee, but having fully administered the estate retains the legacy in his possession, not as assets of the estate, but as trustee of the legacy. In all such cases the trustee or executor is regarded as a wrong doer; and as such, he is compelled to place the injured party in the same situation he would have been in if the wrong had not been done. But, where the executor has received no funds for investment, and is required to raise them in the course of his administration, there can be, in the nature of things, no fixed rule as to the time within which the trust is to be executed. The farthest the courts have gone, is to say that the investment must be made within a reasonable time. What is a reasonable time depends upon all the

247 *circumstances of the case. In one instance a year from the testator's death was considered a reasonable time for the purchase of United States stock. This rule was adopted in analogy to the payment of legacies. In another case the same period was regarded a reasonable time, although the trustees were directed to invest in the purchase of land with all convenient speed. Perry on Trusts, 462, and cases there cited; Hill on Trustees 370-371. And under our statutes the executor is not compellable to pay any legacy given by the will, or make distribution, until after a year from the day of his qualification; and even then he can only be required to make such payment or distribution upon being secured by proper refunding bonds.

In this case the executors qualified in October 1867. The estate which came into their hands is estimated by complainants at one hundred and fifty thousand dollars. The commissioner, however, reports it as of the value of sixty-two thousand dollars only. It consisted of real estate valued at

forty-two thousand dollars, the interest of the testator in an unsettled partnership amounting to fifteen thousand dollars, and certain stocks and securities not exceeding four thousand dollars. From such sources the executors were required to raise the large sum of twenty thousand dollars. The testator was well aware of the difficulties they might encounter in carrying out his wishes. He therefore directed that the legacies should be realized out of his estate, not immediately, but by a sale as early as practicable after his decease. He did not intend that his sons should sacrifice the property given to them in paying the legacies to the daughters. He no doubt had entire confidence in the integrity and sound judgment of the former, and it was his purpose they should exercise a fair and liberal discretion in carrying out his instructions.

248 *I think that discretion has not been abused; and that the executors were well justified in declining to make the investment. The condition of the State politically and financially from October 1867, to January 1870, when the decree complained of was rendered, is a matter of public history. The reconstruction acts passed in the beginning of the year 1867 declared that no legal Governments existed in the States south. Virginia was denominated Military District No. 1, and as such was placed under the control of a General of the Federal Army; her judicial, executive and ministerial officers were removed, and their places occupied by Military appointees, and all the departments of the Government, with all the great interests of the State, political and financial, subjected to a Military denomination acknowledging no constitutional responsibility. How long this state of things was to continue no one could foresee. Reflecting men, attentive observers of the times, were profoundly despondent of the future. They believed the termination of the Military power would be followed by the establishment of a civil Government greatly more disastrous to the prosperity of the State. Whether these fears were well or ill-founded, whether they would have been realized in any event, it is not our province to inquire. It is certain that this condition of things exerted a most depressing influence upon the spirit and temper of the people, upon all the industrial interests of the State, its credit, its business and its progress. The effect upon the credit of the State is apparent from a single fact disclosed by this record, that in 1867 and 1868 State bonds commanded in the market about thirty-eight cents in the dollar only. Capitalists might purchase such securities upon speculation, but few would regard them as safe and judicious investments. The executors no

249 doubt acted upon these views. *They wisely abstained from embarking the fortune of their sister in securities which did not and could not command public confidence, and might at any day become utterly worthless in the commercial world. All the circumstances and facts of the

case tend to show that complainant throughout was informed of the failure of the executors to make the investment. She resided in the same town with them. At the death of the testator she was over twenty-one years of age, and fully competent to understand her rights. If the investment had been made, the bonds would have been in her possession, and the interest collected from the State by her authority alone. But instead of this she receives from the executors annually a sum or sums equal to the yearly interest upon the amount of her legacy. She received the payments without objection or complaint, although she must have been apprized they were made by the executors as borrowers of the fund due her. In Byrchall or Bradfield, 6 Mad. R. 148, cited by complainant's counsel, Sir John Leach directed an enquiry by a commissioner to ascertain whether the legatees were informed at any time that the executor had retained the legacy in his hands. It appeared that he had so retained it for ten years, paying interest to the cestui que trust under a representation that the legacy had been invested according to the trusts. Under these circumstances the executor was required to furnish the stock which might have been purchased when the investment ought to have been made. It is fair to presume a different decision would have been made, if it had appeared that the cestui que trust had accepted the interest knowing the funds were retained by the executor. In such case he would be treated as a borrower and not as a wrong doer. In this case there is nothing to impeach the good faith of the executors. Their conduct throughout evinced a desire to perform

250 *the duties imposed by the will, with a due regard to the interest of all the legatees.

For these reasons I am of the opinion the decree should be affirmed.

The other judges concurred in the opinion of STAPLES, J.

Decree affirmed.

251 *Hardy v. McCullough & als.*

March Term, 1878, Richmond.

1. *Case at Bar—Wharves.*—S. and others were the owners of two wharves and a small dock between them, fronting on Elizabeth river at Norfolk; which dock was used in connection with both wharves. In 1851 they sold to W. the eastern wharf with its appurtenances, with general warranty, making the logging on the west line of the dock the boundary; and in their deed they covenant to allow W. to have the common use with themselves or their tenants of the said dock for the purpose of landing goods on his wharf from vessels or boats which may enter therein, as long as the said dock and adjoining premises are owned by them, or until they may choose to fill up the dock. W. in consideration thereof, hereby undertaking to clean out from time to time, the said

dock at his own expense. In March 1854 they sell the other wharf and the dock to B. **Held:**

1. *Same—Easements—Implication of Law.*—If there had been no special covenant for the use of the dock by W. the right to use it in connection with and for the benefit of the wharf, as it had been openly used by the grantors, would have passed to the grantee by implication of law, as an easement, or as part of the property granted.
2. *Same—Same—Express Contract.*—But in the face of the express contract for the use of the dock, no implication or presumption of law in favor of a different or more extended use of the dock can arise.
3. *Same—Wharves—Held as Private Property.*—The wharves were originally built out into Elizabeth river, and the tide ebbs and flows into the dock; but they are within the portwarden line, a line drawn along the channel of Elizabeth river, under an act of the General Assembly; and they were built so long since that no persons living have any knowledge of the time when they were built, and they have always been held as private property: **Held:**

252 *1. *Same—Same—Title of Commonwealth—Waiver—Quere.*—*Quere:* If any title which the Commonwealth might at an earlier period have asserted to this dock, if not expressly surrendered, has not been, by an almost irresistible implication, waived and abandoned in favor of those claiming to be the owners thereof.

2. *Same—Same—Same—Express Contract.*—In the absence of any claim by the Commonwealth, and in the face of the apparent waiver and abandonment as aforesaid, W. and those claiming under him cannot rely upon that supposed title, in derogation of the express contract of W. to the contrary.

In April 1851, and for some time prior thereto, John Southgate, Tazewell Taylor, and four other persons, were in possession of and claiming to be owners thereof, a lot of ground lying between the south line of what is now Nevison street, and Elizabeth river at Norfolk. This property included two wharves and a small dock lying between them. These wharves lay within what is called the portwarden line, a line run by authority of an act of Assembly along the channel of Elizabeth river, upon which wharves were forbid to encroach. The bottom of the dock was below the tide. These wharves and dock had been built and had been held as private property, from a time before the memory of any men now living.

By deed bearing date the 1st day of April 1851, John Southgate, Tazewell Taylor and the other owners in consideration of the sum of \$12,000, conveyed to Josiah Wills, one of these wharves with the ground from Nevison street; with appurtenances to the same belonging; the line separating it on the East from the other property owned by the grantors being described as follows: Beginning on South side of the street proposed to be opened and designated as Nevison street, at a point which extended Southerly, strikes the logging on the West side of the small dock owned by the parties of the first part; thence running

*For monographic note on Easements, see end of case.

Southerly along the West side of said
253 *dock and to the channel of Elizabeth
river; thence Westerly along said
channel &c. And by a subsequent clause
of the deed the said parties of the first part
"covenant to allow said Josiah Wills to
have the common use, with themselves, or
their tenants, of the dock herein first men-
tioned, for the purpose of landing goods on
his wharf from vessels or boats which may
enter therein, as long as the said dock and
adjoining premises are owned by the said
parties of the first part, or until they may
choose to fill up the said dock. The said
Wills in consideration thereof, hereby un-
dertaking to clean out, from time to time,
the said dock at his own expense."

Wills went into possession of his wharf,
and the dock was used by vessels discharg-
ing their freight and passengers on his
wharf; and this continued to be done until
the commencement of the late war. Wills
died in 1855, and the wharf passed through
several successive owners, until it came into
the possession of Thomas A. Hardy, who
had purchased one, and leased the other,
moiety thereof, and so held it, when the
bill in this case was filed.

By deed bearing date the 23d day of March
1854, Southgate, Taylor and the other
owners in consideration of the sum of
\$18,000 conveyed the other wharf and the
dock to Ball, Santos and Mellen, calling for
the line described in their deed to Wills.
This property was afterwards sold under a
deed of trust given by subsequent pur-
chasers to secure a part of the purchase
money, and was purchased by John M.
Southgate and Tazewell Taylor, to whom
it was conveyed, and subsequently the same
was leased to A. A. McCullough.

In 1869 McCullough commenced to drive
piles along the west line of the dock, to
prevent its use by Hardy; and thereupon
Hardy applied by bill to the judge of the
Corporation court of Norfolk for an
254 injunction to restrain *him; which
was granted. In his original bill he
claimed that under the conveyance to Wills,
the owner of his wharf was entitled to the
use of the dock as an easement appurtenant
thereto, and which had been previously so
used; and also that the covenant in the
deed was under the statute to be construed
as if it was made by or for the assigns of
the respective parties; and therefore he was
entitled to the use of the dock under the
covenant. In an amended and supplemental
bill he set up the further ground, that the
dock extended below low-water mark, and
was a part of Elizabeth river, a navigable
stream; and therefore he was entitled to
the free use of it.

McCullough, Taylor and the other owners
answered, denying that the owners of the
Wills wharves had any right to the use of
the dock, either on the ground of easement
or under the covenant; but on the contrary
any such right was expressly negated by
the covenant, which must be taken as ex-
pressing the intention of the parties to the
contract. As to the dock extending below

low-water mark, that was true, but it was
within the portwarden line, and had been
held as private property for a period ex-
tending beyond the memory of any men
living.

The cause came on to be heard on the
31st of January 1870, when the court dis-
solved the injunction and dismissed the
bill. Whereupon Hardy applied to this court
for an appeal; which was allowed.

Scarburgh, for the appellant.

Milson, for the appellees.

BOULDIN, J., delivered the opinion of
the court.

On the 1st day of April 1851, and many
years prior thereto, John Southgate,
255 Tazewell Taylor and others, *and
those under whom they claimed, were
the owners in fee simple of certain wharf
property in the city of Norfolk on the waters
of Elizabeth river, on the north side thereof.
In this property and claimed by said owners
as part thereof, is a small dock opening on
the South into the main channel of Eliza-
beth river, and supplied by the waters
thereof, extending back into the property
aforesaid at right angles to said channel,
or nearly so, and surrounded on the north,
east and west by said property. There are
wharves on that portion of the property
fronting on the main channel of Elizabeth
river, which however have been neglected,
and also on the east and west sides of the
dock aforesaid; and when all the property
was owned by the said Southgate and others
and their grantors this dock was used for
the common benefit of the wharves. The
tide ebbs and flows into the dock, and the
whole of it is below low-water mark. The
wharf property around the dock was also
originally below low-water mark, and has
been filled up by artificial means; but,
when, or by whom does not appear. No
witness examined in the cause seems to
have known or heard when the wharves and
dock were first constructed; and as far
back as the testimony reaches the dock ap-
pears to have been regarded and treated as
well by the reputed owners as by the State
and City authorities and others, as private
property. The entire dock is within and
above the Port Wardens' line; and as stated
above, Southgate, Taylor and others, and
their predecessors have always claimed to
own it in fee simple as a private dock.

In this state of facts, on the 1st day of
April 1851, John Southgate, Tazewell Tay-
lor and wife and the other owners of the
property aforesaid, by deed of that date,
conveyed to Josiah Wills a portion of said
wharf property particularly described
256 in the deed. The Eastern *boundary
of the property sold is described as
follows: viz: "Beginning on the south side
of the street proposed to be opened and
designated as Nivison street, at a point
which extended southerly, strikes the log-
ging on the west side of the small dock
owned by the parties of the first part,

thence running southerly along the west side of said dock and to the channel of Elizabeth river," &c., &c. The boundary then extends westwardly along the channel of Elizabeth river, thence North to Nivison street, thence along Nivison street to the beginning; making the western side of the dock the eastern boundary of the property conveyed, and embracing no portion of the dock within its limits. The property within the limits aforesaid with its appurtenances, is conveyed to Wills, with general warranty, and no mention is made of the dock in the granting part of the deed, excepting to refer to it as the eastern boundary of the property sold, and to describe it as "owned by the parties of the first part."

But immediately following the grant and warranty is a special covenant in the following words: "And the said parties of the first part hereby covenant to allow the said Josiah Wills to have the common use with themselves or their tenants of the dock herein first mentioned, for the purpose of landing goods on his wharf from vessels or boats which may enter therein, as long as the said dock and adjoining premises are owned by said parties of the first part, or until they may choose to fill up the said dock. The said Wills, in consideration thereof, hereby undertaking to clean out, from time to time, the said dock at his own expense."

On the 23 day of March 1854, Southgate, Taylor and others, grantors in the deed to Wills, ceased to own the residue of the property first mentioned, including said dock, having on that day sold and

257 conveyed the same *to Robert M. Ball, A. F. Santos and John Mellen of the City of Norfolk, with general warranty, making the western side of said dock their eastern boundary, and thus embracing within the grant all the dock.

The appellant claims under the deed to Wills, the appellees under the deed to Ball, Santos and Mellen.

The appellant and those under whom he claims, seem to have enjoyed from the date of the deed to Wills, down to the date of the proceeding sought to be enjoined, the common use of the dock for the purpose of landing goods on their wharf, but not to charge dockage. The appellees had the same use of the dock, but also when they thought proper to charge it, received dockage from all vessels entering the dock.

In February 1869 the appellee, McCullough, representing in his own right and as tenant the entire interest conveyed to Ball, Santos and Mellen, by the deed of the 23d of March 1854, commenced driving piles in said dock on the Western side thereof near the appellant's wharf, with the purpose of erecting thereon a fence so as to exclude the appellant from the further use of the dock. The suit below was instituted to enjoin this proceeding of McCullough, the plaintiff claiming in his original bill under the deed of April 1, 1851, to Josiah Wills alone. The injunction was awarded. In the course of the proceeding amended

bills were filed, in one of which the title of the original grantors, Southgate, Taylor and others, to the dock, was denied, and the right of the State thereto was asserted as part of Elizabeth river below low-water mark, and therefore a public highway open to all citizens of the State. On final hearing the injunction was dissolved and the bill dismissed with costs; and from that decree an appeal was taken by Hardy to this court.

258 *The first two errors assigned run into each other, and will be considered together. They are that the injunction instead of being dissolved, should have been perpetuated.

1. Because, "if the dock was the property of the grantors in the deed to Josiah Wills, then that deed passed to Wills the right to use it in connection with his wharf, by way of easement as parcel of the subject especially granted."

2. Because, "The right to use the dock passed to Wills, also, upon the principle that where the owner of a heritage consisting of two parts, grants one of them, the grant will by implication pass all those continuous and apparent easements which have in fact been used by the owner during the unity of ownership and possession, though they have no legal existence as proper technical easements."

In considering these propositions and their application to the case at bar, the general subject of easements and servitudes has been ably and elaborately discussed by the counsel on both sides, and the authorities on the questions carefully collected and examined; but as the same subject has been very recently investigated, (for the first time I believe,) by this court, in the case of *Scott v. Beutel*, reported *supra* 1, where the same authorities were reviewed, we will content ourselves by a reference to the law in such cases as there laid down by the court. It was a case coming within the class referred to in the second proposition of the appellant above stated; and Judge Christian delivering the unanimous opinion of court, said:

"The owner of two tenements who sells one and retains the other, may undoubtedly grant the right of drain or not to pass with the estate conveyed, or may reserve such right over the estate conveyed for the benefit *of the one retained as he pleases. It is generally a matter of contract; and must be determined by the contract of the parties. Where the intention of the parties is not expressed in terms, the construction of the contract will depend on the facts of each particular case.

"In certain cases, by implication of law, where the owner of two tenements has so arranged them that one derives a benefit from the other, and sells one of them, the purchaser of the tenement takes it with all the benefits and burdens which appear at the time of sale to belong to it, as between it and the property which the vendor retains. The parties are presumed to contract in reference to the condition of the property

at the time of sale. Washburne on Easements, 2d ed. p. 76, (Marg. 49). 'But whether the estate sold be the dominant or servient estate, it is well settled (by numerous cases in England and in the States of the Union) that the easement or other incident of property in order to pass by implication must be open, visible, apparent and continuous; and it seems to be equally well settled that where the servient estate is granted and the dominant reserved, the easement reserved by implication must be, not only one that is apparent and continuous and such as is indicated by the condition of the premises at the time of the sale, but the easement claimed must be one strictly of necessity, so that another cannot be substituted at a reasonable expense.' Washburne on Easements, 2d Ed. 71-8, and cases there cited; 10 Allen R. 366; 7 Allen R. 369; 2 Metc. R. 234; 2 Cush. R. 327; 31 Law J. ch. 610; 2 Eq. Cases 508; 33 L. J. ch. 249; and Russell v. Harford, L. R. 2 Eq. 507; Scott v. Beutel, supra 1.

We have thus stated the conclusions of this court, in the case of Scott v. Beutel, at greater length, perhaps, than is necessary in the present case. We understand *from that decision, that the question whether an easement or servitude will be created, or pass as incident to or part of the property granted, is a matter of contract, and must of course depend on the intention of the parties, as expressed in the contract. If thus expressed, the terms of the contract must control its construction. When not thus expressed, the construction will be controlled by the use and condition of the property at the time of sale, and certain implications or presumptions of law arising thereon. But these implications or presumptions will only be applied in the absence of an express contract on the subject between the parties. Where there is such contract, the case must be governed by it "upon the ground of convention, between those who have a disposing power."

To apply this law to the case before us, had the deed to Mills, under which the appellant claims, conveyed the wharf property, with its appurtenances, to Wills, with general warranty, with no reference to the terms and conditions on which he was to use the dock, we are of opinion on the facts proved in the cause, that the right to use the dock in connection with and for the benefit of the wharf, as it had been openly used by the grantors, would have passed to the grantee by implication of law as an easement, or as part of the property granted.

But, such is not the case. There is no absence here of an express contract between the parties on the very question; and there is, therefore, no room for implication or presumption. The case stands "upon the ground of convention between those who have a disposing power." And about the terms and effect of that "convention" there is, we think, no room for discussion. After making the western side of the dock the eastern boundary of the property conveyed, which included no part of the dock, the parties, to preclude, apparently, the

261 *very argument of implication and presumption now used, go on to say: "And the said parties of the first part hereby covenant to allow the said Josiah Wills to have the common use with themselves or their tenants of the dock, herein first mentioned, for the purpose of landing goods on his wharf from vessels or boats which may enter therein, as long as the said dock and adjoining premises are owned by the parties of the first part, or until they may choose to fill up the said dock." And this qualified privilege of using the dock was allowed to the grantee, not in consideration of the purchase money paid for the wharf property and as part of the grant, but in consideration of the following stipulation expressly entered into on the part of said Wills, viz: "The said Wills, in consideration thereof, hereby undertaking to clean out, from time to time, the said dock, at his own expense." The grantee is not only confined by the "convention" of the parties to a very restricted use of the dock, but he is made to pay for that limited use a consideration outside the consideration for the property. In the face of such express contract the court is of opinion that no implication or presumption of law in favor of a different and more extended use of the dock can arise. This conclusion is in direct accordance with the general doctrine of this court, in Scott v. Beutel, and is not in conflict with the cases referred to by the counsel for the appellant. Indeed those cases lead to the same result. They establish the principle, that whether the property or easement claimed will pass or not depends "upon the intention of the parties collected from the instrument and explained by reference to the facts." Being, in substance, the principle laid down by this court, in Scott v. Beutel. In one of the cases, United States v. Appleton, 1 Sumner R. 492, 502, Judge Story says: "The general rule of law is, that where a house or store is conveyed by the owner *thereof, every thing belonging to and in use for the house or store as an incident or appurtenant, passes by the grant. It is implied from the nature of the grant, unless it contains some restrictions, that the grantee shall possess the house in the same manner, and with the same beneficial rights, as were then in use and belonged to it." If, on the other hand, the grant does contain restrictions, the irresistible conclusion from the cases is, that the case must be ruled by the express restrictions—by the convention of the parties.

We are of opinion, therefore, that by the grant to Wills, in this case, no general right to the use of the dock, as the grantors had used it, passed to him; that the extent of his right under the grant was limited and defined by the express terms of special covenant, and that the right to use it at all, would wholly cease whenever his grantors should cease to own the dock and other property of which it was claimed to be part, or when they should think proper to fill it up.

But it is further contended, that the dock

is not private property at all, but that it is a part of Elizabeth river, below low-water mark; and is, therefore, the property of the State and a public highway. It will be observed that this claim is not preferred by the State herself, or by any one claiming under her by grant or otherwise. Neither the State, nor the city of Norfolk, nor the citizens of either, save the appellant alone, seem to have ever at any time set up such a pretension. On the contrary, the State, the city of Norfolk, and the citizens of each, have uniformly treated them as private property, from a time whereof the memory of men now living runneth not to the contrary. As far back as October 1705, in the 4th year of Queen Anne, it was enacted that "if any person having a lott in town,

upon the water side, will build out into the water before his own lott, *for the better conveniency of landing and shipping off goods, such persons shall have the whole benefit of such building; and the land so built upon shall be reckoned as part of his own lott, and it shall entirely be his as the lott itself, without any further duty or acknowledgment." 3 Hen. Stat. at L., p. 412, ch. 42. By the same law, Norfolk was made a town. P. 415. How soon after the passage of this law the wharves referred to in the proceedings were constructed does not appear; for, as we have seen, no living witness can testify to their origin. Manifestly, however, either under the operation of this law, or some other law or custom recognized by the State, wharves and docks had been constructed in Norfolk long before the year 1801, which were recognized by the State as private property; for, on the 20th January 1801, an act was passed which recited that there were docks and wharves within the borough of Norfolk, which had or might become ruinous and dangerous to the health of the inhabitants; for the prevention whereof the 1st section of the act provided: "That the court of hustings of the said borough shall be and they are hereby empowered, at a court to be held in February or March annually to appoint three discreet persons, being housekeepers, as wardens of the port, for the purpose of inspecting the said docks and wharves, who shall take an oath in the said court faithfully and impartially to execute the said office; and if they, or any two of them, shall be of opinion that any dock or wharf is a nuisance, they shall immediately give notice in writing to the owner thereof, requiring him or her to remove such nuisance, either by deepening the place or filling it up, allowing a reasonable time for performing the same." And the section goes on to provide, that for failure to comply with the portwardens' direction, the party shall be punished by indictment and fine.

264 *The 2d section provided, that if the fine should prove insufficient to remove the nuisance, "and the owner of the place shall not contribute to remove it, like proceedings against him shall be repeated.

The 3d section recites that "owners of lots on the rivers and creeks are constantly

extending their wharves and breastworks beyond each other, whereby navigation is greatly obstructed," and requires the portwardens to run a line in the water from the east to the west end of said borough, and also on each side of the creeks, so as to leave a pass-way of 40 feet at least beyond which no wharf should be extended, under a penalty of \$10,000. 2 Hen. Stat. at L., New Series, ch. 48, p. 282-3. And the 2d section of the act of February 4th, 1818, entitled "an act to extend the jurisdiction and enlarge the powers of the corporation of the borough of Norfolk," authorizes the corporation, among other things, to provide for the "opening, filling and cleaning docks."

Under and by virtue of these laws the vendors of Southgate, Taylor and others, were as owners of the dock in question, actually ordered by the proper authorities of the corporation, soon after their purchase of the dock, to fill up a portion thereof; and under that order they filled up about fifty feet of it.

It will be remembered, also, that the portwarden's line does not run into this creek at all, as it is required to be run into creeks, but runs along the main channel of Elizabeth river directly across the mouth of the dock, so as to leave the entire dock within the line.

In addition to all this, Wills and those claiming under him, have in the most solemn form, in the deed under which they claim the wharf property, acknowledged the dock to be private property, and to be owned by their grantors. This acknowledgment occurs both in the granting part of the deed and in the special covenant.

265 *Under such circumstances the court is inclined to the opinion, that any title which the commonwealth may at an earlier period have been entitled to assert to this dock, if not expressly surrendered, has been by an almost irresistible implication, waived and abandoned in favor of those claiming to be owners thereof.

But, however that might be, were the commonwealth a party claiming the dock, we are clearly of opinion, in the absence of such claim, and in the face of the apparent waiver and abandonment aforesaid, that the appellant cannot rely upon that supposed title in derogation of the solemn acknowledgment and express contract of his grantor to the contrary.

The decree must be affirmed.

Decree affirmed.

EASEMENTS.

I. Definition, Characteristics and Distinctions.

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I. DEFINITION, CHARACTERISTICS AND DISTINCTIONS.

1. Definition.—"A privilege without profit, which the owner of one tenement has a right to enjoy in

respect of that tenement in or over the tenement of another person; by reason whereof the latter is obliged to suffer, or refrain from doing something on his own tenement for the advantage of the former." *Stevenson v. Wallace*, 27 Gratt. 87; *Tardy v. Creasy*, 81 Va. 556; *Goddard on Easements*, 2.

2. *Essential Qualities—Two Distinct Tenements.*—There must be two distinct and separate tenements, which are implied in the existence of an easement; the one, in favor of, or for the benefit of which, it exists, is called the dominant and the other, over, or upon which it is exercised, is called the servient tenement. If at any time these estates are united under one ownership and possession, the easement is at once extinguished. *Washb. E. & S. p. 10* cited in *French v. Williams*, 83 Va. 462.

"So long as two parcels of land belong to the same person there can be no easement in favor of one parcel, or servitude upon the other, for a man cannot have an easement over his own land and of course there can be no claim by prescription to the use of an easement under such circumstances, because there can be no adverse user or possession." *Scott v. Beutel*, 23 Gratt. 1; *Standiford v. Goudy*, 6 W. Va. 364.

3. Kinds of Easements.

a. Easements Appurtenant.

(1) *Broader Meaning of "Appurtenant" Than "Appendant."*—The word "appurtenant" has a broader meaning than "appendant," not being limited to easements acquired by prescription in its technical sense but including rights founded on the presumption of a grant from enjoyment for a limited period, or from necessity or on an express grant. *Standiford v. Goudy*, 6 W. Va. 364.

(2) *Presumption in Favor of Easements Appurtenant.*—"A way is never to be presumed to be in gross when it can fairly be construed to be appurtenant to land." *Washb. E. & S. p. 79*, cited with approval in *French v. Williams*, 83 Va. 462.

The fact that a well was placed conveniently for the use of the owners of the lots and that it is provided that the easement was not to be disposed of apart from the lots, annexes the servitude to the respective lots, as an easement appurtenant. *Warren v. Syme*, 7 W. Va. 474.

b. *Easements in Gross*—See *Easements Appurtenant, supra*.

c. *Apparent and Continuous Easements.*—Open ditches are such. *Sanderlin v. Baxter*, 76 Va. 290, 44 Am. Rep. 165.

In *Scott v. Moore*, recently decided, the court held a well defined alley way to be an apparent and continuous easement also, though it had been contended that a mere right of way was not so. *Scott v. Moore*, 96 Va. 668, 37 S. E. Rep. 842.

4. Rights in Nature of Easements Distinguished.

a. *Natural Rights.*—The right to support of soil from adjacent soil is a natural right, arising *ex jure nature*, as distinguished from the easement of support of buildings, which in this country can be obtained by grant only, express or implied. *Tunstall v. Christian*, 80 Va. 1; *Stevenson v. Wallace*, 27 Gratt. 77; *Salamone v. Kelley*, 80 Va. 86; *Stearns v. Richmond*, 83 Va. 602, 14 S. E. Rep. 847.

b. *Licensees.*—A provision in an agreement that a partnership should have the exclusive privilege of working any ore on a certain tract of land, is a mere license and not an easement. *Barksdale v. Hairston*, 81 Va. 764; *Hodgson v. Perkins*, 84 Va. 706, 5 S. E. Rep. 716.

c. Corporeal Hereditament.—A conveyance of a tract of land reserving the right of the vendors to raise ore from a bank or banks on said tract is the reservation of a corporeal hereditament and not of a mere easement. *Lee v. Bumgardner*, 86 Va. 315, 10 S. E. Rep. 3, and cannot pass as appurtenant to a conveyance of land. *Barksdale v. Parker*, 87 Va. 141, 12 S. E. Rep. 344.

d. Distinction Between an Easement and a Personal Covenant.—A conveyance of a parcel of land with covenant by the grantor to abstain from all business on remainder of tract remaining in his possession is a covenant personal, binding the grantor, but it is not an easement. *Tardy v. Creasy*, 81 Va. 553. **Lewis, P.**, dissented, holding that it was an easement, the court saying: "Besides such well known easements as a right to light, to a right of way, etc., attempts have been made to establish other easements which the law does not recognize and to annex them to land; but the law will not permit a landowner to create easements of every novel character and attach them to the soil. And although some novel right has been granted by a landowner to another person which may be valid and binding upon him personally, so long as he continues owner of the *quasi servient tenement*, so that on disturbance, he may be sued for breach of covenant, yet if such right be of such kind that the law does not recognize as capable of being annexed to the soil, that right, good against the grantor, is void as against other persons than the grantor, and will not entitle the grantee to sue for the benefit in his own name, on the one hand, nor annex to his premises the burden on the other." *Tardy v. Creasy*, 81 Va. 553. See also, *W. Va. Transp. Co. v. Ohio Riv. Pipe Line Co.*, 22 W. Va. 600.

II. CREATION.

1. By Express Grant. a. Generally.

(i) Requisites of Grant, Deed.—The right of drainage through the lands of another is an easement requiring for its enjoyment an interest in such lands which cannot be conferred except by deed or conveyance in writing. *Pifer v. Brown*, 43 W. Va. 413, 37 S. E. Rep. 399. See also, *Powell v. Sims*, 5 W. Va. 1.

Not a Conveyance of the Soil.—The grant of a right of way is not a conveyance of the soil, it gives merely the privilege of designating a convenient right of way. *Home v. Richards*, 4 Call 441, 3 Am. Dec. 574.

(a) Construction of Deed of Grant.

When Equivalent to a Present Grant.—A deed, by which the owner of a lot on which a well is situated binds himself that the other parties shall forever have the use of the said well, recognizing that each of the parties takes an interest that he may dispose of, and not indicating that any further assurance is contemplated, is to be construed as a present grant of the right to use the water. *Warren v. Syme*, 7 W. Va. 474.

Admissibility of Extrinsic Evidence.—"Intrinsic certainty, in a deed relative to specific property, is simply impossible. The description can be made certain only by proof or recognition of the identity of the subject to which it refers, or other objects or things that, more or less directly and distinctly, indicate and determine it. And, in the application of deeds and documents to lands and lots, extensive latitude is allowed for the discovery and proof, not only of visible monuments or objects mentioned, but of

mathematical lines of other lands and lots, and various classes of facts to which the description or suggestions in the deed apply." *Warren v. Syme*, 7 W. Va. 474. See also, *French v. Williams*, 82 Va. 463; *Diffendal v. Va., etc., R. Co.*, 86 Va. 459, 10 S. E. Rep. 536.

Restraints on Alienation.—A provision in a deed that the grantee of the easement shall not dispose of it apart from the property to which it is annexed, is not an objectionable restraint upon alienation. *Warren v. Syme*, 7 W. Va. 474.

(3) Parol Grants and Statute of Frauds—Estoppel.

Oral Agreements.—Where one conveys a tract of land to another, no evidence can be received to prove an oral agreement between the parties that a private way over the land conveyed should exist in favor of the grantor. *Shaver v. Edgell (W. Va.)*, 37 S. E. Rep. 664.

Executed Contracts.—"As a court of equity will take a parol contract for the sale of lands out of the statute of frauds, where it is partly performed, it will, on this same principle, treat an executed parol contract for an easement as equivalent to a grant under seal, where the parties cannot be restored to their original position." *Rindge v. Baker*, 57 N. Y. 221, cited with approval in *Tufts v. Copen*, 37 W. Va. 623, 16 S. E. Rep. 793. Full discussion and citations in *Brewing Co. v. Morton*, 47 N. J. Eq. 168.

Equitable Estoppel.—"A mere license in the nature of an easement may be acquired in any way by which permission can be understood to have been given, and whether there is any writing in existence to prove the grant or not." And on page 91 the same author says: "In addition to these modes of acquiring licenses, they may frequently be implied from the passive acquiescence of the grantor in the act of the licensee; but in many instances, when the acquiescence is not sufficient, or of such a character as to support a defense of leave and license in an action, it is sufficient to entitle the *quasi* licensee to the equitable assistance of the court to restrain interference with the enjoyment of the privilege." *Goddard on Easements*, 90, 91, cited with approval in *Tufts v. Copen*, 37 W. Va. 623, 16 S. E. Rep. 793. See in general, *Trueheart v. Price*, 2 Munf. 468.

(4) Disabilities, Married Women, Equitable Estoppel.

—Grant of an easement to run a tramway over defendant's land cannot be regarded as either a sale or conveyance of said tract of land and for that reason it is not necessary that her husband should join her. *Tufts v. Copen*, 37 W. Va. 623, 16 S. E. Rep. 793. Equitable estoppel will apply in the last case for married women since their disability in such cases has been removed by statute. "A married woman is *sui juris* to the extent of the enlarged capacity to act conferred by statute, and may be estopped by her acts and declarations, and is subject to all the presumptions which the law indulges against others with full capacity to act for themselves. To this extent the old restrictions of the doctrine of estoppel, as applied to married women, are not in force, because, the reason of the rule ceasing with the removal of the incapacity, the rule falls." *Bodine v. Killeen*, 53 N. Y. 93, cited with approval in *Tufts v. Copen*, 37 W. Va. 623, 16 S. E. Rep. 793.

b. Covenant Operating as a Grant.—A covenant purporting to confer an exclusive right of way will operate as a grant of a right of way but not an exclusive one, since that would be an unreasonable restraint of trade and is not such a covenant as runs with the land. *W. Va. Transportation Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 46 Am. Rep.

527; *Lucas v. Smithfield, C. & H. F. Turnpike Co.*, 36 W. Va. 437, 15 S. E. Rep. 132.

c. **Reservation in Deed.**—A reservation of a right of way over leased property gives the right of selection of the way to the lessor, but it must be exercised in a reasonable manner. *McKell v. Collins Colliery Co.*, 46 W. Va. 625, 33 S. E. Rep. 765.

a. **By Implied Grant.**

a. **Appurtenant Easements Pass with the Land.**—*Scott v. Moore*, 98 Va. 668, 37 S. E. Rep. 342.

Appurtenant to Every Part of Tenement.—It is well settled that where land is granted with a right of way over other lands, the right is appurtenant to every part of land so granted, and the grantee of any part, no matter how small, is entitled to it; provided it impose no additional burden on the servient estate. *Henrie v. Johnson*, 28 W. Va. 190; *Linkenhoker v. Graybill*, 80 Va. 835.

Transfer to Assignee.—The transfer of property to an assignee in bankruptcy, to which an easement is appurtenant and a part from which the easement cannot be transferred, implies the transfer of the easement, though it be not necessary to the enjoyment of the property nor even, at the time, used in connection therewith. *Warren v. Syme*, 7 W. Va. 474.

Grant of Land with Appurtenances—Construction of Statute.—"When the owner of two tracts of land has used a way to and from one, over the other, no matter how long, and he grants the former tract without mention of any way, unless the way is necessary to the enjoyment of the tract granted, the mere grant of the land does not create or confer a way appurtenant, appurtenant, or in gross."

"The statute declaring that a deed, unless an exception be contained in it, shall be construed to include appurtenances, does not apply to the creation of easements, but to the transfer of those already existing." *Standiford v. Goudy*, 6 W. Va. 367; *Warren v. Syme*, 7 W. Va. 474.

b. **Severance of Unity of Possession.**

(1) **Implied Grants and Implied Reservations.**

(a) **Distinction Recognized—Grants More Liberally Construed.**—The court, in *Scott v. Beutel*, 23 Gratt. 7, says: "In certain cases, by implication of law, when one owner of two tenements has so arranged them that one derives a benefit from the other, and sells one of them, the purchaser of the tenement sold takes it with all the benefits and burdens which appear at the time of sale to belong to it, as between it and the property which the vendor retains. The parties are presumed to contract in reference to the condition of the property at the time of the sale. *Washburn on Easements* (2d Ed.) 76, mar. 49. But whether the estate sold be the dominant or servient estate, it is well settled, by numerous cases in England and in the states of the Union, that the easement or other incident of property, in order to pass by implication, must be open, visible, apparent and continuous. And it seems to be equally well settled, that where the servient estate is granted, and the dominant reserved, the easement reserved by implication must be, not only one that is apparent and continuous, and such as is indicated by the condition of the premises at the time of the sale, but the easement claimed must be one strictly of necessity, so that another cannot be substituted at a reasonable expense." *Washburn on Easements* (2d Ed.) 71-83. See also, *Hardy v. McCullough*, 23 Gratt. 251; *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165; *Burwell v. Hobson*, 12 Gratt. 323, 65 Am. Dec. 247; *Scott v. Moore*, 98 Va. 668, 37 S. E. Rep. 342.

The grant is implied in the absence of express stipulations, in every case where the owner of adjoining houses, or of houses and land, severs the property by sale; for, in every such case, rights to support are granted by implication by the vendors and purchasers respectively for the preservation of the buildings belonging to each other. *Goddard on Easements*, 154, cited with approval in *Stevenson v. Wallace*, 27 Gratt. 77.

(b) **Support of Buildings.**—The right to support for artificial burdens on land is an easement and can be acquired only by grant, express or implied, but not by prescription as in England. The English doctrine of "ancient lights" has been repudiated by American courts, as not adapted to our surroundings. *Powell v. Sims*, 5 W. Va. 1. In *Stevenson v. Wallace*, 27 Gratt. 77, there are expressions in the opinion, indorsing the English doctrine; but the decision was not necessarily involved and the contrary is now settled as the law in Virginia by *Tunstall v. Christian*, 80 Va. 1. See *Lille's Notes to 3 Min. Inst.* (4th Ed.) 15.

Buildings Destroyed by Fire.—If buildings to which such right of support has already attached are destroyed by fire, such buildings, when restored, will still enjoy such right. Owner of servient tenement, when grant is implied, is absolutely liable for any damage resulting from removal of support, and even if dominant tenement is defectively constructed it is only a question for the jury in mitigation of damages and not a bar to the action. *Stevenson v. Wallace*, 27 Gratt. 77.

Such right of support is limited to the condition of things at the time of the grant and if additional burdens are afterwards placed on the land no right of support can be acquired for them, but reasonable care must be used in the removal of the support, and it would seem that reasonable notice would be proper. *Tunstall v. Christian*, 80 Va. 1.

Extent of Liability for Removal of Support.—Any one removing soil or buildings, a right to support from which has been acquired as above, is absolutely liable for all damage resulting; he will not even be excused by defective construction of building supported, which will only be considered in amount of damages. Nor can he evade liability by employing a competent contractor to do the work. *Stevenson v. Wallace*, 27 Gratt. 77.

(c) **Rights to Light, Air and View.**—The English common-law doctrine of "ancient lights" is disapproved of as unsuited to the conditions in this country. "The prevailing doctrine here would seem to be, that an implied grant of an easement of light will be sustained only in cases of real and obvious necessity, and will be denied or rejected in cases when it appears that the owner of the dominant estate can, at a reasonable cost and expenditure, have or substitute other lights to his building, so that he may continue to have the reasonable enjoyment of the same; leaving the owner of the servient estate also to the enjoyment of his own property free from the restriction and burden that would otherwise be imposed upon it. In the application of this principle, doubtless, some embarrassment will sometimes be realized in determining the degree of necessity that ought to be required to support the right to the easement, and each case must necessarily be settled on the facts and circumstances surrounding it." *Powell v. Sims*, 5 W. Va. 1, 13 Am. Rep. 630; *Cunningham v. Dorsey*, 3 W. Va. 293; *Standiford v. Goudy*, 6 W. Va.

364; *Stevenson v. Wallace*, 37 Gratt. 77. See *Lille's Notes* to 3 Min. Inst. (4th Ed.) 12.

(d) *Ways by Necessity, Degree of Necessity.*—When a man grants land to another in the middle of land retained, he impliedly gives the grantee a way to come at it across the land retained. *Boyd v. Woolwine*, 40 W. Va. 282, 21 S. E. Rep. 1090. Also, 3 Va. Law Reg. 586.

When a party sells two adjoining tracts of land and the owner of one can have access to the public road only by passing over the other of said tracts, this creates a right of way of necessity. *Rogerson v. Shepherd*, 33 W. Va. 307, 10 S. E. Rep. 632; *Wooldridge v. Coughlin*, 46 W. Va. 345, 33 S. E. Rep. 233.

If a person voluntarily takes a conveyance of land which is surrounded on all sides by lands of his grantors and others he can enforce this right of way under the plea of necessity, against none but his grantor. *Linkenhoker v. Graybill*, 80 Va. 835. See also, *Uhl v. Ohio River R. Co.* (W. Va.), 34 S. E. Rep. 984; *Shaver v. Edgell* (W. Va.), 37 S. E. Rep. 664; *Bond v. Willis*, 84 Va. 796, 6 S. E. Rep. 136; *Parrish v. Parrish*, 88 Va. 529, 14 S. E. Rep. 825; *Springer v. McIntire*, 9 W. Va. 196.

Contractual Right of Way Supersedes a Former Right of Way.—When a man buys lands, knowing their position with regard to the public roads, and they have a right of way over a third party's lands, and contracts with his grantors for a right of way over *their* lands, he cannot afterwards abandon his contractual right of way and claim the old right over third party's lands. *Linkenhoker v. Graybill*, 80 Va. 835.

(e) *Easement of Access.*—As to rights of abutting lot owners to access to the streets, see *Kehrer v. Richmond City*, 81 Va. 745; *Page v. Belvin*, 88 Va. 965, 14 S. E. Rep. 843.

(2) *Simultaneous Alienation of Two Parts of Same Estate.*—If an estate, part of which enjoys an easement in the other is simultaneously conveyed to different persons, they will be presumed to have taken the parts subject to such burdens or benefits as may have been apparent at the time of the alienation and in a division of an estate such obvious burdens and benefits are presumed to have been taken into consideration. *Burwell v. Hobson*, 12 Gratt. 222; *Scott v. Moore*, 98 Va. 668, 37 S. E. Rep. 342.

(3) *Alienation of Dominant or Servient Estate, Notice of Easement.*

(a) *Where Servient Tenement Is Alienated.*—"Where no private right of way or other easement is reserved in the deed itself, and the purchaser has no notice of any such claim, he takes the property without the burthen of any such claim either from the grantor or any person claiming under him. *Scott v. Beutel*, 23 Gratt. 1. Where the deed conveys without reservation, the grantee takes all conveyed by the deed unincumbered, unless in some way notice is brought home to him, that the land is sold subject to the encumbrance of some easement or privilege in another person or in the public." *Patton v. Quarrier*, 18 W. Va. 447; *Deacons v. Doyle*, 75 Va. 258; *Diffendal v. Va. Mid. R. Co.*, 86 Va. 450, 10 S. E. Rep. 588; *Scott v. Moore*, 98 Va. 668, 37 S. E. Rep. 342.

(b) *Where Both Dominant and Servient Tenements Are Alienated.*—Where a part of a tract of land is conveyed and it is so situated that vendee is entitled to a right of way over vendor's land *ex necessitate*, then a purchaser at an execution sale of vendor's remaining property, cannot close up such way. *Bond v. Willis*, 84 Va. 796, 6 S. E. Rep. 136.

Alienation of Dominant Tenement.—*Sanderlin v. Baxter*, 76 Va. 299; *Standiford v. Goudy*, 6 W. Va. 364; *Henrie v. Johnson*, 28 W. Va. 190.

c. *By Prescription.*—As to doctrine of "ancient lights" and rights of support, see *infra*, "Implied Grant."

An open and public use of an easement for more than 20 years, unexplained, will be presumed to be under a claim of right, and adverse, and plaintiff will be entitled to an unobstructed use of said easement. *Rogerson v. Shepherd*, 33 W. Va. 307, 10 S. E. Rep. 632; *Lucas v. Smithfield, C. & H. F. Turnpike Co.*, 36 W. Va. 427, 15 S. E. Rep. 182; *Boyd v. Woolwine*, 40 W. Va. 282, 21 S. E. Rep. 1090.

Honest, uninterrupted and adverse possession for upwards of 20 years, gives a title by prescription to an easement. 3 Min. Inst. (4th Ed.) 494, quoted with approval in *Cornett v. Rhudy*, 80 Va. 710.

A right may thus be established to intercept or pollute water to the injury of a lower proprietor. *Cornett v. Rhudy*, 80 Va. 710.

(1) *User Must Not Be by License.*—If the water of a stream is diverted from its usual course by permission no right can arise by prescription, since the possession is not adverse. *Coalter v. Hunter*, 4 Rand. 58. In accord, *Stokes v. Upper Appomattox Co.*, 3 Leigh 318; *Gaines v. Merryman*, 95 Va. 660, 29 S. E. Rep. 738.

(2) *There Must Be Acquiescence in User.*—Enjoyment of an easement for the statutory period of 10 years creates a *prima facie* presumption of a grant, but it must be with the knowledge and acquiescence of the owner of the land and not denied by him. *Wooldridge v. Coughlin*, 46 W. Va. 345, 33 S. E. Rep. 233; *Fleld v. Brown*, 24 Gratt. 74; *Nichols v. Aylor*, 7 Leigh 546; *Cunningham v. Dorsey*, 3 W. Va. 298.

(3) *Distinction in Presumption from User for "Immemorial Period" and Statutory Period.*—User for "immemorial period" produces a conclusive presumption of a grant, but user for statutory period only a *prima facie* presumption, which may be rebutted. *Wooldridge v. Coughlin*, 46 W. Va. 345, 33 S. E. Rep. 233.

(4) *Easements in Public Ways.*—"A man having enjoyed the easement of freedom from toll for 46 years, peaceably, notoriously, adversely and continuously as a matter of right; he and his family, his servants and his tenants (when on his business) are entitled by prescription to the enjoyment of said easement and the land being devised to his son and enjoyed under a claim of right by him for 10 years, he is entitled to a like easement." *Lucas v. Smithfield, C. & H. F. Turnpike Co.*, 36 W. Va. 427, 15 S. E. Rep. 182.

3. By Operation of Law.

a. *By Decree of Court.*—In suits for partition, the court has the same powers over easements as over the land itself. It may assign an easement, appurtenant to an entire estate, to one tenant alone, and it may create easements among the co-tenants upon each other's parcels. *Henrie v. Johnson*, 28 W. Va. 190. See also, *Springer v. McIntire*, 9 W. Va. 196; *Parrish v. Parrish*, 88 Va. 529, 14 S. E. Rep. 825; *Martin v. Martin*, 95 Va. 26, 27 S. E. Rep. 810.

Where a parol partition provided for a right of way over one of the lots, without specifying where it should be located, or the width thereof, a decree, fixing its width at four feet, and its location at the end of the lot, did not prejudice the owner of the lot. *Fredrick v. Fredrick*, 81 W. Va. 568, 8 S. E. Rep. 295.

In assigning dower in a house, the court may create such easements in passages, stairways, etc.,

as may be essential to the beneficial enjoyment of the property by the assignees of the several rooms. *Parrish v. Parrish*, 88 Va. 530, 14 S. E. Rep. 325.

b. *In Condemnation Proceedings*.—Under section 14 of chap. 43, W. Va. Code, commissioners may make provision for the construction of easements upon property which has been condemned. *Railroad Co. v. Halstead*, 7 W. Va. 301.

No easement is acquired in land which has been finally and validly condemned for a public road at the application of a party, merely by an agreement between said party and the former landowner to submit their differences, touching the public road, to arbitration. *N. & W. R. Co. v. Rasmake*, 90 Va. 170, 17 S. E. Rep. 879.

III. RIGHTS AND LIABILITIES OF THE PARTIES.

1. *Additional Servitudes*.—Where a telegraph company has only an easement of a right of way, the erection of telegraph poles and wires constitutes an additional easement and entitles the owner of the fee to additional compensation. *Western Union Tel. Co. v. Williams*, 86 Va. 606, 11 S. E. Rep. 106.

2. *User Unconnected with Dominant Tenement, Forfeiture*.—Where, under a decree of court, an estate has been divided up into a number of lots and rights of way created over some for the benefit of others, the owner of the dominant tenement will have the use of the right of way for all purposes connected with it; but he cannot further burden it for the benefit of other tenements which are entitled to no right of way over it. But such claim of a greater use than he was entitled to under his easement will not cause a forfeiture of such right as he has, but only gives a right of action of trespass against him. *Springer v. McIntire*, 9 W. Va. 196; *Shaver v. Edgell* (W. Va.), 37 S. E. Rep. 664.

3. Remedies.

a. Injunction.

(1) *Generally*.—"Where easements or servitudes are annexed by grant, covenant or otherwise to private estates, the due enjoyment of them will be protected against encroachments by injunction." 3 Story's Eq. § 927, cited in *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165. See also, *Berkeley v. Smith*, 27 Gratt. 892; *Brooke v. Barton*, 6 Munf. 306.

(2) *Remedy at Law Inadequate*.—Though the plaintiff have a remedy by action at law, if it is inadequate and repeated suits would not compensate him, the injury is irreparable and calls for a preventive remedy, which equity alone can provide. *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165.

(3) *Equity's Function to Prevent a Threatened Injury*.—If a stream has been diverted, but has been restored to its former channel before recourse is had to equity, equity has no jurisdiction, but the remedy is an action at law for damages. *Coalter v. Hunter*, 4 Rand. 68; *Trueheart v. Price*, 2 Munf. 498; *Rogerson v. Shepherd*, 33 W. Va. 307, 10 S. E. Rep. 682.

(4) *Necessary Allegations*.—It is not sufficient that a bill contain general allegations of irreparable injury; the facts constituting such injury must be set forth. *Cresap v. Kemble*, 26 W. Va. 603. But if it is set forth that occupants of land can have no other ingress or egress except over defendant's land and that the defendant has obstructed such way, this is sufficient. *Rogerson v. Shepherd*, 33 W. Va. 307, 10 S. E. Rep. 682. See, on general right to injunction, *Lucas v. Smithfield, C. & H. F. Turnpike Co.*, 36 W. Va. 427, 15 S. E. Rep. 182; *Boyd v. Woolwine*, 40 W. Va. 282, 21 S. E. Rep. 1020; *Woods v. Early*,

95 Va. 307, 28 S. E. Rep. 374; *Switzer v. McCulloch*, 78 Va. 777; *note*, 6 Va. Law Reg. 191.

(5) *Compensation*.—If a just compensation may be made to the plaintiffs for the injury done to their property and rights, the court may ascertain and decree such compensation. *Berkeley v. Smith*, 27 Gratt. 892.

(6) *Time to Sue, Laches*.—A bill for specific execution of a contract between parcellers to keep open a right of way through their lands, filed nearly 20 years after the contract was made, will be dismissed when the plaintiff has stood by and allowed the land to be twice sold and the way to be obstructed or closed for years and the alienees had no notice of his claim; since it has become too stale, and, if not lost, has become a mere personal right. *McCue v. Ralston*, 9 Gratt. 430.

(7) *Want of Sufficient Interest in the Easement*.—If plaintiff's interest in the easement is insignificant, a court of equity will not interfere in his behalf. *McCue v. Ralston*, 9 Gratt. 430.

4. Pleading.

a. *Form of Declaration*.—The form of declaration prescribed by Mr. Chitty and approved by Mr. Robinson, 3 Chit. P. C. 308-10; § Rob. Pr. 796, alleging generally the plaintiff's right and the defendant's violation of it is good. *Standiford v. Goudy*, 6 W. Va. 364.

b. *Allegations*.—A count not alleging any necessity for a way over tract retained, in order to the enjoyment of the tract granted or any fact that would imply the grant of such a way or any express grant is bad. A demurrer to the whole declaration should be overruled when one of the counts is good and the other bad. When a count purports to state not merely that the plaintiff had a right of way, but to set forth the facts that constitute his title, it indicates negatively, that, if these facts do not make his right, he has none. *Standiford v. Goudy*, 6 W. Va. 364.

5. Evidence.

Declarations of Persons in Possession as to Title.—"In regard to the declarations of persons in possession of land, explanatory of the character of their possession, there has been some difference of opinion, but it is now well settled that declarations in disparagement of the title of the declarant are admissible as original evidence. Possession is *prima facie* evidence of seisin in fee simple, and the declaration of the possessor that he is tenant to another, it is said, makes most strongly against his own interest, and therefore is admissible. But no reason is perceived why every declaration accompanying the act of possession, whether in disparagement of the claimant's title or otherwise qualifying his possession, if made in good faith, should not be received as a part of the *res gestæ*, leaving its effect to be governed by other rules of evidence." *Lucas v. Smithfield, C. & H. F. Turnpike Co.*, 36 W. Va. 427, 15 S. E. Rep. 183. See also, *McKell v. Collins Coll. Co.*, 46 W. Va. 625, 33 S. E. Rep. 765.

6. *Appeal*.—See *Fredrick v. Fredrick*, 31 W. Va. 566, 8 S. E. Rep. 206.

IV. EXTINGUISHMENT.

1. *Deed Not Necessary*.—A party entitled to a right of way or other mere easement in land, may abandon and extinguish such right by acts *in pais* and without deed or other writing. *Vogeler v. Gelsa*, 51 Md. 408, cited with approval in *Scott v. Moore*, 36 Va. 668, 37 S. E. Rep. 342.

2. *Abandonment by Acts or Declarations Incompatible with Existence of Easement*.—In *Warren v.*

Syme, 7 W. Va. 474, it is held that in order to constitute abandonment by acts or declarations incompatible with the existence of an easement, one of the following combinations of fact must occur: Proof of act or declaration of owner indicative of renunciation or abandonment, followed by non-user for a period long enough to bar an action of ejectment to recover possession of land, which period, when the defendant is not under disability, is ten years, when he is, twenty years. Or proof of a claim by the owner of the corporeal estate or by another in his stead, known to the owner of the easement or evinced by acts that in the exercise of ordinary vigilance he would have learned, followed by non-user by the owner of easement for such period. Or an act or declaration of the owner of the easement, clearly demonstrative of actual abandonment, that in fact promotes some action on the part of another, by which, if the easement were not held to be determined, the latter would be seriously injured. And such proof may conclude the extinguishment of the easement, but certainly nothing less than one or the other of these combinations of facts will have such effect. See also, *Scott v. Moore*, 98 Va. 603, 37 S. E. Rep. 342; *Woodridge v. Caughlin*, 46 W. Va. 345, 33 S. E. Rep. 233.

3. *Mere Failure to Use Not Sufficient.*—Mere failure to use an easement unaccompanied by proof of an intention on the part of the owner of the premises or of some act done or permitted which is inconsistent with the future enjoyment of the right, and which clearly indicates an intention to abandon the easement, is not sufficient. *Scott v. Moore*, 98 Va. 603, 37 S. E. Rep. 342.

4. *Equitable Estoppel.*—Equitable estoppel is the ground upon which the doctrine of abandonment of easements rests, and the representation or conduct relied on must have been intended to influence the other party to act. *Scott v. Moore*, 98 Va. 603, 37 S. E. Rep. 342; *Warren v. Syme*, 7 W. Va. 474.

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*Graeme v. Cullen & als.

Hunter v. Johnston & als.

March Term, 1873, Richmond.

1. *Deed of Trust—Two Trustees—Sale by One.*—Deed of trust to two trustees to secure debts, empowers the two, or either of them, to sell upon the demand of the creditor. If one of the trustees refuses to unite in the sale, the other may make a valid sale.
2. *Same—Trust Property Destroyed—Lien for Improvements—Priority of Liens.*—The house on the lot in a city conveyed in trust is burned down, and the grantor in the deed employs workmen to build another house, upon an agreement to give them a lien upon the lot and house for the cost of the building. The workmen are not informed of the first lien, until they have nearly completed the work, though it was duly recorded. The whole property is subject to satisfy the first lien.
3. *Statutes—Inapplicable to Case at Bar.*—The act, ch. 135, s. 30-34, "concerning the action of ejectment," and the act, ch. 136, concerning the allowance for improvements, do not apply to this case. They are confined to cases of ejectment, or cases in which a

*Statutes—To What Applicable.—See the rule laid down in the third headnote sustained in *Hurn v. Keller*, 79 Va. 419, and *Emfinger v. Hall*, 81 Va. 107.

decree or judgment is rendered against any defendant for land.

4. *Second Deed of Trust—Cloud on Title—Right of Trustees of First Deed to Sell.*—Though the builders have obtained a second deed of trust on the property, and claim that only the value of the lot without the house should be applied to satisfy the first lien, this is not such a cloud on the title as forbade the trustee to sell under the first deed; especially as the grantor in the deeds had obtained an injunction to a sale of the property on that ground; which had been dissolved before the advertisement of the second sale.

5. *How Trustees Should Sell.*—The trustee should sell according to the provisions of the deed.

6. *Improvements on Land of Another—When Compensation Allowed.*—In what cases, and upon what principles, a party making permanent improvements upon land, which belongs to another, will be allowed compensation therefor; see the opinion of *Moncure, P.*

267 *7. *Deed of Trust—Insurance Policy.*—A vendor of a house and lot transfers to the vendee an insurance policy upon the house, and takes a deed of trust upon the house and lot to secure the purchase money. The house is afterwards consumed by fire. The debt not being paid, the vendor is not bound to pursue the insurance company, but may enforce payment by sale of the house and lot.

8. *Separate Bonds for Interest—Bear Interest from What Time.*—Upon a sale of a house and lot, upon credits extending through several years, separate bonds are taken for the interest. They will bear interest from the time they fall due.

*Improvements—Compensation.—In *Wood v. Krebbs*, 33 Gratt. 692, the court, citing the principal case as authority for the proposition, said: "As a general rule, a creditor, who records his deed of trust, or docketts his judgment, has done all he is bound to do; and parties dealing with the property do so at their peril, and in complete subjection to the lien." See also, *foot-note* to *Wood v. Krebbs*, 33 Gratt. 696, for a collection of cases.

In *Emfinger v. Hall*, 81 Va. 101, the court, citing the principal case, said: "It is a general rule of the common law, subject to some exceptions, as in the case of fixtures, that everything annexed to the freehold becomes a part thereof, and passes with the recovery. Improvements are therefore made at the occupant's peril, except that in an action against him by the rightful owner for *mesne* profits; the rule has been so far modified, independent of statutes, as that the former is permitted to set-off against the plaintiff's claim the value of his improvements, but not in any case to exceed the amount of the rents and profits."

In *Dawson v. Grow*, 29 W. Va. 336, 1 S. E. Rep. 566, it is said: "Consequently, where the owner recovered his land in ejectment, and made no claim for rents and profits, the *bona fide* adverse claimant who had been ejected could in no manner obtain any compensation for improvements made while he was in possession of the land, however honest and reasonable his belief that he was the owner at the time. *Graeme v. Cullen*, 23 Gratt. 294."

In *Hall v. Hall*, 80 W. Va. 784, 5 S. E. Rep. 202, the court, citing *Dawson v. Grow*, 29 W. Va. 336, 1 S. E. Rep. 566, and the principal case, said: "The first inquiry is, do the facts appearing in the record entitle the appellee, *Moses S. Hall*, to compensation for any of the improvements alleged to have been

By deed bearing date the 15th of February 1860, John Græme, of the city of Richmond, conveyed to Gustavus A. Myers and John Græme, jr., a certain lot of land in the city of Richmond, situated on the south side of Main street, on which there was a brick house, and bounded by the same boundaries as when Patrick Cullen purchased the same from James Talley, on the 23d of January 1835; in trust to secure to Patrick Cullen the payment of the sum of \$22,200, for which the said Græme had that day executed and delivered to the said Patrick Cullen thirty writings obligatory commonly called single bills, by which he promised to pay to said Cullen, the several sums of money, and at the times, respectively set forth and specified in a schedule annexed to the deed. These single bills were for various amounts and their times of payment ran from 1860 to 1875.

The deed provides that in the event that default be made in the payment of either of the above mentioned writings obligatory as they become due and payable, then the trustees, or either of them, on being required so to do by the said Patrick Cullen, his executors, administrators or assigns, shall sell the property hereby conveyed. And it is covenanted and agreed between the parties aforesaid, that in case of a sale, the same shall be made after first advertising the time, place and terms thereof, for ten days in some newspaper published
268 *in the city of Richmond, and upon the following terms, to wit: For cash as to so much of the proceeds, as may be necessary to defray the expenses of executing this trust, the fees for and recording this deed, if then unpaid, and to discharge the amount of money and interest then payable upon the said writings obligatory; and if at the time of such sale any writing shall not have become due and payable, and the purchase money be sufficient, such part or parts of said purchase money as will be sufficient to pay off and discharge such remaining writings obligatory shall be made payable at such time or times as the said writings obligatory will become due; the same to be properly secured; and for any residue, of purchase money on such credit as Græme, his executors, &c., should direct,

made by him upon the house and lot? In order to entitle him to such compensation it must be shown either that he was at the time he made the improvements a *bona fide* occupant and holder of the property, or that the improvements were made by him under such circumstances that it would be a fraud upon his rights to permit the owner to take them without compensation. To bring the appellee within the first class, it must appear that he not only believed he had a good title to the premises and made the improvements in good faith under that belief, but it must be shown that he at the time had reasonable grounds to believe his title good. It is sufficient to defeat his right to compensation if the title under which he claimed appeared upon its face to be defective: in other words, he will not be entitled to compensation if he had the means of obtaining information of the defect in his title."

or on his failure to direct as the trustees should think fit.

This deed was not executed by the trustees. It was recorded in the clerk's office of the Hustings court of the city of Richmond on the acknowledgment of Græme, on the 21st of February 1860.

The house and lot conveyed in this deed, had been sold by Cullen to Græme, and the writings obligatory mentioned, were for the purchase money. About the time of the conveyance by Cullen to Græme, Cullen assigned to him a policy of insurance on the house.

The writings obligatory were paid by Græme as they fell due, up to the year 1864. Those that fell due that year and subsequently were not paid; and on the 3d of April 1865 the house was burned in the fire which consumed a great part of the city.

In July 1865 John Græme being the owner of the ground extending from the lot conveyed as aforesaid, to Twelfth street, and running back on that street, made a contract with S. H. and J. F. Adams, of Baltimore, for the building of three tenements on
269 his ground on *Main street, and two to front on Twelfth street; and the agreement seems to have been that the contract should be reduced to writing and placed on record, so as to give them a lien on the lot and buildings for the price of building them. This, however, was not done until November, for the reason as S. H. Adams states, that they were advised by their counsel, that the clerk's office was in the possession of the United States Military authorities, and therefore it could not be recorded. In November they had been informed of the deed of trust held by Cullen, and then John Græme and James Hunter and Mary his wife, who was the daughter of Græme, entered into an agreement in writing, which was admitted to record, by which Græme covenanted that the Adams should have a lien on the ground and the buildings they were putting up for Græme; and Hunter covenanted that they should have a lien on certain real estate of his own, for the cost of building the said houses; and by deed bearing date the 15th of March 1866, and duly admitted to record on the 17th, Græme conveyed to Andrew Johnston and John Græme, jr., the ground and buildings aforesaid, and Hunter and wife conveyed to them the real estate mentioned in his agreement, in trust, to secure to S. H. Adams for himself and his partner J. F. Adams, the payment of seven negotiable notes bearing date the 15th of March 1866, with interest from the date, executed by Græme to S. H. Adams, payable in from one to six years, amounting together to \$58,660. The first of these notes, which was payable in one year, was for \$9,450, and the second, which was payable in eighteen months, was for \$5,525.

The trusts of the deed were to sell if and when any of the said notes were not paid; and for cash for expenses of executing the trust, and to discharge all principal and interest then due, and upon a credit

270 for such sums *and at such times as required to meet the other notes not then due, if any, and the surplus if any was to be paid as Græme should direct. And it was provided that as soon as the first two notes were fully paid Hunter should be entitled to have and receive a release of the property which he conveyed by the deed. By another deed bearing date the 14th of March 1867, executed by Græme, Hunter and wife, the trustees and S. H. Adams, reciting the sale by Græme to Robert A. Mayo, of a part of the property conveyed by him, in consideration of the trustees and Adams uniting in a conveyance of the same to Mayo, Turner and wife released the provision in his favor for a release of his property on the payment of the first two notes.

By the direction of Cullen the trustees, Myers and John Græme, jr., advertised the property embraced in the deed from John Græme to them to be sold on the 7th of March 1868 on the terms of the deed. The advertisement set out the several writings obligatory secured by the deed, then stated the several bonds then due, and also the bonds which were yet undue, with the amount of each and the time it fell due. The amount due and for which cash was required was between seven and eight thousand dollars, the amount to fall due and for which a credit was to be allowed, was \$8,680, and extended from August 1868 to February 1875.

To enjoin this sale John Græme filed his bill in the Circuit court of the city of Richmond. The grounds on which the injunction to the sale was asked, was that the building which was on the lot when Cullen sold it to Græme had been burned, and the new building put upon it by the Adams was built under an agreement that gave them a lien upon it; and that Cullen with a knowledge that they were putting up the building, had not given them any notice of his lien.

271 The plaintiff insisted, *therefore, that Cullen was entitled to a lien to the value of the ground, and that the Adams were entitled to the balance of the price at which it should be sold; and that the property should not be sold until this question was settled.

The injunction was refused by the judge of the Circuit court, but was granted by a judge of the court of Appeals. This injunction was dissolved on the 11th of April 1868. And then Cullen directed the trustees to proceed to sell the property under his deed of trust; and John Græme, jr., declining to unite in the sale, it was advertised by Gustavus A. Myers, the other trustee, to be sold on the terms prescribed in the deed, and was sold on the 22d of March 1868, and purchased by S. H. Adams for himself and his partner, at the price of \$20,000. To this sale John Græme, jr., objected both by advertisement in the newspaper and also at the sale.

The Adams not complying with the terms of the sale, Cullen, in June 1868, filed his bill in the Circuit court of the city of Richmond, against John Græme, Gustavus A.

Myers, John Græme, jr., as trustee in both deeds, the Adams, Andrew Johnston and Mrs. Hunter, as executrix and sole devisee of James Hunter, deceased, setting out his deed of trust, the sale by Myers, and the purchase by the Adams, and asking for a specific execution of the contract of purchase by the Adams.

S. H. and J. F. Adams answered the bill. They say that S. H. Adams attended the sale, and gave notice to the auctioneer that they had a claim against said property, and any action of his was for the protection of their interest; and that they did not mean to compromise the same by such action. They admit the purchase at the sale made by Myers, for twenty thousand dollars, and that the purchaser did decline to comply with the terms of said purchase, until

272 he should be satisfied upon the *subject of the validity of the sale made by Myers as sole trustee, and also until the question was settled between the said Cullen and the respondents, as to the priority of their respective claims upon the value of the buildings which they had erected upon said lot. After stating the facts as to the refusal of the trustee, John Græme, jr., to unite in the sale, and the burning of the house on the 3d of April, they said that on the 24th of July 1865, they entered into a contract with John Græme to furnish all the materials and labor, and build the houses on Main and Twelfth streets, and to take security for their reimbursement by instalments, upon the property, with the improvements so to be made. They aver that they were not informed by the said Græme nor by the said Cullen, nor by any body else, that Cullen had any lien or claim whatsoever upon the said property or any part of it; and they had no suspicion of such a lien, nor any grounds to suspect it. In pursuance of this contract the respondents went on to furnish the labor, materials and money, and erected the house upon this lot, and upon the adjoining property aforesaid, with their own money and other resources. The fact that they were doing so was notorious. The site of the property was one of the most public, and its value inferior to few in the city; and it was known to every body acquainted with the affairs of John Græme, that he had not the means himself to defray the costs of such improvements. The plaintiff had been a resident of the city of Richmond for many years, and if he was not a resident at that time, he was a sojourner therein during a considerable part of the year 1865, and at the time the respondents were going on with said improvements; and they charge that the plaintiff well knew, or was informed and believed, that the said improvements were being made by these respondents, under a contract with

273 *Græme, and that the funds for the same were in fact advanced by the respondents; or if he was not informed as to the precise facts, he knew or was informed of enough to be assured that some person or persons, other than John Græme,

was engaged in the erection of said improvements, and was advancing the funds for that purpose. And they insist that under these circumstances it was the duty of the plaintiff to have enquired and ascertained the facts, if they were not known to him, and to have given notice of his alleged lien and claim upon the property, to the person engaged in making such improvements; and not making such enquiry and giving such notice, but standing by and suppressing the fact of his interest in the property, he will be regarded in law as having fraudulently concealed the same, and he will be postponed in the enforcement of his lien to these respondents, to the extent of the value of the improvements erected upon said lot by them.

They further say, that before they had any notice or suspicion as to the lien of the plaintiffs, they had expended upon this and the adjoining property about \$40,000; that it was in November 1865 when they received this information, when John Græme was about to enter into the agreement with these respondents, which was to be duly recorded in order to give them a lien upon the property; and the reason why this had not been done at the commencement of the work, was that the office of the Hustings court of the city was then in the possession of the Military authorities of the United States; and respondents were informed and believed that no agreement could then be so recorded as to give them a valid lien on the property.

Mrs. Hunter in her own right and as executrix of James Hunter deceased, filed her bill in the same court against Cullen, the

Adams, John Græme and the trustees
274 *in Cullen's deed, in which she insists upon the illegality of the sale made by Mr. Myers, and also on the conduct of Cullen and his trustees in standing by and not giving notice of his lien, as giving the Adams preference over him.

The depositions of Cullen and of S. H. Adams were taken. That of Cullen, so far as it refers to the last point, is stated by Judge Moncure in his opinion, for which see other facts referred to by him. That of Adams is in accord with his answer.

On the 14th day of February 1871 the causes came on to be heard together, when the court dismissed Græme's bill with costs; and held that Cullen was entitled as against the Adams to specific performance of their contract of purchase under the sale by the trustee Myers, which sale was confirmed; and that he was entitled to have, out of the purchase money, satisfaction of the debts due and to become due from Græme to Cullen, and secured by the deed aforesaid, without abatement, because of the improvements put upon the lot by Græme since the said deed of trust was executed to secure the same; and that the Messrs. Adams must be postponed to said Cullen. It was therefore decreed accordingly; interest being charged upon all the writings obligatory, from the time they fell due, whether given for the principal or for the interest. From this decree Mary Hunter, John Græme and

John Græme, jr., applied for, and obtained an appeal to this court.

Lyons, Meredith and John Howard, for the appellants.

Jones & Bouldin and Daniel, for the appellee.

MONCURE, P., delivered the opinion of the court.

The two main questions arising in this case are, first: whether the sale made
275 by Gustavus A. Myers, one of the two trustees named in the deed of trust of the 15th day of February 1860, from John Græme to said Myers and John Græme, jr., for the benefit of Patrick Cullen, was a valid sale? And second: whether Cullen is entitled to have full satisfaction of his debt secured by that deed, out of the proceeds of that sale, before S. H. & J. F. Adams, the builders of the house which was upon the lot of ground sold at the time of the sale, will be entitled to any part of the said proceeds on account of the debt due to them by said Græme for said building? These two questions, substantially, in the above order, were considered by the learned judge of the court below, in the opinion delivered by him on pronouncing the decree appealed from in this case, and were discussed by the able counsel in their argument of the case before this court. We will, therefore, consider the same questions, and in the same order, in our examination of the case. Other questions arise in the case which were considered in the court below, and were argued by counsel in this court, and which we will also have to consider; but they are subordinate and collateral to the main questions aforesaid. Proceeding, then, to consider those two main questions, we will enquire:

First—Was the sale made by Myers, as aforesaid, a valid sale?

The law in regard to the power of one of two or more trustees, named in the instrument creating the trust, to execute the trust severally, is very plain, and is familiar to us all. Where two or more persons are authorized to execute a trust or power jointly, of course they are not authorized to execute it severally, unless such authority be also given by the instrument creating the trust or power. That instrument being the only source of the authority, of course there can be no authority which does not flow from that source. Lewin on Trusts, 266,

276 *marg.; 1 Lom. Dig. 249. A trust or power given to two or more, is joint only, unless words be added making it several also. But while one or two or more joint trustees cannot execute the trust severally, it is perfectly competent for the author of the trust to empower the trustees to act severally, as well as jointly; and in that case, the act of one of the trustees, in pursuance of the trust, is just as valid as if he only had been appointed to execute it. The law on this branch of the subject is correctly laid down in the opinion of the

court below and the authority therein cited. By the terms of the instrument creating the trust, its author "may confide the execution of the trust to one person alone, or to two or more jointly, or to two or more jointly and severally; and in the latter case, one of the trustees alone, or a less number than the whole, may execute the trust where the deed provides that less than the whole number may act. 1 Lom. Dig., marg. p. 325. When there are several trustees, and there is no provision in the deed that a less number than the whole may act, all must act; because it is an office of personal confidence, (Lewin 262,) and in such case the grantor has not confided in any one, or in any number less than the whole. But, when the deed does provide that a less number may act, it is a clear indication that the grantor has the same confidence in the lesser number that he has in the whole; and it follows, that in such case it is competent for a less number than the whole to execute the trust." The case of *Taylor & ux. v. Dickinson, &c.*, 15 Iowa R., 483, cited by one of the counsel for the appellee Cullen, bears directly on this branch of the case, and seems to be a correct decision. Then, the question in regard to the power of Myers to act severally in making the sale, is one of construction merely. Does the deed of trust confer such power?

277 *The deed was executed to secure the purchase money, or part of the purchase money, of the lot of ground thereby conveyed, which it seems, on the same day had been sold and conveyed by Cullen to Græme. The amount secured by the deed was \$22,200, for which Græme executed and delivered to Cullen thirty writings obligatory, for different sums of money, payable at different times, between the 15th day of February 1860, the date of the deed, and the 15th day of February 1875, inclusive, according to schedule annexed to the deed. The deed provides, that in the event that default shall be made in the payment of either of the above mentioned writings obligatory as they become due and payable, then the trustees or either of them, on being required so to do, by the said Patrick Cullen, his executors, administrators or assigns, shall sell the property hereby conveyed." Certainly language could not be plainer, nor more unlimited and unconditional, than is the language here used to empower the trustees, severally as well as jointly, to make the sale, on being required so to do as aforesaid. The power thus given to either of the trustees to make the sale, is not a conditional power to make it only in the event of the death of the other trustee, or of his non-residence in the State, or of his refusal to accept the trust, but it is general and unconditional; just as much so, as is the power given to them to act jointly in the matter. How then can it be said, that Myers had not power to make the sale severally in this case? Suppose both of the trustees had signed the deed of trust, (though neither of them did,) that would have been the most express and binding

acceptance of the trust which the trustees could possibly have given; and yet, could it have been contended in that case, that one of the trustees could not have made the sale on being required by the trust creditor to do so, notwithstanding *the refusal of the other trustee to join in making it? How then can it be said that by joining in the first advertisement of sale, Græme, jr., accepted the trust, and thereby put it out of the power of Myers, afterwards, to make the sale severally, though Græme, jr., was expressly requested and expressly refused to join in making it? Did Græme, jr.'s acceptance of the trust, and his refusal afterwards to join in making a sale, annul that portion of the deed which expressly requires either of the trustees to make the sale, on being required by the trust creditor to do so? It may be true that in the selection of the trustee, the trust debtor and creditor may have been influenced, to some extent, by the consideration, that one of them was the son of the debtor, and the other the friend, if not counsel of the creditor; (though it seems he was only such counsel in drawing the deed, and not the general counsel;) but it was certainly not intended that the trustees should only act together, and not severally; for the deed expressly provides otherwise. The parties were friendly at the time of the execution of the deed, and did not anticipate any difficulty in the future. But the debts to be secured had a long time to run, covering a period of fifteen years; and the parties could not know what would turn up in the meantime. It was a prudent precaution, therefore, in the trust creditor to stipulate in the deed for a right to require the trustees or either of them to make a sale, in the event of a default by the debtor in making his payments. Before all the debts became payable, the parties, debtor and creditor, might become inimical to each other, (as turned out to be the case,) and the trustee, who is a son of the debtor, might naturally take sides with his father, and be biased in his favor; and might think it improper to join in making a sale, and therefore refuse to do so. In such an event, it was *important to the creditor to have the right to require the other trustee to make the sale, and the right was accordingly secured to him by the deed. We do not mean to say that this was the only motive for inserting that provision in the deed. On the contrary, there were many other motives for its insertion. But this may have been one of the motives, and was a reasonable one; and at all events, such a state of things presents a case in which either of the trustees may be required to make a sale, notwithstanding the refusal of the other trustee to join in making it, and even against his protest, if such sale would be otherwise proper. We do not mean to say that one of the trustees might have been required to make the sale alone, if the other had been willing to join him in making it. It is unnecessary to decide that question in this case, and we therefore ex-

press no opinion upon it. But we do mean to say, that if one refuse, though requested to join in making a sale, no matter what may be the motive of such refusal, the other has power to make it; and if it be otherwise proper, the sale will be valid. In this case Græme, jr., was requested to join in making the sale; and he did join in the first advertisement; but he refused to join in the second. After being made trustee in the deed for the benefit of Cullen, he accepted another trust upon the same property for the benefit of S. H. and J. F. Adams. These trusts were, in his opinion, conflicting, and he could not decide between them, "and what right," enquires the petition, "had Cullen, or Myers either, to require him to assume the grave responsibility of so doing?" This may have been a very good reason for his refusing to join in making the sale under the deed for the benefit of Cullen; but it was at least as good a reason, why Myers should have power to make the sale alone, if such a sale would otherwise be proper.

280 *Then we proceed to enquire, whether the sale was otherwise proper; in other words, whether it is valid, notwithstanding the fact that both trustees did not join in making it?

The sale was advertised and made in strict pursuance of the terms prescribed by the deed of trust. There was no uncertainty as to the amount due on account of the trust debt at the time of the sale. The debtor had made default in the payment of the instalment which became payable on the 15th of February 1864, and of all the semi-annual instalments which became payable afterwards, down to the time of the sale on the 22d of May, 1868, and had paid nothing on account of the principal or interest of the debt during all that period. The title to the property was perfect, and there was no cloud whatever over it, at least at the time of the execution of the deed of trust. The deed was duly recorded a few days after its date. The creditor was prevented by the stay law from having the deed of trust enforced by a sale of the property, until after it was decided by this court in *Taylor v. Stearns, &c.*, 18 Gratt. 244, that so much of that law as suspended the enforcement of deed of trust liens was unconstitutional; which decision was made in 1868, February 19. Shortly thereafter, the sale was advertised and made as aforesaid. It does not appear, and is not pretended, that the trustee did not use every means in his power to make the property produce the highest possible price at the sale. On what ground, then, can it be, that the said sale is invalid?

The ground on which the appellants insist that it is invalid is, that at the time it was made there was a pending controversy in regard to the improvements which had been constructed upon the said property by S.

H. and J. F. Adams; that is to say, 281 whether the proceeds *which might arise from the said sale, on account of the said improvements, would be properly applicable, in the first place, to the pay-

ment of the trust debt due to Cullen, or to the payment of the debt due to the Adams for said improvements; for the security of which latter debt a subsequent deed of trust on the said property had been executed and recorded. The appellants contend that this controversy, in itself, (however the right may be,) was such a cloud over the title as made it improper in the trustee to make the sale until the said cloud was removed; and that the necessary effect of making the sale, under such a cloud, was to produce a sacrifice of the property. We will now enquire as to the nature of this supposed cloud, and as to its probable effect upon the sale.

The question now to be considered is, not how the proceeds of the sale of the property ought to be applied—that will be the subject of our next enquiry—but what was the nature and state of the controversy on the subject at the time of the sale, if controversy it could be called; and whether it injuriously affected the sale.

It is manifest, we think, that when the agreement of the 18th of November 1865, between Græme, James Hunter and the Adams, providing for a lien to be given to the Adams on the property therein mentioned, to secure the payment of the cost of the improvements, which had been and were expected to be put upon the said property, all of the parties to said agreement believed that Cullen would have a prior lien to that of the Adams, not only on the lot of ground conveyed by the deed of trust for Cullen's benefit, but also on the improvements which had been, or might be, put upon that ground, as aforesaid. And this belief, no doubt, continued down to the time of the advertisement of the property

for sale by Græme, jr., and Myers, 282 the two *trustees under the said deed of trust. But afterwards a change seems to have occurred in the views of the said parties. That change in the views of Græme, sr., manifested itself by the bill which, on the third or fourth of March 1868, just three or four days before the day fixed by the trustees for the sale of the property, was presented to the Judge of the Circuit court of the City of Richmond, praying for an injunction of the said sale, upon the ground of the alleged, or supposed, prior lien of the Adams to that of Cullen, on the improvements aforesaid, and of the injurious effects of making a sale of the property under such a supposed cloud. The injunction prayed for, was refused by the Judge of the Circuit court on the 4th of March 1868, but was granted by a judge of this court on the 10th of March 1868, and the sale advertised to be made on the 7th day of the same month was not made. Cullen filed his answer to the bill, and gave notice to Græme that he would, on the 28th of the same month, move the judge of the said Circuit court to dissolve the injunction: which motion was accordingly made. And on the 11th day of April 1868, to which day the said motion was continued by consent of parties, it came on to be heard by the said judge in vacation; on the original bill,

the answers of the defendants Cullen, Myers, and S. H. & J. F. Adams to the said original bill, with general replication to said answers, the answer of the defendant Mary Hunter on that day filed, the amended and supplemented bill (making said Mary Hunter a defendant to the suit,) the exhibits filed and the depositions of witnesses, and was argued by counsel: On consideration whereof, the said Judge in vacation adjudged, ordered and decreed that the said injunction should be, and the same was thereby dissolved. And on the motion of the plaintiff by counsel, who represented that he desired and intended to present

283 *a petition for an appeal from the said decree, it was further ordered that the said decree be suspended for thirty days from its date, to enable the plaintiff to present such petition. No such petition ever was presented; or, at all events, no such appeal ever was obtained. After the said period of thirty days had expired, to wit: on the 12th of May 1868, Myers, as sole acting trustee, again advertised the property for sale, in pursuance of the terms prescribed by the deed of trust, on the 22d day of the same month. Before proceeding to act as sole trustee in advertising and making the sale, Myers, on the 11th of May 1868, sent the advertisement to his co-trustee, Græme, jr., with a note requesting him to sign it. The latter replied by a note dated on the same day, in which he said: "as co-trustee alike in the deed from John Græme, to secure Messrs. S. H. and J. F. Adams, and in the deed from said Græme to secure Dr. Cullen, both of which trusts I have accepted, I am advised by counsel, that under the circumstances, it would not be proper or safe in me to unite with you in the sale of the house erected on the lot in question by Messrs. Adams, to pay the debt due to Dr. Cullen, or to consent to such sale by you, my co-trustee, in said deed to secure Cullen. I therefore notify you that I can not consent to the sale proposed to be made, the advertisement of which was submitted to me to-day, and shall decline to do any act to divest the title in me, in part, under said deed, in order to effectuate the said proposed sale. Any expenses, costs, or damages that may be incurred by reason of an attempt to make such sale by you, will of course be assumed by yourself, and on your own responsibility; and such a sale would be regarded by me, co-trustee in said several deeds, as an act done without lawful authority, and therefore null and void, &c."

The writer also appended to the said

284 advertisement of *Myers in the newspaper, a notice signed by himself, in which he stated: "I have notified Mr. G. A. Myers, under the advice of counsel, that I could not safely consent to the sale above advertised by him to take place on the 22d instant, and that such sale would be regarded by me as illegal, and therefore null and void." It seems also that he attended the sale, and then and there gave a similar notice, and that he had been notified by his sister, Mrs. Mary Hunter, executrix and

sole devisee of James Hunter, "not to unite in such a sale; that she would regard the same as a null and void act, so far as it affected her rights; and that she would hold him personally responsible for any damage that might accrue to her by reason of his uniting in or giving any countenance to such a sale." Myers, however, made the sale, according to his advertisement; and S. H. & J. F. Adams, being the highest bidders, became the purchasers at the price of twenty thousand dollars. It does not appear that that was not an adequate price for the property at that time, on the terms on which it was sold; which were the terms prescribed by the deed of trust. Real estate in Richmond had considerably fallen in market value, since 1865 and '6, and it was uncertain whether there would not be a still further fall therein. The property might have produced more if sold on different terms; or rather if a less amount of cash had been required; but it certainly does not appear, nor is there any evidence in the case, that more could have been gotten for it on the same terms. The trustee properly sold it on the terms prescribed by the deed, which he had no right to vary. The amount of the cash payment required was quite large, but it was made so by the long continued default of the debtor, which accumulated the amount in arrear. But still, the terms were favorable in regard to the

285 portion of the purchase money *required to meet the instalments of the debt which had not become payable, and which were to run to February 1875, nearly seven years after the sale. Then was this sale valid, under these circumstances?

We are of opinion it was. There was no cloud over the title at the time of the sale. The only controversy which then existed, if any, was as to the application of the proceeds of the sale. The injunction of the sale which had been granted by a judge of this court after having been refused by the Judge of the Circuit court, had been dissolved by the latter, and no appeal had been taken from the order of dissolution. There was then no impediment in the way of a sale, and no reason for believing that a fair sale could not be made, at as full a price as could be obtained for such property, at that time and on the terms prescribed by the deed. There had been no decree dismissing the injunction suit after the injunction was dissolved, and it was a pending suit at the time of the sale; but it was pending only for the purpose, if any, of having the proceeds of the sale applied according to the respective rights of the claimants, as they might thereafter be determined by the court. Græme's suit against Cullen (the injunction suit) was the only one of the four suits in which the decree appealed from was rendered, which had been brought, or, at least, in which a bill had then been filed; and the injunction awarded in that suit had been dissolved. To be sure, it seems that Mary Hunter, executrix and sole devisee of James Hunter, on the very day on which the injunction

was dissolved, sued out the subpoena which was the commencement of the suit of "Hunter v. Johnston, &c.," which was one of the said four suits; but no bill was filed in the suit until the 7th day of September, 1868, nearly four months after the sale. If

the property did not in fact, produce
286 a full *price, it was owing, doubtless, to the means used by the debtor Græme, sr., his son, one of the trustees, Græme, jr., and his daughter Mary Hunter, to prevent the other trustee Myers from making a sale, after the court, by dissolving the injunction had decided that there was no impediment in the way. It was their duty then to do every thing in their power to promote a good sale; and it was their interest also, except so far as it may have been more to the interest of Græme, the debtor, to postpone the sale as long as possible, in order that he might, in the meantime, continue to receive and enjoy the rents of the property. If the sale was injured by the course pursued by them, they, surely, have no just cause to complain. See *Ford v. Heron*, 4 Munf. 316, cited by one of the counsel for Cullen. The Messrs. Adams do not complain. But the property sold for a fair price, considering the time at and the terms on which it was sold. The Messrs. Adams in their answer to Mrs. Hunter's bill, deny that the sale was made under such circumstances of difficulty and cloud as to title, that fair competition for it, at its real value in the market, was excluded." And they "aver, on the contrary, that the price bid for the said property by them, and at which the said property was struck off to them, as the highest bidders therefor, was, in fact, the full market value of the said property, supposing the title to be conveyed to be a full and complete title in fee simple, without any cloud or difficulty whatever." And they say they were induced to offer a full price for the same, in order to save themselves, as far as possible, from loss; and relying upon the judgment of the court to make such distribution of the purchase money as should be consistent with their rights and those of the said Patrick Cullen." And Mrs. Hunter herself, in

her answer to Cullen's bill for the ap-
287 pointment of a receiver, in **Cullen v. Græme*, one of the said four suits, manifests her willingness and indeed suggests that the purchase money should be paid into bank to the credit of the cause, which she is advised, it would be entirely competent for the court to do, and respectfully suggests that it ought to do; and then a conveyance may be made to the purchaser." Thus showing that the real controversy on her part, was not as to the propriety or fairness of the sale or the adequacy of the price, but as to the proper application of the proceeds. We can readily see how the existence of a controversy between Cullen and the Adams as to the proper application of the proceeds, might enhance the price of the property at the sale, by producing a competition between these parties as bidders. This case is very

different from the cases cited by the counsel for the appellants to show, that property should not be sold by a trustee while there is a cloud over the title. The difference will readily appear by a comparison of the circumstances of this case with those which existed in them. The cases referred to are *Rossett v. Fisher*, 11 Gratt. 496; and *Roberts v. Roberts*, 13 Id. 639. We proceed now to enquire:

Secondly—Is Cullen entitled to have full satisfaction of the balance due to him by Græme, out of the proceeds of the sale of the said lot of ground with the building thereon, before S. H. and J. F. Adams will be entitled to any part of the said proceeds on account of the balance due to them by Græme for said building.

It is a general rule of law, that the owner of land owns every thing annexed to it. *Cujus est solum, ejus est usque ad cælum*, is a well established and familiar maxim of the law. To this general rule, there seems, originally, to have been few or no exceptions. But there are now many exceptions to it, as well established as the rule itself; though there is some uncertainty, and
288 *apparent conflict in the cases, as to the extent of some of these exceptions; and it is sometimes difficult to determine whether a particular case comes within any of them. Most of these exceptions arise under the law in regard to what are called "fixtures;" which law has undergone great change in modern times, as trade has increased and its necessities and conveniences have required a modification of the law. The decision of Lord Ellenborough in *Elwes v. Maw*, 3 East's R. 38, is a celebrated case on this subject. He considers it under three heads: 1st, as between heir and executor; 2dly, as between executors of tenant for life or in tail, and the remainderman or reversioner; and 3dly, as between landlord and tenant. This case may be found in 2 *Smith's Leading Cases* p. 117 top and 228 marg.; and in it and the notes appended thereto both by the English and American publishers of that valuable work, all the authorities having any material bearing on the subject are referred to. These authorities show how carefully the law in regard to these exceptions, guards the inheritance against injury by the removal of fixtures, even where they are annexed by a tenant for the purpose of trade; in which case the right of such removal is most favored by the law. The removal must be effected during the possession of the tenant and without any substantial injury to the freehold. But it is unnecessary to comment further on the cases which relate to the law of fixtures, as that law has no direct application to this case. The building erected by the Adams, on the lot of ground conveyed by the deed of trust, to secure the debt due by Græme to Cullen, is certainly not a fixture, within the meaning of that law; and if the parties, Græme and the Adams, or Cullen and the Adams, stood towards each other in the relation of landlord and tenant, the Adams would not

289 not have a right to remove the "building without the consent of Græme and Cullen, according to any of the authorities in regard to fixtures. Indeed no such right is claimed in this case. The right claimed here by the Adams is, to have so much of the proceeds of the sale aforesaid as arose from the building applied, in the first place, to the payment of the debt due to them for erecting the said building; upon the ground, first, that they contracted to do the work without any knowledge of the existence of the deed of trust for Cullen's benefit, and on the terms that the price of the work should be secured to them by a lien on the said lot when the building should be completed; and also upon the ground, secondly, that Cullen was aware that they were doing the work, relying on such security, and yet failed to inform them of his deed; and so was guilty of a fraud, by reason of which his lien will be postponed by a court of equity to theirs. Now, let us see whether these two grounds, or either of them, be sufficient to sustain their claim.

But before we consider them separately, we will make some general observations which apply to them both. And first—all buildings and other improvements and fixtures put upon mortgaged premises by the mortgagor, after the execution of the mortgage, become a part of the freehold, and enure as such to the benefit of the mortgagee. There are a great many authorities on this subject, but no conflict among them. All affirm or recognize the principle just stated. It is, perhaps, no where more clearly stated than by Chief Justice Shaw, in the case of *Butler's adm'r v. Page*, 7 Metc. R. 40, referred to in the opinion of the chancellor in this case: "All buildings erected, and fixtures placed on mortgaged premises, by the mortgagor," says the Chief Justice, "must be regarded as permanently annexed to the freehold; they go to enhance the value of the estate, and

290 will, therefore, *enure to the benefit of the mortgagee, so far as they increase his security for his debt; and to the same extent, they enhance the value of the equity of redemption, and thereby enure to the benefit of the mortgagor. *Winslow v. Merchants Ins. Co.*, 4 Metc. R. 306. There is no necessity to adopt any liberal rule in regard to fixtures to enable the mortgagor to remove what he has erected at his own expense; because he has the full benefit of all such improvements when he regains the estate by redemption, which he may do simply by payment of his actual debt. The general rule of the common law, therefore, that what is fixed to the freehold becomes part of the realty, and passes with it, has its full effect in regard to things erected on the land by an owner who subsequently mortgages the land, and also in regard to things erected by the mortgagor after the mortgage. It was argued that a mortgagor in possession is tenant to the mortgagee, and the authorities were cited to show that temporary buildings erected by a tenant at his own expense may be re-

moved. This we think is founded on a fallacy." Nobody ever contended that permanent buildings, erected by the mortgagor, or at his expense, could be removed by him, or that the mortgagee could be compelled to account for them, or the proceeds of the sale of them, at least until the mortgage debt was fully paid. The counsel for the appellants admit the correctness of this principle. And they do not deny, but in effect admit, the correctness of what is further said by the chancellor on this subject, (which is undoubtedly true,) that "there is no difference in this respect between a deed of trust and a mortgage, but the principle is equally applicable to both. 2dly: It will be observed, that on the 21st day of February 1860, just six days after the date of the deed of trust for Cullen's benefit, it was duly recorded in the office

291 of the court of Hustings for "the city of Richmond, the place prescribed by law for that purpose; and Cullen thus did every thing required of him by law to give public notice of his lien upon the land. 3dly: It will be observed, that there was no time, at or after the commencement of the building on the land by S. H. and J. F. Adams, when they could not have seen the deed of trust by enquiring at the said office, which was situated only a few hundred yards from said land; and yet they made no such enquiry, until after the work had been more than half done. They did not even enquire of Græme, nor any body else, whether there was any lien upon the land; nor did Græme give them any, the slightest, information on that subject. They seem to have dealt with him in perfect confidence in his ability and willingness to make good his engagements; and he seems not to have doubted, that the property, subject to the prior liens upon it, would be ample security for the cost of the improvements about to be erected on the land. The high price of such property in Richmond at that time, and the prospect of its continued increase in value, afforded a just foundation for such an opinion. 4thly: It will be observed, that until after the improvements were completed, not a word was said to Cullen about them, either by Græme, or by S. H. and J. F. Adams, or by any body else; and even after the Adams' were informed of the existence of Cullen's lien, they did not go to him to have any negotiation about the continuance of the work, but went to Græme and demanded of him further security, in consequence of that prior lien; and accordingly, such further security was given, by a lien on additional property of Græme, and by Hunter and wife; the son-in-law and daughter of Græme joining him in the conveyance of their property as such security. The parties concerned thus admitting,

by acts if not by words, that Cullen's 292 lien *was prior and paramount to that of the Adams on the property conveyed by the deed of trust, including all the improvements thereon. And it does not appear that there was ever any claim or pretension to the contrary, until after the

trustees named in that deed had advertised a sale of the property in pursuance thereof; and then a bill of injunction was filed by Græme as aforesaid. 5th: It will be observed, that notwithstanding the destruction by fire, of the building which stood upon the land when the deed of trust was executed, and until the 3d of April 1865, such was the favorable location of the ground, and such was the high market value of the property for one or two years after the war, that it could have been sold for enough, during that period, without any improvements thereon, to have paid the balance of the debt due to Cullen. He would have had it sold under the deed of trust, but was prevented from doing so by the stay law. Græme could have sold it if he would, notwithstanding the stay law, but he would not; and preferred to have a new building erected thereon and take the chances of deriving greater benefit from the property, in that way. In November 1865, Cullen sold his own lot on the same square at a price which Goddin regarded ("all things considered,") as the highest sale ever made in Richmond. Under all these circumstances, the parties must stand upon their legal rights; Cullen on the one side; and Græme, Mrs. Hunter and the Adams on the other; and the law must determine whether Cullen is entitled to the priority which he claims for his lien, as well in regard to the improvements on the land as in regard to the land itself. And now we address ourselves to the several considerations of the two grounds relied on as aforesaid, to show that Cullen is not entitled to such priority, at least in regard to the improvements. And,

293 *First, as to the ground that the Adams, without any actual knowledge of Cullen's lien, contracted to erect the building, upon an understanding or agreement with Græme that a lien should be given on the ground and improvements for the cost of the work, and that the greater part of the work was done before they had such knowledge.

We have seen that the general rule of the common law is, that all buildings and other fixtures annexed to the freehold become part of it, and enure to the benefit of those who are entitled to it; and that this rule applies to property subject to a deed of trust or mortgage. Now, any exceptions which may be set up to this rule, either under any statute or under any established principle of law or equity, must be clearly made out by the party who seeks to have the benefit of them. If the building had been erected in this case under a contract with Cullen, or under a license from him, there would have been no doubt that his lien would have been postponed to the lien for the cost of the building. But such was clearly not the case, and no such fact is pretended.

The statute law gives a lien or claim for improvements against the owner of the land on which they are made, in certain cases and under certain circumstances. The Code, ch. 119, p. 567, gives what is called the

"mechanic's lien, on buildings in towns." The 2d section provides, that "If a person owning, or having interest in land, in a city or town, shall, by writing signed by him, contract with another, to pay him money for erecting or repairing any building, &c., on such land, there shall be a lien for such money on the whole interest of the said person in such land, from the time that the said writing is duly admitted to record in the county or corporation wherein the said land lies. But the said lien shall not

be in force more than six months from 294 the time when the money, or *the last instalment of the money to be paid under such contract shall become payable, unless a suit in equity to enforce the lien shall have been commenced within the said six months. If in such suit the lien be established, the court shall order a sale of such interest in the said land, to satisfy the money which ought to be paid under such contract." It is not pretended that there is any lien in this case under that statute. Some of its most important provisions were not complied with, and indeed were not intended to be complied with, as the parties had not that statute in their view, and had no idea of stipulating for a lien under it. There was no contract in writing for a lien until after the builders were informed of Cullen's deed of trust; and the contract then entered into never was recorded at all, though such lien can only take effect "from the time that the said writing is duly admitted to record." But, what is most significant and instructive in this statute is, that it confines the right to give such a lien only to the interest of the person who contracts with another to pay him money for erecting or repairing any building, and does not authorize a lien to be given on the interest of others in the land, although they may be much more interested therein than the party who has the building erected or repaired. Therefore, Græme had no right, under the statute, to bind Cullen's interest in the land, even if he had intended to do so; which he did not.

The only other statute law which gives a lien for improvements, is that to be found in ch. 135 of the Code, concerning the action of ejectment §§ 30-34, p. 612; and in ch. 136 concerning "allowance for improvements," p. 613-616. This latter chapter, which embraces all the material provisions of the two relating to the subject we are now considering, introduced a new principle into the law of Virginia, and was taken by the 295 revisors and the *joint committee of revision in framing the Code, substantially from the revised statutes of New York and Massachusetts: See Code, p. 613, note. But they do not apply to this case. They are confined to cases of ejectment, or cases in which a decree or judgment is rendered against any defendant for land. And ch. 136, § 1, provides that such defendant may, at any time before the execution of the decree or judgment, present a petition to the court rendering such decree or judgment, stating that he or those under

whom he claims, while holding the premises under a title believed by him or them to be good, have made permanent improvements thereon, and praying that he may be allowed for the same, over and above the value of the use and occupation of such land; and thereupon the court may, if satisfied of the probable truth of the allegation, suspend the execution of the judgment or decree, and empanel a jury to assess the damages of the plaintiff and the allowances to the defendant for such improvements." Subsequent sections of the chapter give a lien on the land to the defendant for any balance due to him on account of such improvements; and also give to the plaintiff, in such a case, a right to have the value of his estate in the premises, without the improvements, ascertained, and to elect to relinquish his said estate to the defendant, at the value so ascertained, instead of paying him the balance aforesaid. But these statutes have no application to this case, and apply only to a case against a defendant for land which he bona fide claims as owner thereof, under a title believed by him to be good, and on which he has made improvements under such belief. Here the building was not erected by a person in possession of the land claiming it under a title believed by him to be good; but was erected by a person not in possession, nor claiming any title to the land, who erected it

296 under a contract made *with Græme, who could set up no claim against Cullen, for whose benefit he had conveyed the land, by deed of trust duly admitted to record. But the 9th section of ch. 136 expressly declares that "nothing in this chapter nor any thing in the 135th chapter, concerning rents, profits and improvements, shall extend or apply to any suit brought by a mortgagee, or his heirs or assigns, against a mortgagor or his heirs and assigns, for the recovery of the mortgaged premises." We think, therefore, that these chapters can afford no ground for the claim of priority of lien asserted in this case by or for the Adams.

There being nothing in the statute law to sustain the claim, let us now see if there be any established principle of law or equity which can sustain it.

If there be any such it must be found laid down in Story's Eq. Ju. §§ 385-390; or in 2 Id. §§ 799 a, 799 b, and 1237 and 1238; all of which sections were cited and much relied on by the counsel for the appellants. The sections cited from 1 Story's Eq. relate to the ground of fraud, which will be considered presently. Those cited from 2 Id. relate to the ground we are now considering. In § 799 a, it is said, that "if a plaintiff in equity seeks the aid of the court to enforce his title against an innocent person, who has made improvements on land, supposing himself to be the absolute owner, that aid will be given to him only upon the terms that he shall make due compensation to such innocent person, to the extent of the benefits which will be received from these improvements." In § 779 b., after

referring to the more liberal rule of the civil law in favor of a bona fide possessor of land, whose title is defective, and who claims compensation for improvements made by him upon the land in good faith against the true owner, who asserts his title to it, the writer says: "But

297 courts of equity *seem not to have gone to this extent, but to have confined themselves simply to the administration of the equity cases where their aid has been invoked by the true owner in support of his equitable claims. They have never enforced, in a direct suit by the bona fide possessor, his claim to meliorations of the property from which he has been evicted by the true owner." To the same effect are §§ 1237 and 1238; and in the latter it is said: "In all cases of this sort, however, the doctrine proceeds upon the ground, either that there is some fraud, or that the aid of a court of equity is required; for if a party can recover the estate at law, a court of equity will not, unless there is some fraud, relieve a purchaser or bona fide possessor on account of money laid out in repairs and improvements." What is said in regard to fraud will be noticed presently. In regard to the rest of what is said in these sections, we think that nothing can be found therein to sustain the claim of the appellants. These sections relate to improvements made by a bona fide purchaser or possessor of the land on which they are made for his own use. Here the building was erected by persons who were neither purchasers nor possessors of the land, and not for their own use, but for the use of another, who was in possession of the land as an apparent owner, and with whom a contract was made by them for the erection of the building. Relief is afforded under these sections only upon the principle (except in cases of fraud) that he who asks equity must do equity. Here there is no room for the application of that principle. Cullen does not ask equity, in the sense of this principle. His trustee was clothed with the legal title, and might have recovered possession of the land at law, if it had been held adversely to him; but it was not.

He was virtually in possession when

298 he made the sale, *and the purchasers had no equity which they could claim against him in the sense of the said principle.

In Putnam v. Ritchie, 6 Paige's R. 390, referred to in a note to § 799 b, supra, Chancellor Walworth said: "This principle of natural equity is constantly acted upon in this court, where the legal title is in one person, who has made the improvements in good faith, and where the equitable title is in another, who is obliged to resort to this court for relief. The court in such cases acts upon the principle, that the party who comes here, as a complainant, to ask equity, must himself be willing to do what is equitable. I have not, however, been able to find any case, either in this country or in England, wherein the court of Chancery has assumed jurisdiction to give relief to a

complainant who has made improvements upon land, the legal title to which was in the defendant; where there has been neither fraud nor acquiescence on the part of the latter, after he had knowledge of his legal rights. I do not, therefore, feel myself authorized to introduce a new principle into the law of this court without the sanction of the Legislature, which principle, in its application to future cases, might be productive of more injury than benefit."

On the other hand, Judge Story, in *Bright v. Boyd*, 1 Story R. 478, 494, a case very much relied on by the counsel for the appellants in this case, said: "The other question as to the right of the purchaser, bona fide and for a valuable consideration, to compensation for permanent improvements made upon the estate, which have greatly enhanced its value, under a title which turns out defective, he having no notice of the defect, is one upon which, looking to the authorities, I should be inclined to pause." "I am aware that the doctrine has not, as yet, been carried to such an extent in our courts of equity."

After stating the instances in which 299 relief is *afforded to a defendant for such improvements, upon the maxim that he who seeks equity must do equity, he further said: "But it has been supposed that courts of equity do not and ought not to go further, and to grant active relief in favor of such a bona fide possessor, making permanent meliorations and improvements, by sustaining a bill, brought by him therefor, against the true owner, after he has recovered the premises at law. I find that Mr. Chancellor Walworth in *Putnam v. Richie* (cited supra) entertained this opinion; admitting, at the same time, that he could find no case in England or America where the point had been expressed or decided either way. Now if there be no authority against the doctrine, I confess that I should be most reluctant to be the first judge to lead to such a decision. It appears to me, speaking with all deference to other opinions, that the denial of all such compensation to such bona fide purchaser in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and improvements, without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity." The court accordingly, in that case, which was one of extraordinary hardship, gave such active relief to a bona fide purchaser, suing for the same against the owner who had recovered the estate in an action at law against the purchaser. See the same case in 2 Story's R. p. 605. "This," said the Judge, "is the clear result of the Roman law; and it has the most persuasive equity, and I may add common sense and common justice for its foundation. The Betterment Acts (as they are commonly called) of the States of Massachusetts and Maine and of some other States, are founded upon the like equity, and were manifestly intended to support it, even in suits at law for the

300 recovery of the estate." This *decision of Judge Story seems to be contrary to what is laid down by him as law in 2 Story's Eq. Ju. § 1238, already referred to, and we are not aware that it has been followed in any subsequent case. We do not mean to say, however, that it would not be followed; especially in this State, in which the provision of the Betterment Acts, or some of them, seem to have been substantially copied in chapters 135 and 136 of the Code. But we express no opinion upon that question, because it is unnecessary to the decision of this case.

If the decision in *Bright v. Boyd* correctly expounds the law, it does not govern this case. The two cases are very different, as perhaps plainly appears from what has already been said. There the party who made the improvements was in possession of the estate as bona fide purchaser claiming title to it, and having no notice of any defect in his title. Here the party who erected the building on the land subject to Cullen's deed of trust, was not in possession of the land, and claimed no title to it. He claims to have erected the building upon an understanding or agreement with Græme, the mortgagor, as he may be called, that the cost of the building should be secured by a lien on the land when the building should be completed, and that until the greater part of the work was done, the builder had no knowledge of Cullen's lien. Was he not bound, like any other party contracting for a lien on real estate, to search the record to ascertain whether there were any prior liens upon the estate? Suppose he had loaned money to Græme, and taken a deed of trust on the estate to secure the loan, not having actual notice of the prior lien of Cullen, though duly recorded; would not his lien have been subordinate to Cullen's lien? Can it make any difference that the debt for the security of which

he contracted to take a lien, was a debt 301 due for work and labor *done and materials found, and not for money loaned? He does not claim a lien upon the ground that the mere erection of the building by him at the request of Græme entitled him to such lien. Suppose that, having perfect confidence in Græme's ability and willingness to pay for the building, he had erected it upon the personal credit of Græme; could he then have claimed to be entitled to a lien upon the land or the building, even as against Græme, much less as against Cullen, who had a prior duly recorded lien on the land, and who had made no contract or request in regard to the building? Certainly not. And this shows that a lien for the cost of the building in such a case must spring, not from any vague idea that whenever a house is put by one man upon another's land there is an equitable lien upon the house for the cost of building it, but from the contract and consent of the parties concerned, as was said by the Supreme court in *Kutler v. Smith*, 2 Wall. U. S. R. 491: "The well settled rule is that such erections as this become a part of the land, as each

stone and brick are added to the structure. The only exceptions to this rule are, the class of fixtures already adverted to, and such rights as may grow out of express contract."

Here then is a contest for priority between two lienors, Cullen and the Adams, each of them claiming under a contract which the law requires to be recorded. The Adams' was not recorded, and moreover was entered into by them with full knowledge of the existence of Cullen's lien; which knowledge of itself, without the registration of that lien, would have given it priority. Can there be a doubt as to Cullen's right of priority in this case? We clearly think not; unless he has postponed that right by fraudulent conduct on his part. And we will therefore now consider:

302 *Secondly: As to the ground relied on by the appellants, that Cullen was aware that the Adams were doing the work, relying for their security on a lien to be given on the lot, and yet failed to inform them of his deed of trust; and so was guilty of a fraud, by reason of which his lien will be postponed by a court of equity to theirs.

There can be no difficulty about the law which is to govern this question. The only difficulty which can arise upon it must be about the facts. The law is correctly laid down in 1 Story's Eq. Ju. §§ 385-390, before referred to; and that part of the law which especially applies to this case, may be found in §§ 385, 388, 389 and 390. Thus in § 385, it is said: "In many cases a man may innocently be silent; for as has often been observed, *aliud est tacere, aliud celare*. But in other cases a man is bound to speak out; and his very silence becomes as expressive as if he had openly consented to what is said or done, and had become a party to the transaction. Thus, if a man, having a title to an estate, which is offered for sale, and knowing his title, stands by and encourages the sale, or does not forbid it, and thereby another person is induced to purchase the estate, under the supposition that the title is good, the former so standing by, and being silent, will be bound by the sale; and neither he nor his privies will be at liberty to dispute the validity of the purchase." "So if a party having a title to an estate, should stand by, and allow an innocent purchaser to expend money upon the estate, without giving him notice, he would not be permitted by a court of equity to assert that title against such purchaser, at least not without fully indemnifying him for all his expenditures." In § 388, it is said: "Another case, illustrative of the same doctrine, may be put, arising from the expenditure of money upon

303 *another man's estate, through inadvertence or a mistake of title; as for instance, if a man, supposing he has an absolute title to an estate, should build upon the land, with the knowledge of the true owner, who should stand by and suffer the erections to proceed, without giving any

notice of his own claim, he would not be permitted to avail himself of such improvements, without paying a full compensation therefor; for in conscience he was bound to disclose the defect of title to the builder." And in § 390, it is said: "A more common case illustrative of the same doctrine, is where a person, having an encumbrance or security upon an estate, suffers the owner to procure additional money upon the estate by way of lien or mortgage, concealing his prior encumbrance or security. In such a case he will be postponed to the second encumbrancer; for it would be inequitable to allow him to profit by his own wrong in concealing his claim, and thus lending encouragement to the new loan."

This being the law bearing upon this part of the case, let us now see what is the charge of fraud, and what is the evidence relied on to sustain the charge.

Substantially the charge is this: that Cullen saw the building while it was being constructed by the Adams; that he knew Græme had no means of paying for the building, or securing such payment, but by giving a lien on the lot; that he gave no notice of his deed of trust to the builders, as it was his duty to do, but on the contrary purposely remained silent on the subject, in order, as is plainly implied, if not expressly charged, that the builders, in ignorance of his prior lien, might proceed to complete the building, and thus increase and perfect his security. If this charge had been proved by the evidence, the complainants might have made good their ground of fraud, though it is unnecessary to

304 decide *that question in this case, and we do not mean to do so.

But what is the evidence? There is none whatever on the subject, but that of Cullen himself. The building was commenced in June or July 1865. Cullen testifies on the subject as follows:

3d question by counsel for defendants, on his examination in chief. "Where were you in the summer of the year 1865?"

Ans. I was in Richmond until the 12th day of June, and was in extremely bad health for a month previously to that date. On that day I left for New York, having been carried on board the steam vessel, and remained in New York until the 30th day of the following September.

4th question by same. When did it first come to your knowledge that a house was going up on the lot in question in this suit—I mean the lot you have spoken of as sold by you to Mr. Græme?

Ans. I can't positively say; but I suppose I saw it when it was visible—that is, when the building was some height above the level of the street. Being still in feeble health, I was not as much about the city as was my wont, for some weeks after my arrival; and also having been engaged in the repairing of a house in which I then lived, with the intention of selling it; which I afterwards did.

5th question by same. In what way did

you come to the knowledge that the Messrs. Adams had any interest in the lot?

Ans. The first knowledge I had of it, or of the Messrs. Adams, was communicated to me by my nephew, Dr. Dorsey Cullen, whom I met on the Main street of Richmond some four weeks after my arrival; the precise time, at this distance of time, I

305 cannot determine. *He informed me that he had just parted with a Mr. Adams, of Baltimore, who stated to him that he was putting up houses for Mr. Græme, and that he understood that I had a lien on one of the lots, and that he should like to know what I would take for the bonds that were given to secure said lien.

6th question. What were your relations with Mr. John Græme, sr.?

Answer. I had no intercourse with Græme, directly or indirectly, from February 1864.

7th question. Were you on good or bad terms with him?

Answer. In consequence of a nefarious attempt to rob me of my property, by applying in the aforesaid month of February 1864 to the confederate court to confiscate it, of course I was not on good terms with him.

10th by same. What knowledge had you of the terms on which the Messrs. Adams were building the house on the said lot?

Answer. None whatever. I did not know one of the Messrs. Adams till the month of May last (1868) I was introduced to one of them, whose name I do not know.

1st question on cross-examination by counsel for S. H. and J. F. Adams. When it came to your knowledge that the Messrs. Adams were building houses upon Mr. Græme's property, did you acquaint them, or any person acting for them, with the existence of your lien upon a part of the property?

Answer. I did not think it necessary, inasmuch as I relied upon my lien to secure my debt. I came to Richmond for the purpose of winding up my affairs and requesting a sale of the lot, but I found the stay law interposed and prevented its sale.

306 *2d question by same. You say that you did not think it necessary; do you mean to be understood that you did not in fact take any steps to acquaint the Messrs. Adams with the existence of your lien upon the said property?

Answer. I did not; because I was under the impression they already knew it, from the statement made to my nephew; being the first time I knew of any lien, and thereby ascertaining that he was aware of my lien, I did not think it necessary. I will here remark that I believe the buildings were very near completion at that time.

7th by same. Did you have any information until you returned to Richmond in the September following 1865,) that any building was going up on said lot?

Answer. None whatever; I expected on my return to have the lot sold by virtue of my lien.

9th by same. Was not your trustee and

counsel, Mr. Myers, a resident of Richmond during the summer and fall of 1865?

Answer. Mr. Myers was, I believe, here in 1865; I am not Mr. Myers' keeper. He was my trustee, but not my counsel in that case; not having any occasion for law advice in it. Nor was Mr. Myers my general attorney; having no power to act for me in any case without specific directions."

This is the evidence. Does it sustain the charge of fraud? We think it clearly does not. There ought to be strong proof to sustain a charge of fraud. We do not think the evidence in this case warrants even a suspicion of fraud on the part of Cullen. He knew nothing of the building until the greater part of it was completed. He knew nothing of the arrangement which Græme had made for its construction, nor that the

307 Messrs. Adams had any thing to do with it, until after *they were fully apprised of his prior lien. He had caused that lien to be duly recorded, and had good reason to believe, and no doubt did believe, if he thought at all on the subject, that any person who might contract with Græme for the erection of the building upon the faith of a lien to be taken on the property to secure the payment of the price of the work, would use the obvious and necessary precaution to examine the record, to see if there were any prior liens on the property; which could so readily be done. He might well have taken it for granted, and no doubt did, if he thought at all on the subject, that Græme, whose duty it was to do so, had fully informed the contractor for the work of the prior lien on the property, if it was intended to give such contractor also a lien on the property for his security. Goddin proves that when Græme entered upon the erection of the building, the lot could have been sold for about enough to have paid the whole balance then due Cullen; and that he regarded Græme as a gentleman of undoubted solvency and of excellent credit. The Messrs. Adams might have been willing, so far as Cullen knew, to do the work on the credit of Græme's interest in the property and on the personal credit of Græme, or even on the latter alone. It is not uncommon for work of this kind, as well as any other, to be done on personal credit only. It was not incumbent on Cullen to enquire into this matter, when he had no suspicion, and no ground for suspicion, on the subject. He had done his whole duty in the matter by putting his deed of trust on record, where all concerned could easily see it. It is a thing of every day occurrence that a mortgagor improves the mortgaged premises, and that the improvement enures to the benefit, as well of the mortgagee as of the mortgagor. Such improvements are rarely

308 made by the mortgagor's own hand, but generally *by the hands of others employed by him for that purpose. Whether made by one or the other, they are his improvements; that is, in effect, made by him. And when the mortgagor sees such improvements going on, he may well

believe, in the absence of evidence to the contrary, that the mortgagor is making them, whether by his own hand or the hands of others, on his own personal credit. The case is different where a man is in possession of another's land, claiming it as his own, and erecting valuable improvements upon it with the knowledge of the real owner. In such a case the owner knows that the man is acting under a mistake, and it is his duty to give notice of his title. If he stand silently by, and permit the party to go on with the work under such mistake, it will be a fraud in him, and create an equitable estoppel against him.

But we deem it unnecessary to say any thing more on this subject, and are of opinion that the ground of fraud relied on by the appellants has not been sustained.

Only one or two more points remain to be noticed; and upon them little will be said.

One of them is, that there was a policy of insurance existing upon the house which stood upon the lot when the deed of trust for Cullen's benefit was executed, and which was burned down by the great fire of the 3d of April 1865; that the insurance company is liable for the loss; that the liability is covered by the deed of trust; and that Cullen is bound to have that liability enforced, before he can subject the proceeds of the sale of the lot to the payment of his debt. In other words, he is regarded by the counsel for the appellants, as the assignee of that claim, and as bound to use diligence in endeavoring to recover it. We do not think that such is the case. It is altogether uncertain whether any liability at all exists on that policy to any body.

The policy was transferred by Cullen to Græme in 1860, about the time of the execution of the deed by which the property was conveyed by the former to the latter. It is not mentioned in the deed of trust, and seems to have remained in the possession of Græme ever since it was first transferred to him. Indeed, it appears that Græme has actually instituted suit upon it to enforce the supposed liability aforesaid. At all events, conceding that the liability exists, and that it is virtually assigned by the deed of trust, it is a mere collateral security; and there is no obligation on Cullen to embark in an expensive and protracted litigation to enforce it before he can have the property conveyed by the deed of trust sold, and the proceeds of sale applied to the payment of his debt, in pursuance of the terms of the deed. If such liability exists, it can be enforced by Græme or his assigns, as they may be advised.

Another, and the only remaining point, is, that by the decree appealed from, compound interest, on a considerable portion of Cullen's debt, is allowed. It is said "that interest is allowed on bonds given for interest, and on bonds past due, including principal and interest on their face." The court is of opinion that there is no error in the decree in this respect—at least to the prejudice of the appellants. And we do not understand the appellees as complaining

of such error. See *Kraher v. Shields*, 20 Gratt. 377-398; and *Græme v. Adams*, 23 Gratt. 225, decided during the present term.

Upon the whole, we are of opinion that there is no error in the decree appealed from, and that it ought to be affirmed.

Decree affirmed.

310 *Bower & als. v. McCormick & als.*

March Term, 1878, Richmond.

1. **Estoppels—On What Founded—Purpose.***—All estoppels, whether estoppels at common law, or equitable estoppels, are founded upon the great principles of morality and public policy. Their purpose is to prevent that which deals in duplicity and inconsistency, and to establish some evidence as so conclusive a test of truth that it shall not be gainsaid. But estoppels, whether legal or equitable, are not to be extended by construction.
2. **Deed—Reference to Previous Deed—Mistake—How Shown.**—A mistake in the recitals of a deed, referring to a previous deed of marriage settlement between the grantors, may, in equity, be shown by the grantees, by introducing in evidence the deed referred to in the recitals.
3. **Same—Same—Proof of Latter Deed.**—What is sufficient proof that the deed offered in evidence is the deed referred to in the recitals; see opinion of the court.
4. **Estoppel—Admitted State of Facts.**—Where it can be collected from the deed, that the parties to it have agreed upon a certain admitted state of facts, as the basis on which they contract, the statement of these facts, though but in the way of recital, shall estop the parties to aver the contrary.
5. **Recital in Deed—Estoppel.**—When a recital in a deed is intended to be a statement which all the parties to a deed have mutually admitted to be true, it is an estoppel upon all. But where it is intended to be the statement of one party only, the estoppel is confined to that party; and the intention is to be gathered from the deed.
6. **Same—Statements of the Grantors.**—When the recitals in the deed refer to what the grantors have done, or intend to do, among themselves, and in which the grantees have no part or interest, and the wording of the recitals indicate that the scrivener did not have the recited deed before him; and there is no evidence that the grantees knew any thing of the recited deed except as recited; these recitals will be intended to be the statement of the grantors only.
- 311 *7. **Same—When All Parties Bound.**—A mere recital in a deed does not conclude all the parties; there must be a direct affirmation, so intended by all the parties, in order to bind all. And this intention may be gathered from the whole instrument.

This was a suit in equity, in the Circuit court of Loudoun county, brought in February 1868, by Edward L. Bower and his wife and others against Francis McCormick and Hannah Taylor, to recover a tract of land in that county.

The case is fully stated by Judge Christian, in his opinion.

*For monographic note on Estoppel, see end of case.

J. R. Tucker and J. C. & J. W. Green, for the appellants.

R. Y. Conrad & Son, for the appellees.

CHRISTIAN, J., delivered the opinion of the court.

This is an appeal from a decree of the Circuit court of Loudoun county. The plaintiffs in the court below, who are the appellants in this court, are the children and the grand-children of George W. Carter and Mary B. his wife, who was Mary B. Wormley. They seek to recover a tract of land, held by the defendants, which the plaintiffs claimed was settled upon their mother by a certain ante-nuptial deed, executed in the year 1812, which conferred upon their mother a life estate in said land, with remainder in fee to the children of the marriage.

Mrs. Carter died in December in the year 1865, and in March 1868 the bill of the plaintiffs was filed in the clerk's office of the Circuit court of Loudoun. It is necessary to refer somewhat in detail to the allegations in the bill. It alleges that in August 1810, "a division of the real estate derived from John Wormley" (the father of said Mary B. Carter) "was made between his *said children and widow, whereby along with other property, three hundred acres, part of the Cool Spring tract, was allotted to the said Mary B. Wormley, subject to the life estate therein of her said mother; the said Mary Wormley, the mother and guardian of the said Mary B. Wormley, giving her consent to said division, and executing deeds of partition on behalf of her ward; which partition has ever since been acquiesced in by all the parties.* * * That in the year 1812, the said Mary B. Wormley being still under the age of twenty-one years, and a marriage being about to be solemnized between the said Mary B. Wormley and George W. Carter, a deed of marriage settlement was duly executed, whereby the said Mary B. Wormley, with the consent of the said George W. Carter and Mary Wormley her mother and guardian, conveyed all her property, real and personal, including the said three hundred acres of land, in strict marriage settlement, to the said Mary Wormley, in trust for the said Mary B. during her life, and after her death for the benefit of her children by the said George W. Carter; and in case she died without children, for the benefit of (her brothers) Hugh W. Wormley and John C. Wormley. Shortly after the execution of said deed of marriage settlement, the marriage between the said George W. Carter and Mary B. Wormley was duly solemnized."

The bill further alleges that "no copy of said deed of marriage settlement is filed, because it was never recorded; nor is said original deed of marriage settlement filed; because, after the said marriage, it was destroyed with the privy and by the procurement of David Castleman, jr., and Charles McCormick, purchasers of said tract

of three hundred acres, as hereinafter set out. But said Castleman and McCormick had full notice of the *existence and contents of said deed of marriage settlement, as will presently be shown."

Then follows the allegation "that some time after the said marriage the said Castleman and McCormick procured the said Geo. W. Carter and Mary B. his wife, and the said Mary Wormley, in her own right, and as trustee aforesaid, and Hugh W. Wormley, to enter into written articles of agreement, bearing date the 13th day of September 1813, for the sale to them (Castleman and McCormick) of the said three hundred acres of land; * * * that this agreement set out at length the manner in which the said Mary B. acquired title to said three hundred acres of land in fee simple, subject to the life estate therein of her said mother; as also the existence and contents of said ante-nuptial deed of marriage settlement. * * * It also sets out an agreement between all the parties thereto, that the said marriage settlement should be annulled, rescinded, and rendered void; and that the said George W. Carter and his wife should enter into another marriage contract, whereby her estate should be settled upon her and him during their joint lives, with remainder to their children; and upon failure of issue, to such uses as she by her will should appoint; that the said tract of three hundred acres of land should be sold by the said Mary Wormley, Geo. W. Carter and Mary B. his wife; and in lieu thereof the said George W. Carter should settle the lands he had acquired from his father, Charles Carter, lying in the county of Culpeper, in the manner agreed upon in relation to the estate of the said Mary B. Carter. By the said articles it was further agreed, that the said Mary Wormley, in her own right, and as trustee as aforesaid, should execute a deed, conveying said three hundred acres of land to Castleman and McCormick, with general warranty of title of her life estate

314 therein, *and a warranty against all claim under said original deed of marriage settlement; and that George W. Carter and Mary B. his wife, should join in said deed, with a general warranty of the remainder in fee simple; and should also give or procure approved real security for the title to be conveyed by them." That under this agreement, Castleman and McCormick were to pay forty-one dollars per acre, upon certain credits, and certain parts of which were to be paid to Mary Wormley, for her life estate. That in execution of this agreement, the land was conveyed by deed executed by Mary Wormley in her own right and as trustee, Geo. W. Carter and Mary B., his wife, together with Hugh and John C. Wormley, and was duly recorded, and Castleman and McCormick put in possession of the land.

The bill, after charging that the lands acquired from Charles Carter, lying in Culpeper county, were never settled upon Mrs. Carter, and no other real or personal estate,

in lieu of the three hundred acres conveyed to Castleman and McCormick, alleges that "Castleman and McCormick well knew of the existence and terms of said original deed of marriage settlement, and that they procured, or at least were privy to its destruction;" and that the said agreement and deed above referred to, were in fraud of the rights of the plaintiffs." The bill further alleging, that in a division of property held in partnership by Castleman and McCormick, the said three hundred acres, known as Cool Spring, was allotted to McCormick, and upon his death was divided between his devisees, Francis McCormick and Hannah Taylor, who are now in possession of said three hundred acres; then insists "that the said Francis McCormick and Hannah Taylor are trustees, holding the legal title for the benefit of complainants; and that they are chargeable with the rents and profits of said land, since the death of the said Mary B. Carter."

315 And the prayer of the bill is, "that they may respectively be decreed to account for the rents and profits of said land in their possession since the death of the said Mary B. Carter; and that they may be decreed to convey to complainants the legal title, and surrender the possession of said three hundred acres of land." Then follows the usual prayer for general relief, &c.

This bill is answered by Francis McCormick and Hannah Taylor, the defendants. They both deny all the material allegations of the plaintiffs' bill, and call for strict proof of the same. They deny the existence of the ante-nuptial deed of settlement, as set up in the bill, and call for its production. They deny that Castleman and McCormick either procured or were privy to the annulling or destruction of any deed of marriage settlement between George W. Carter and Mary B. Carter. They affirm that Castleman and McCormick paid full value for the land, (the three hundred acres called Cool Spring,) and that it had been in their possession and the devisees of McCormick, for the period of fifty-five years, their title unquestioned, and that they never heard of any claim being set up by complainants, or any one else, until a short time before the institution of this suit. They affirm that whatever may have been the character of the settlement referred to in the recital of the deed conveying "Cool Spring" to Castleman and McCormick, the agreement set forth in that recital to substitute another tract of land in lieu of this tract, which was to be settled on Mrs. Mary B. Carter, was carried out, by the conveyance to trustees of a tract of land in Culpeper; and they file deeds to show that this was done as far back as the year 1813; and that Mrs. Carter and the complainants had enjoyed the benefits of this conveyance.

316 *They claim the benefit of all the equities arising in favor of purchasers who have paid full value, and who have had quiet and uninterrupted possession under claim of title for upwards of fifty years.

The answer of Hannah Taylor, disclosing the fact that a part of the three hundred acres in controversy had been conveyed by her to Eliza Tucker, made it necessary for the complainants to file an amended bill, making new parties.

The answer of Francis McCormick to the amended bill brings into the case, for the first time, a new and important fact, upon which the decision of the case must in a large degree turn. In that answer are the following statements, supported by the record evidence filed therewith. "Respondent is gratified in the opportunity offered by the filing of this amended bill, to present in the cause some additional facts, of which he was entirely ignorant and unsuspecting at the time of filing his former answer, which have come to his knowledge recently by mere accident, in the following manner. Having become the owner of the mansion house upon the "Cool Spring" place, after the death of his late brother Cyrus, but being settled elsewhere, respondent has never resided there; but has had it occupied by tenants. * * * It was formerly the residence of the Wormley family, afterwards of Castleman and McCormick; and after the death of the former, of Charles McCormick, up to the period of his death. * * * A short time ago, about the

last days of August 1868, the Messrs. McDonald, with their sisters, being about to remove from the place, upon the expiration of their tenancy, some old papers were found put away in a barrel; and one of the family, Mr. Marshall McDonald, (now married to a daughter of respondent,) undertook to look over them.

In so doing, he discovered some relating to the subject of this suit, and particularly one supposed to be the last "marriage contract." * * * Upon examination the supposed marriage contract was found to be a copy from the office of the clerk of Frederick county, (in which county the said land laid,) in the handwriting of the late Thomas A. Tidball, late clerk; but it seems only partly proved, although spread in full upon the proper record books of said office. It also appears (as respondent is advised) of no effect whatever, because never signed or executed by the alleged grantor, Mary B. Wormley, but only signed by her mother, Mary Wormley, and the intended husband, Mr. Carter. It further appears by the paper, that it was prepared and executed and witnessed and probably left with the clerk, all in Winchester, sixteen miles distant from "Cool Spring," where the intended bride was living, on the very day (as complainants' evidence shows) she was married at "Cool Spring;" a fact well nigh conclusive that she never saw the paper. With this answer was filed a copy of the marriage settlement executed by Geo. W. Carter and Mary Wormley, but not by Mary B. Wormley, the intended bride; and also the original articles of agreement executed by the above named parties with the said Castleman and McCormick, and the original deed executed

by the same parties in pursuance of that agreement, conveying the "Cool Spring" tract to Castleman and McCormick.

It was proved that the exhibit of the "marriage contract" filed was a copy taken from the public records of the county of Frederick, which had been recorded, though only partly proven. It was also proved, that after long search among a great mass of papers, in an upper room of the clerk's office, the original paper was found. That one reason why this search was made was because it "was conjectured" by one of the counsel, that the latter signature, "Mary Wormley," would be found

318 "written on the original "Mary B. Wormley;" but the original proved to be correctly copied on the record book, and the name of Mary B. Wormley was not signed to the original, as it was not to the copy.

It was further proved that the original paper was in the handwriting of Archibald Magill, a lawyer, and that he and William Davidson and Samuel Kercheval, who witnessed the paper, all resided in the town of Winchester, the latter being a law student in Mr. Magill's office; and it was also proved that Cool Spring, the residence of Mary B. Wormley, was distant sixteen miles from Winchester.

It was also proved that the article of agreement above referred to, and the deed made in pursuance thereof, which conveyed the land in controversy to Castleman and McCormick, were both in the handwriting of Henry St. George Tucker, at that time a practicing lawyer residing in Winchester, and afterwards for many years the distinguished and learned president of this court.

It is also proved that the marriage contract executed by George W. Carter and Mary Wormley, attested by Magill, Davidson and Kercheval, all of whom lived in Winchester, bears date the same day on which Carter and Mary B. Wormley were married; and there is proof strongly, if not conclusively, tending to show that Mary B. Wormley remained at Cool Spring, while Carter and Mrs. Mary Wormley went to Winchester, and brought from thence with them the minister who was to perform the ceremony.

At the October term 1868, the cause came on to be heard, upon the bill, the amended bill, the answers thereto, the exhibits filed and the depositions of witnesses, and the arguments of counsel; and thereupon the said Circuit court of Loudoun entered its decree dismissing the plaintiffs' bills with costs. From this decree an appeal was allowed to this court.

319 *If the plaintiffs can maintain their claim to recover from the defendants the land in controversy, it must rest solely on certain recitals contained in the agreement made with Castleman and McCormick, above referred to, and also in the deed made in pursuance of that agreement, conveying the land in controversy to those parties. The only deed of settlement produced is the deed of the 3d of October 1812;

and outside of the recitals contained in the post-nuptial contract and deed referred to, there is not a particle of proof that any other ante-nuptial settlement ever existed. It is conceded that the deed of settlement of the 3d of October 1812 is a mere nullity. It was never signed by Mary B. Wormley; nor did it purport to be the deed of the mother as guardian of the daughter, but only in her character as trustee constituted by this same deed, and reserving her individual life estate in the three hundred acres conveyed.

But it is insisted by the learned counsel for the appellants, in the elaborate and able arguments addressed to this court, that Castleman and McCormick are estopped by the recitals in the agreement and the deed executed in pursuance thereof, from denying the existence of the ante-nuptial deed of settlement recited in said agreement and deed; and that they, being parties thereto, cannot set up or rely upon the deed of marriage settlement produced by the appellee, Francis McCormick, as the true deed of marriage settlement. It becomes important, therefore, to notice particularly the character, scope and effect of these recitals, so as to determine whether, according to the settled rules governing estoppels, they are of such a character as to preclude the appellees from showing the real and true nature of the marriage settlement, or that no deed of marriage settlement was ever perfected.

In the articles of agreement referred 320 to, to which *Castleman and McCormick were parties, they being articles of agreement "between Mrs. Mary Wormley, in her own right, of the first part; the said Mrs. Mary Wormley, as trustee for her daughter Mary B. Carter, of the second part; George W. Carter and Mary B. his wife, of the third part; John C. Wormley and Hugh W. Wormley of the fourth part; and David Castleman and Charles McCormick of the fifth part, there are the following recitals: "And whereas, upon the proposed marriage of the said George W. Carter and the said Mary B. Wormley, all her property was by them conveyed in strict marriage settlement, to the said Mary, her mother, in trust, in substance as follows: that is to say, for the said Mary B. during her life, and after her death for the benefit of her children by the said George W. Carter; and in case she die without issue, for the benefit of the said Hugh W. and John C. Wormley."

In the deed between the said parties, executed in pursuance of said agreement, is contained the following recital: "And whereas a marriage some time since being about to be had and solemnized between the said Geo. Washington Carter and Mary B. his present wife, then Mary B. Wormley, and who at that time was under the age of twenty-one years, a certain marriage contract and settlement was made and entered into between the said George Washington Carter and the said Mary B. Wormley, now wife of the said George W. Carter, and the said Mary Wormley, her mother, whereby,

among other things, the said George and Mary B., his intended wife, conveyed and transferred all the title and interest of the said Mary B., in the said tract of three hundred acres, together with other property, to the said Mary Wormley her mother, upon certain trusts in the said settlement set forth and declared; and among other things, in trust for the use of the said

321 Mary B. and the children of the said Mary B.; and in case the said Mary B. should depart this life without children, then to the use and interest of John C. Wormley and Hugh W. Wormley and their heirs."

The claim of the plaintiffs (enforced by much ingenuity and learning of their able counsel) is this: that the defendants in possession hold the land in controversy under Castleman and McCormick, who were parties to an agreement and deed, both of which recited an ante-nuptial deed of settlement, by which the land sold to them was settled upon the mother of the plaintiffs, (Mary B. Carter), during her life, with remainder in fee to her children; and that being parties to that deed they took the land subject to the provisions of said marriage settlement, so recited; and that they are therefore estopped, either from showing that no such marriage settlement was ever executed, or that the real and true marriage settlement was different from the one recited, and was never executed by Mary B. Carter.

The doctrine of estoppel, once tortured into a variety of absurd refinements, has, in a great measure, been reduced to consonancy with common sense and justice. In the language of Judge Gaston, in *Jones v. Sassee*, 1 Dev. & Bat. R. 464, "all estoppels, whether estoppels at common law or equitable estoppels, are founded upon the great principles of morality and public policy. Their purpose is to prevent that which deals in duplicity and inconsistency, and to establish some evidence as so conclusive a test of truth, that it shall not be gainsaid. But as the effect of an estoppel may be to shut out the real truth by its artificial representative estoppels whether legal or equitable, are not to be extended by construction. No man is to be precluded from showing the truth of his claim or defence unless it be forbidden by a positive rule of law."

322 "There is certainly no positive rule of law growing out of the doctrine of estoppel, that would prevent either party to this deed of September 1813, or those claiming under either party, to offer in evidence the deed of marriage settlement referred to in that deed; and if it can be shown that the deed of settlement of October 3d is the deed referred to in the recitals, though by mistake inaccurately described, that deed may be offered in evidence. Whatever may be the effect at law of such a recital as the one relied upon, it is clear that in equity the party may show that the recital was a mistake, and set up the true deed intended to be referred to. In a recent English case decided in 1868, it was held that a party to

a deed is not estopped in equity from averring against, or offering evidence to controvert, a recital therein contrary to the fact which has been introduced into the deed by mistake of fact, and not through fraud or deception on his part. In delivering his opinion in this case, Lord Romilly, M. R., said: "There was simply a mistake of fact common to all the parties; and under these circumstances I am inclined to think there would be no estoppel at law, and certainly there is none in equity. Although an executor may execute a solemn deed saying: 'I have paid all the legacy duty on certain bequests,' amounting to a sum named, still, if he shows clearly that there is a mistake in the amount, and there is no fraud or deception in the case, I am of the opinion that in equity he is entitled to recover any further sum which he may have been properly called on to pay." *Brooke v. Haynes*, 6 Eq. Cases, L. R. 1868, p. 24.

In *Stoughton v. Lynch*, 2 John Ch. R. 209, it was held that a recital in a deed founded on a mistake and untrue in fact, will not be allowed to operate by way of estoppel to exclude the truth satisfactorily shown to the court.

323 "In the case before us it is easy to show that the unperfected deed of marriage settlement of the 3d of October 1812, is the deed of settlement referred to in the recitals contained in the deed of September 1813, conveying the land in controversy to Castleman and McCormick; and that this was the only attempt at a marriage settlement made by the parties.

But it is objected by one of the learned counsel for the appellants, that the deed produced, known as the Winchester deed, is not properly proved in the cause. This objection was not taken in the court below; but the deed was received and acted upon, by the court and the parties, as a paper properly received in evidence. The objection to its reception in evidence is made for the first time in this court.

We are of opinion that the deed produced is sufficiently proved for the purposes for which it is used. 1st: There is found upon the records of the clerk's office of Frederick county a deed signed by George W. Carter and Mary Wormley, purporting to be a deed of marriage settlement between Geo. W. Carter, Mary B. Wormley and Mary Wormley, but signed only by George W. Carter and Mary Wormley. 2d: This deed was partly proven only; but it is conclusively shown that this deed is a copy of the original deed which was found among loose papers in the said clerk's office; and that the original is the same as that recorded, and is in the handwriting of Mr. Magill, and witnessed by Kercheval and Davidson, the witnesses to the recorded deed. The evidence of Gibbons, the clerk, of S. C. Moore, who found the original, and the affidavit of Sherrard, all of which was received without objection in the court below, are, we think, amply sufficient testimony upon which to found the introduction of the deed relied on. Regarding the deed as

324 properly in the case, *especially as its introduction was not objected to, we are constrained to say, that the proof is overwhelming to show that the deed produced by the defendant, McCormick, was the deed referred to in the recitals relied upon by the plaintiffs, and that no other deed of marriage settlement was ever executed.

1st: This is the only deed produced. 2d: This deed answers the general description of the deed referred to in the recitals relied upon by the appellants. The recital in the deed to Castleman and McCormick refers to a deed of settlement made on the eve of the proposed marriage of Geo. W. Carter and Mary B. Wormley. The deed produced bears date the very day of the marriage. The parties recited as such are named as parties to the deed produced. The property is the same; the limitations if not technically the same, bear a close resemblance, and the ultimate remainders are the same. Both in the recitals and the deed produced, the property is settled upon Mrs. Carter during her life, with remainder in fee to her children; and if she died without issue, then in remainder over to her brothers. It is true the deed produced was never signed by Mrs. Carter; and it is therefore insisted that this is not the deed referred to in the recitals. The contract recites: "And whereas upon the proposed marriage of the said George W. Carter and the said Mary B. Wormley, all her property was by them conveyed in strict marriage settlement," &c. The deed recites a certain marriage contract and settlement entered into between the same parties, "whereby the said George and Mary B., his intended wife, conveyed and transferred all the title and interest of the said Mary B. in the said tract of three hundred acres, with other property, to the said Mary Wormley, her mother, upon certain trusts," &c. It is said that the deed produced is not the deed
325 *referred to, because Mrs. Carter did not execute it, and it could not be said, as in the recitals, that she, with her husband, conveyed the property. But the deed produced, known as the Winchester deed, upon its face purported to be a deed between Mary B. Wormley of the first part and the other parties; though she did not in fact sign it.

It may fairly be presumed, from the fact that the recitals in the deed and the recitals in the articles of agreement are not the same in words, if indeed they are of the same legal effect, and the use also of the words "in substance," "upon certain trusts," "among other things," that the draughtsman of the deed of the 13th of September 1813 did not have before him the deed of marriage settlement referred to in the recitals; but it is most probable that the supposed settlement was described in the absence of any writing or memorandum, but merely from the recollection of the terms of settlement by the particular members of the Wormley family present at that settlement, who alone could know any thing about it.

The general description in the recitals, not purporting to be literal or accurate as if taken from a paper before the draughtsman at the time, showing many points of resemblance to the deed produced, and the failure to produce or prove the existence of another, creates of itself a strong presumption that this deed is the deed of settlement referred to and recited in the deed of September 13th, 1813. The appellants can only maintain their claim upon the theory that there was another and perfected deed of settlement. If there was, when was it executed? Before the Winchester deed? If so, why was it not put upon record? Why is it not referred to in the deed produced? Why, indeed, was the imperfect settlement made and put upon record at all, if before that time a perfect deed of settlement had
326 already been *executed? It is clear from all the circumstances that no deed of marriage settlement was executed before the Winchester deed of October 3d, 1812.

Was any deed of ante-nuptial settlement executed after that? That there was, is almost a moral impossibility. The 3d day of October 1812, was the very day of the marriage. The deed of settlement was written, signed and witnessed in Winchester; a distance of 16 miles from the intended bride's residence. It is proved that she was not in Winchester on that day, where the deed was written, signed by Geo. W. Carter and Mary Wormley, and witnessed. That it was written and executed on the day it purports to be, and that there was no time to execute another, is conclusively proved from the memorandum attached to the deed. That memorandum has reference to the conveyance upon the same trust declared in this deed, of a certain tract of land in the county of Lancaster containing six hundred acres. In the body of that memorandum is the following statement: "It was intended to have been in the body of the deed, but by mistake not mentioned to the drawer, and the parties cannot delay until another be drawn."

All these circumstances show conclusively, that no other deed of marriage settlement was or could have been executed on that day, before the marriage, which occurred on the evening of the same day. If there was, why is it not produced? Why was it not recorded? Why was the perfected deed of settlement suffered to remain unrecorded, while an imperfect settlement remained upon record?

Now it must be borne in mind that there is not in the record any proof, or shadow of proof, that any other pre-nuptial settlement was ever made, or was ever heard of, except as such is established by the recitals

327 in certain deeds and articles of agreement referred to. The plaintiffs rest their whole case upon these recitals, and insist that they must be taken as true, and that the defendants are estopped from denying them. It has been already shown that the recitals must refer to the Winchester deed, and that there was no other; and that these being the same parties, and the

same property, and the same ultimate remainders, that the deed is sufficiently identified as the deed referred to; and that the only material discrepancy of description is the fact that the deed produced was not executed by Mrs. Carter, while the recitals declare (not in terms) that she executed the deed, but that she, with her husband, conveyed the property upon certain trusts. And we have seen that upon reason and authority, a recital in a deed founded on a mistake, and untrue in fact, will not be allowed to operate by way of estoppel to exclude the truth satisfactorily shown to the court.

But we come now to consider the question how far Castleman and McCormick, and those under whom they claim, are to be bound by the recitals referred to. They are grantees in a deed in which there are numerous recitals of facts within the knowledge of the grantors only. There is not a particle of proof in the record that Castleman or McCormick ever knew of the existence of any contract, or deed of settlement, except at the date of the papers to which they were parties; and which they derived from the grantors.

The general rule, as often stated, that parties and privies are estopped from denying the recitals in a deed, when taken in its broad and literal sense, is not altogether accurate.

The rule properly understood and more accurately stated, is this: where it can be collected from the deed that the parties to it have agreed upon a certain admitted state of facts, as the basis on which they contract, *the statement of these facts, though but in the way of recitals, shall estop the parties to aver the contrary. See *Toney v. Raincock*, 7 Com. B. 336; *Stoughell v. Buck*, 68 Eng. C. L. R. 786; *Borst v. Corey*, 16 Barb. R. 136.

In *Stoughell v. Buck*, it was held, that "where a recital is intended to be a statement which all the parties to a deed have mutually admitted to be true, it is an estoppel upon all. But where it is intended to be the statement of one party only, the estoppel is confined to that party; and the intention is to be gathered from construing the instrument." Looking to the deed to Castleman and McCormick, and in the absence of any proof, it is evident, upon a fair construction of the deed itself, that the recital of the existence of a marriage settlement between the grantors, was a recital of facts within the knowledge of the grantors, and in which they alone had an interest. And so, too, the recital that it was the purpose of the parties to annul and render void the ante-nuptial settlement and substitute another, conveying in lieu thereof other property upon the same trusts, referred to a matter in which the grantors alone were interested, and to which the grantees were not and could not be parties, and in which they had no interest. This is the fair construction to be gathered from the whole deed; and the recital relied upon is

not to be taken as the admission or affirmation of all the parties, but only of the grantors.

A mere recital does not conclude all the parties; there must be a direct affirmation so intended by all the parties, in order to bind all; and this intention may be gathered from the whole instrument.

It was held in *Borst v. Corey* (supra) that "mere recital never concludes a party: there must be a direct affirmation. A recital by A. and B. will not estop or furnish evidence against C., even though the latter be

329 a *party to the instrument containing the recital; provided the recital does not purport to be of any fact within his knowledge, but relates to transactions between the other parties." This case is one directly in point. The recital in the deed signed by Corey, as well as the other parties, was in reference (as in the case before us) to a marriage settlement entered into by the grantors. The recital was in these words: "Whereas, a marriage has lately been solemnized between said Martin and Rachel, and it having been agreed before said marriage between said parties thereto, that the sum of thirteen hundred dollars, the gross amount of the said Rachel's right of dower in the real estate of her said former husband, now deceased, shall be secured to her separate use, in the manner hereinafter mentioned," &c. Corey signed this deed; but it was held he was not estopped for showing that there was no valid ante-nuptial settlement. The court says: "This recital does not purport to be of any fact within the knowledge of the said Corey, nor does he affirm the truth of it in any respect. It is language applicable only to the other two parties, and is probably obligatory on them. So far from being an estoppel, the recital is not even evidence, as against Corey, of the fact therein recited. There being no evidence of an ante-nuptial agreement, Corey had the right to apply the funds to the payment of Borst's honest debts, rather than apply them to a bond and warrant of attorney given in trust for his wife."

The principles settled in this case, and others above referred to, apply with peculiar force to the case before us. The recital in this case was of a fact of which the grantees had no knowledge, and in which they had no interest; but of facts in which the grantors were alone interested and peculiarly within their knowledge. Upon a true construction of the recitals in the 330 instruments relied *upon, we are of opinion that there was no such solemn admission or distinct affirmation by the grantors as will operate as an estoppel upon them.

And we are further of opinion upon the evidence, that there never was but one deed of marriage settlement, and that was the imperfect deed not executed by Mrs. Carter, known in the record as the Winchester deed; and that that was the deed referred to in the recitals, though by mistake described as a deed by which Mrs. Carter, with her

husband, conveyed the land in controversy; when, in point of fact, she had never signed it. This mistake of recital may be shown; and the parties, most certainly the grantees, are not precluded from showing the true deed, and only deed of settlement.

It would be carrying the doctrine of estoppel to an absurd extent, and would be a monstrous perversion of justice, to hold that a court of equity is bound to set up a false and fictitious deed, merely because it had been inserted in the recitals of a deed, against the real and true deed, proven to be the only one in existence; and that, too, against purchasers for full value, who have been in possession of the property for upwards of fifty years.

We are not willing to carry the doctrine of estoppel, which is founded upon the principles of morality and public policy, to that extent. The decree must be affirmed.

Decree affirmed.

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I. DEFINITION AND GENERAL NATURE.

"An estoppel is that which prevents one from shewing the truth in defence of his rights; call it by what name we will, it is that which shuts out the evidence of the actual truth of the case. For this reason, estoppels have ever been held to be repugnant to reason, and odious in law.' They are tolerated in a very few cases, and only from absolute necessity. Even in these cases, judges have for ages been astute to unshackle the estopped by every means in their power." WHITE, J., in *Baker v. Preston*, Gilmer 300.

All estoppels, whether estoppels at common law, or equitable estoppels, are founded upon the great principles of morality and public policy. Their purpose is to prevent that which deals in duplicity and inconsistency, and to establish some evidence as so conclusive a test of truth that it shall not be gained. But estoppels, whether legal or equitable, are not to be extended by construction. *Bower v. McCormick*, 23 Gratt. 810.

It is of the essence of an estoppel that the act relied upon as such should have been injurious and prejudicial to him who relies upon it as an estoppel. *Smith v. Powell*, 98 Va. 481, 36 S. E. Rep. 522.

Must Be Certain.—"According to Coke, an estoppel must be 'certain to every intent'; and if upon the face of a record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence." *Chrisman v. Harman*, 30 Gratt. 494. See also, *Bolling v. Petersburg*, 8 Rand. 568; *Taylor v. Cussen*, 90 Va. 40, 17 S. E. Rep. 721.

"The doctrine of estoppel is never applied, in any of its branches, upon an uncertain and speculative state of facts." *Bargamin v. Clarke*, 20 Gratt. 544; *Repass v. Richmond* (decided June 27, 1901), 99 Va. —.

Must Be Reciprocal.—"Estoppel must be reciprocal and mutual, and is founded upon the idea that the acts of the party estopped must result in injury to the other party, and generally that it would be a fraud if the right asserted be maintained." *Montague v. Massey*, 76 Va. 307. See also, *Bolling v. Petersburg*, 8 Rand. 568.

Does Not Apply between State and Citizen.—"No question of estoppel can arise between a citizen and the state owing him money for services rendered. *Montague v. Massey*, 76 Va. 307.

The doctrine of estoppel is not applicable to the commonwealth in a criminal prosecution. The maxim, "No one shall be twice put in jeopardy for the same offence," rests upon technical notions of jeopardy, and not upon the principle of *res judicata*. But the doctrine of estoppel has been held applicable to the accused. *Justice v. Com.*, 81 Va. 309.

II. ESTOPPEL BY RECORD.

A. In General.—"The record of a court imparts such absolute verity that, as a general rule, no person against whom it is producible is allowed in collateral proceedings to aver or prove an error in fact a matter contrary thereto. 11 Am. & Eng. Enc. Law (2d Ed.) 889. As to the conclusiveness of judgments in general, see *Cox v. Thomas*, 9 Gratt. 312; *Ballard v. Thomas*, 19 Gratt. 14; *Cline v. Catron*, 22 Gratt. 378; *Lancaster v. Wilson*, 27 Gratt. 624; *Withers*

v. Fuller, 30 Gratt. 547; Nulton v. Isaacs, 30 Gratt. 726; Gray v. Stuart, 33 Gratt. 351; Neale v. Utz, 75 Va. 480; Pennybacker v. Switzer, 75 Va. 671; Woodhouse v. Fillbates, 77 Va. 317; Pannill v. Calloway, 78 Va. 387; Wilcher v. Robertson, 78 Va. 602; Perkins v. Lane, 82 Va. 50; Gresham v. Ewell, 85 Va. 1, 6 S. E. Rep. 700; Blanton v. Carroll, 86 Va. 580, 10 S. E. Rep. 329; Hall v. Hall, 12 W. Va. 13; Leach v. Buckner, 19 W. Va. 36; McMillan v. Hickman, 35 W. Va. 718, 14 S. E. Rep. 231; Burner v. Hevener, 34 W. Va. 774, 12 S. E. Rep. 861.

No one can be estopped by any record unless it be shown that he was a party to it, and this should be shown by the record itself. *Randolph v. Longdale Iron Co.*, 84 Va. 457, 5 S. E. Rep. 30; *Chrisman v. Harman*, 29 Gratt. 494.

B. Estoppel by Judgments or Decrees.

1. As between Parties and Privies.

a. In General.—A judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies, whenever the existence of that fact is again in issue between them, not only when the subject matter is the same, but when the point comes incidentally in question in relation to a different matter, in the same or any other court, except on appeal, writ of error, or other proceeding provided for its revision. *C. & O. Ry. Co. v. Rison*, 99 Va. —, 37 S. E. Rep. 320, 6 Va. Law Reg. 665; *Shelton v. Barbour*, 2 Wash. 64; *Preston v. Harvey*, 2 Hen. & M. 68. See also, *Chrisman v. Harman*, 29 Gratt. 494; *Blackwell v. Bragg*, 78 Va. 530.

It is essential to an estoppel by record that the identical question upon which it is invoked was in issue in the former proceeding. "There must be an identity of issues, and by this is meant that the issue raised in the second suit, upon which the evidential force of the former judgment is to be directed, must be identical with the issue, or one of the issues, raised and determined in the first action." *C. & O. Ry. Co. v. Rison*, 99 Va. —, 37 S. E. Rep. 320, 6 Va. Law Reg. 665.

But it is not necessary to the conclusiveness of the former judgment that the issue should have been taken upon the precise point which it is proposed to controvert in the collateral action. It is sufficient if that point was essential to the former judgment. Every point which has been specifically decided, or by necessary implication an issue which must have been decided, in order to support the judgment or decree, is concluded. The estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps or the ground-work upon which it must have been founded. It is accordable to reason back from the judgment to the basis upon which it rests, upon the obvious principle that when a conclusion is indisputable, and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion. *Diehl v. Marchant*, 87 Va. 447, 13 S. E. Rep. 803.

The general rule with respect to the conclusiveness of a verdict and judgment in a former suit between the same parties, when the judgment is used in pleading as an estoppel, or is relied upon as evidence, is substantially this: that, to render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined, that is, that the verdict could not have been rendered without deciding that matter; or it must be shown by extrinsic evidence consistent with the record, that the verdict and judgment necessarily

involved the consideration and determination of the matter. *Withers v. Sims*, 80 Va. 659.

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment was rendered, the whole subject-matter of the action will be at large and open to a new contention, unless the uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible. * * * * According to Coke, an estoppel must be 'certain to every intent'; and if upon the face of a record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence." *Chrisman v. Harman*, 29 Gratt. 494; *Withers v. Sims*, 80 Va. 651. See also, *Corprew v. Corprew*, 84 Va. 590, 5 S. E. Rep. 798; *McComb v. Lobdell*, 32 Gratt. 185; *Tilson v. Davis*, 23 Gratt. 92.

A suit in chancery and decree therein, can neither be pleaded in bar, nor given in evidence, in an action at law between the same parties, unless the very same matter of controversy was involved in both suits, and unless the court of chancery had competent jurisdiction to decide the matter. *Pleasants v. Clements*, 2 Leigh 474.

Two actions on the case are brought in the same court at the same time, by the same plaintiff against the same defendant. The same act of defendant is charged as the cause of the damage in each case; but the damage in one case is charged to be to the plaintiff's land, and in the other to the crops grown and growing upon it. The case as to the crops is the first tried, and the evidence is as to the crops, and there is a verdict and judgment for the defendant. This verdict and judgment cannot be set up as an estoppel to the plaintiffs in the other action for damages to the land. *Southside R. Co. v. Daniel*, 20 Gratt. 344.

Where Administrator Estopped to Deny Assets.—If a judgment be rendered against an administrator for a debt of his intestate, and, after his death, an action of debt suggesting a *devastavit* to have been committed by him in his lifetime, be brought against his administrator, such defendant is estopped, by the judgment, from pleading that no assets of the estate of the original intestate ever came to the hands of the said original administrator. *Eppe v. Smith*, 4 Munf. 466.

Where Matter in First Action Not Submitted to Jury.—Where the matters involved in a second action were not submitted to the jury on the trial of the first action, or if submitted could not have been legally adjudicated by them, no question of estoppel can arise. *Allebaugh v. Coakley*, 75 Va. 628.

No Estoppel by Mere Order of Court.—In an action by a contractor against a county for the price agreed to be paid for building a jail, the defendant pleaded that the building was not completed in time and that the material and work were defective so that it was unsafe for the use intended. The plain-

tiff offered in evidence an order of court showing that commissioners had been appointed to examine the building and that their report that it had been constructed pursuant to contract had been accepted. *Held*, that, such order not being a judgment, there was no estoppel. *Carroll County v. Collier*, 22 Gratt. 302.

Will Rejected in County Court Cannot Be Offered for Probate in Circuit Court.—Where a paper was propounded for probate to the county court of C., as the will of B., and was rejected on the ground that B. was incompetent to make a will, and, afterwards, the paper was propounded for probate to the circuit court of C., and that court, with knowledge that it had been rejected in the county court, admitted it to probate, the sentence of the county court is conclusive against the will, and the sentence of the circuit court is a nullity. *Ballow v. Hudson*, 13 Gratt. 672.

Creditor Confessing Judgment Estopped to Set Up Conflicting Claim.—A creditor of a decedent accepting from the administrator a confession of judgment when assets, is thereby estopped at law from alleging that the administrator at the time of the judgment had assets applicable to the demand. *Dupuy v. Southgates*, 11 Leigh 92.

A creditor of a decedent, by specialty, after accepting from the administrator a confession of judgment when assets, filed a bill in equity against the administrator for a discovery and account. Upon taking the account it appeared that at the time of the judgment there were assets in the hands of the administrator, which he afterwards applied in discharge of another specialty, on which he was bound as the indorser or assignor thereof. *Held*, under such circumstances, the technical estoppel would avail in equity as a defence against the creditor's claim. *Dupuy v. Southgates*, 11 Leigh 92.

Decree Discharging Bankrupt Conclusive upon Creditors.—A decree discharging a bankrupt from his debts under the act of congress of August 19th, 1841, is conclusive upon all his creditors in all suits which may be brought against him in any court, except where the discharge is impeached for some fraud or wilful concealment by the bankrupt of his property, or rights of property, contrary to the provisions of that act. *Tichenor v. Allen*, 13 Gratt. 15.

Dismissed Bill Conclusive upon Issues Therein.—A bill in equity having been dismissed generally without a reservation of any right of the plaintiff to sue thereafter, is conclusive between the parties and those claiming under them upon all the issues made up in the cause. *Taylor v. Yarbrough*, 13 Gratt. 183.

b. Second Suit on Same Claim—Res Judicata.—"There is a marked difference between the effect of a judgment as a bar or estoppel against the prosecution of a second suit upon the same claim or demand, and its effect as an estoppel in another suit between the same parties, or their privies, upon a different claim or cause of action. In the former case the judgment or decree, if rendered upon the merits, constitutes an absolute bar to a subsequent suit. All those matters which were offered and received, or which might have been offered, to sustain the particular claim or demand litigated in the prior suit, and those matters of defense which were presented, or which might have been introduced, under the issue to defeat such claim, are concluded by the judgment or decree in the former suit. *Cromwell v. Sac Co.*, 94 U. S. 351; *Davis v. Brown*, *Id.* 428; *Withers' Adm'r v. Sims*, 80 Va. 651. But, in order that a judgment or decree may constitute a bar to

another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and be determined on its merits. *Hughes v. U. S.*, 4 Wall. 236; *Cromwell v. Sac Co.*, *supra*; *Russell v. Place*, 94 U. S. 606; *Chrisman's Adm'r v. Harman*, 29 Gratt. 494; and *Withers' Adm'r v. Sims*, *supra*; *Miller v. Wills*, 95 Va. 337, 28 S. E. Rep. 337.

A plea of *res judicata* is good only when the causes of action are the same. It is otherwise with a plea of estoppel by a former verdict. *C. & O. Ry. Co. v. Rison*, 99 Va. —, 37 S. E. Rep. 320, 6 Va. Law Reg. 665.

The doctrine of *res judicata* applies to all matters, which existed at the time of giving the judgment or rendering the decree, and which the party had the opportunity of bringing before the court. *Shenandoah Valley R. Co. v. Griffith*, 76 Va. 913; *Blackwell v. Bragg*, 78 Va. 529; *Fishburne v. Ferguson*, 85 Va. 321, 7 S. E. Rep. 361; *Simpson v. Dugger*, 88 Va. 963, 14 S. E. Rep. 760; *Roller v. Pitman*, 98 Va. 613, 36 S. E. Rep. 987.

Judgment having been recovered against a deputy sheriff, he applied for and obtained an injunction on the grounds that he had been induced to confess the judgment, upon the agreement of the high sheriff that the account should be settled by persons named; and the execution should only issue for the amount, if any, found due from the deputy, and that in fact nothing was due, and in breach of this agreement execution had been sued out on the judgment. At the hearing, the injunction was dissolved and the bill dismissed; and this decree was affirmed on appeal. The deputy was held to be estopped from proceeding by bill in equity against the justices of the county to recover the amount he had paid to the county creditors above what he had collected from the county levies. *Lee County Justices v. Fulkerson*, 21 Gratt. 182.

2. As Affecting Strangers.—Where the court of appeals, with all the parties before it held that a bond was valid, though executed after the time prescribed in a private act of assembly, such judgment concludes the question, though the decree of the court below was reversed because the proceeding was by petition instead of by bill. *Corbell v. Zeluff*, 12 Gratt. 226.

A surety on an injunction bond for the second endorser of a negotiable note, who has been compelled to pay said note, is not barred from recourse against the first endorser to recover the amount so paid by the fact that, in a suit in equity brought by the holder of such note against the maker and endorsers, a decree was rendered in favor of the first endorser. Nor is the surety barred of such recourse by the fact that, in another suit in equity brought by the second endorser to establish the liability to him of the first endorser, the bill was dismissed upon answer and demurrer, there being set out several causes of demurrer, of which some went to the merits of the controversy, and others did not, and it not appearing for what cause the bill was dismissed. *Chrisman v. Harman*, 29 Gratt. 494.

One of the distributees of B. sues D. as executor of A. his former guardian, for her share of B.'s moiety of the slaves, and recovers decree in chancery for value of share, but no legal representative of B. is party to that suit; and this recovery and payment of amount recovered, are alleged as breach of condition of C.'s indemnifying bond, in an action thereon against C.'s surety. *Held*, it is a breach thereof; and defendant cannot, in this action, contest the regularity of the decree in chancery, or

take advantage of any error in it; neither can he plead that D. was never the executor of A. *Lamb v. Harrison*, 2 Leigh 585.

Effect of Decree upon Heirs Not Party Thereto.—Where, upon the death of a party to a suit in equity to recover land, the suit is revived against his administrator, but not against his heirs, and a decree is obtained, such decree is not conclusive as to the heirs upon the principle which binds parties to a cause. *Early v. Garland*, 18 Gratt. 1.

Erroneous Decree Unquestionable in Collateral Proceedings.—A decree erroneous in itself, or collusive between the parties to it, cannot be examined into in a collateral proceeding; but it is conclusive upon the matters thereby adjudicated until set aside in some proceeding for the purpose. Where a sale of land has been made under such decree, the title passes. *Baylor v. Dejarnette*, 18 Gratt. 152.

Appointment of Commissioner Unquestionable in Collateral Proceedings.—A commissioner of the revenue under § 7 of the act of 1867, in relation to the assessment of taxes on licenses, appointed an assistant commissioner, and the appointment was approved by the proper court. *Held*, that the question whether the facts existed which authorized the commissioner to appoint an assistant could not be raised in a collateral proceeding. *Com. v. Byrne*, 20 Gratt. 165.

Where Former Judgment Set Up in Evidence.—A former judgment set up by plea is conclusive, but if only relied on in evidence, the jury are not estopped by it, but must find their verdict upon the whole evidence in the case, and may find against the former judgment. *C. & O. Ry. Co. v. Rison*, 99 Va. —, 37 S. E. Rep. 320, 6 Va. Law Reg. 665.

Judicial Admissions.—See *infra*, Inconsistent Positions.

C. Admissibility of Parol Evidence.—Except for the purpose of identifying the subject-matter to which a verdict and judgment apply, parol evidence is inadmissible. The record must speak for itself when it is pleaded as an estoppel. The record alone can be looked to for the purpose of showing what the issues were. *C. & O. Ry. Co. v. Rison*, 99 Va. —, 37 S. E. Rep. 320, 6 Va. Law Reg. 665.

Where the record of a court appears on its face to have been regularly signed by the judge who presided at the trial of a cause, parol evidence is not admissible to show that the proceedings had not been read in court, and that the record was not signed by the judge until some days after the adjournment of the court for the term. *Quinn v. Com.*, 20 Gratt. 138.

Where, in case of a decree of a court of competent jurisdiction, the record declares that notice has been given, such declaration cannot be contradicted by extraneous proof. *Wilcher v. Robertson*, 78 Va. 616; *Marrow v. Brinkley*, 86 Va. 55, 6 S. E. Rep. 605.

To Show Real Issue in Former Suit.—Where judgment or decree is relied on as estoppel, and pleadings and proceedings in former suit leave it doubtful what was the issue, or state of facts whereon the judgment or decree was rendered, parol evidence is admissible in a subsequent suit to show what was actually in issue and determined by the former suit. *Withers v. Sims*, 80 Va. 651.

To Show Former Suit Did Not Relate to Same Transaction.—Whenever a former judgment is relied on as a bar, whether by pleading or in evidence, it is competent for the plaintiff to show by parol evidence that it did not relate to the same property or transaction in controversy, and the question of

identity thus raised is a matter of fact to be decided upon the evidence, if the record is itself silent. And so if the cause of action is divisible or the pleadings involve two distinct propositions, it is competent to show that only one of them was submitted to and passed upon by the jury. *Allebaugh v. Coakley*, 75 Va. 637.

III. ESTOPPEL BY DEED.

A. Grounds of Estoppel in General.

1. **Recitals in Deeds.**—A trust deed to secure creditors reciting the amount of the debts due to the different creditors is not conclusive, even as against the grantor and his administrator, of the amount of the respective debts. *Griffin v. Macaulay*, 7 Gratt. 476.

Where it can be collected from a deed that the parties thereto have agreed upon a certain admitted state of facts as the basis on which they contract the statement of these facts, though but in the way of recital, will estop the parties from averring the contrary. But a mere recital in a deed does not conclude all the parties. There must be a direct affirmation, so intended by all the parties, in order to bind all; and this intention may be gathered from the whole instrument. *Bower v. McCormick*, 28 Gratt. 310.

When the recitals in the deed refer to what the grantors have done, or intend to do, among themselves, and in which the grantees have no part or interest, and the wording of the recitals indicate that the scrivener did not have the recited deed before him and there is no evidence that the grantees knew anything of the recited deed except as recited, these recitals will be intended to be the statement of the grantors only. *Bower v. McCormick*, 28 Gratt. 310.

A mistake in the recitals of a deed, referring to a previous deed of marriage settlement between the grantors, may, in equity, be shown by the grantees, by introducing in evidence the deed referred to in the recitals. *Bower v. McCormick*, 28 Gratt. 310.

Recitals in deeds do not operate as estoppels in favor of strangers who have not acted on or been misled by them; and formal statements and admissions, unacted upon, are not conclusive. *McCullough v. Dashiell*, 78 Va. 634.

Recital of Payment.—The acknowledgment by the grantor in a deed of conveyance of the receipt of the purchase money does not estop him from proving that it has not been received. *Wilson v. Shelton*, 9 Leigh 342; *Radcliff v. High*, 2 Rob. 271.

Description of Land—Sale of Lots by Map.—The sale of lots according to a map vests in the purchasers the right to use the streets appearing on such map, and the right so vested cannot be defeated by the act of the vendor, because, by the sale under such circumstances, he is estopped to deny or impeach rights thus acquired. Such an estoppel, however, operates only in favor of him who has been misled to his injury, and he alone can set it up. It does not operate in favor of a city or county which has acquired no rights thereunder. *Norfolk v. Nottingham*, 96 Va. 34, 30 S. E. Rep. 444.

2. **Recitals in Mortgages.**—A trust deed to secure creditors recited a debt which was described as the balance due on a judgment to W., "rendered in the United States District Court, held at Charleston, Kanawha County, in the spring of 1856, the said balance being now about \$2,000." W. filed a bill to enforce his judgment, and the defendants alleged a want of notice by reason of its not being docketed,

and also that they had no actual notice of it. *Held*, that the trustee and trust creditors claiming the benefit of the trust were estopped by the recital of the deed from averring a want of notice of the judgment at the time of the execution of the deed. *Coal River Nav. Co. v. Webb*, 3 W. Va. 438.

3. **Recitals in Bonds.**—N. living in Virginia brought two suits in South Carolina, and B. living there became his security for costs. N. executed to B. a bond with sureties living in Virginia, with condition to indemnify him against injury for having entered into the undertaking as surety for the said costs. In an action by B. against N. and his sureties, the records of the suit brought by N. in South Carolina were offered in evidence by B. and were objected to on the ground that they showed that B. had not become the surety at the date of the bond of N. and his sureties to him. *Held*, that as the defendants did not show that B. was surety for N. for costs in other cases, their bond must be held to refer to these suits, and they are estopped by their bond from denying that B. was the surety of N. at the time of its execution. *Cordie v. Burch*, 10 Gratt. 480.

A bond executed pursuant to an order made in a chancery suit requiring its execution, as a condition precedent to the enjoyment of certain rights, does not derive its efficiency from the order. The liability of the obligors is determined by the bond alone, and not by the order. The obligors are estopped to deny the recitals of the bond, even if they were in conflict with record, and a plea of *nul tiel record* is inapplicable. *Blankenship v. Ely*, 98 Va. 350, 36 S. E. Rep. 484.

Where the official bond of the cashier of a bank was conditioned for the faithful performance of the duties of the said office, "which may be prescribed by the board of directors," it was held that the cashier, by the performance of certain duties in his office of cashier, was estopped to deny that they had been prescribed by the board. *Durkin v. Exchange Bank*, 2 Pat. & H. 277.

There is no exception to the rule that the fair and voluntary execution of a sealed instrument is conclusive, against all who seal it, of everything admitted in it. *Hoke v. Hoke*, 3 W. Va. 561.

Office of Principal or of Obligee.—Where persons become the sureties of a deputy sheriff by executing his bond jointly with him, they are estopped to deny that he is the deputy and that the person named therein as such is the sheriff. *Cox v. Thomas*, 9 Gratt. 312.

The sureties of a deputy in his bond to the high sheriff for the faithful discharge of his duties are estopped to deny that their principal was a deputy, unless the bond is invalid. *Cecil v. Early*, 10 Gratt. 198.

M. was elected sheriff of S. in 1854 and gave bond as such. In July, 1856, he gave bond under the act of March 15, 1856, extending the time for which sheriffs should hold office to Jan. 1, 1857. In May, 1856, he was re-elected sheriff for a regular term of two years commencing Jan. 1, 1857, but he did not give his official bond under that election within 60 days after his election, nor until Jan. 12, 1857, when it was executed by himself and his sureties. This bond, reciting his election for two years from Jan. 1, 1857, was acknowledged and recorded, and he was permitted by the court to qualify and act as sheriff. *Held*, that the sureties of M., in his last bond were estopped by its recitals from denying that M. was sheriff, and that the bond was binding on them. *Monteith v. Com.*, 15 Gratt. 172.

Where a bond is executed to the obligee "as executor," the obligor is estopped to deny that the obligee is such executor. *Hoke v. Hoke*, 3 W. Va. 561.

Recognition of Judicial Proceedings.—In an action of debt on an injunction bond, the obligors are estopped to deny that there is such a judgment as that which the bond describes, or that the injunction has been awarded. *Bank v. Flesham*, 22 W. Va. 317.

Where an appellant by attorney gives bond reciting that a *supersedeas* has been allowed, he is estopped to deny that the *supersedeas* issued. *B. & O. R. Co. v. Vanderwerker*, 19 W. Va. 265.

In a suit by a *bona fide* holder before maturity for value and without notice brought on county bonds issued in aid of the construction of a railroad, the county is estopped by the certificate of the proper officers, appearing on the face of the bond, to the effect that all the conditions precedent to the issuing of such bonds have been fully performed, from setting up any irregularities of the proceedings antecedent to the preparation, execution and issuance of the bonds. *Pickens Township v. Post*, 5 Va. Law Reg. 789.

Parties who voluntarily enter into a forthcoming bond are estopped from all inquiry into the regularity and validity of the levy of the writ of *hæc facias* upon which the bond was taken. *Shaw v. McCullough*, 3 W. Va. 260.

4. **Covenants.**—Where the purchaser at a judicial sale of lands, who was a party to the administration proceedings, assumes the payment of a lien thereon and retains of the purchase price so much as "is equal to that debt, including interest to this time," covenanting to keep the first parties, the estate, and all persons claiming thereunder, harmless by reason of such debt, he is estopped from afterwards asserting that he did not retain enough. *Menefee v. Marge (Va.)*, 4 S. E. Rep. 728.

M. died seised of two tracts of land, known respectively as Tanner and Walker tracts. He left nine heirs. Two of them sold their interest in the Tanner tract, with covenants of general warranty. Subsequently the two tracts were partitioned, and the whole of the interest of one of these grantors was set apart to her in the Tanner tract, and the whole share of the other in the Walker tract. The purchaser took possession of the share of the one in the Tanner tract; whereupon she brought suit to recover out of that interest a parcel equal in value to her ninth interest in the Walker tract. *Held*, that she was estopped from any claim in the Tanner tract by her covenant of general warranty. *Mitchell v. Petty*, 2 W. Va. 470, 98 Am. Dec. 777.

In an action for breach of warranty of title to land, where the deed recites that "immediate possession is delivered" and the declaration avers no eviction, the covenantee is not thereby estopped to deny that he got possession. *Sheffey v. Gardiner*, 79 Va. 313.

By deed with covenants of general warranty, an heir apparent may estop herself from afterwards claiming her inheritance. Such estoppel extends to her heirs. *Buford v. Adair*, 43 W. Va. 211, 37 S. E. Rep. 260.

Effect of Grantor's Discharge in Bankruptcy.—A discharge in bankruptcy releases the warrantor from liability for covenants broken, but does not affect the estoppel as to after-acquired property, because the covenant runs with the land. *Gregory v. Peoples*, 80 Va. 355.

Effect of Partition Deed without Warranty.—The heirs of an estate partitioned the land by deeds. The deed to one of the heirs and her husband read: "The parties of the first part do grant, relinquish, and release unto the parties of the second part, and to the heirs of the female party of the second part," etc. The deed contained no warranty. Similar deeds were made to the other heirs. No other consideration passed. The wife died without having had children. *Held*, that there was no estoppel growing out of the deed to preclude the heirs of the wife from asserting their claim against the husband. *Yancey v. Radford*, 86 Va. 688, 10 S. E. Rep. 972.

Effect of Covenant of Ancestor as against Heir.—Where a husband conveys the property of his wife with warranty against the claims of himself and his heirs, his children, deriving title from their mother, will not be affected by the warranty. *Urquhart v. Clarke*, 2 Rand. 549.

Contracts—Performance—Hindrance.—A covenantor is excused from performing his part of an agreement when the other party hinders the performance. And when so hindered, the covenantee will be estopped from setting up the default of the covenantor. *Young v. Ellis*, 91 Va. 297, 21 S. E. Rep. 480.

B. Effect of Invalid Deeds.

Where Deed Not Acknowledged—Validity as between Parties.—A person who signs, seals, and delivers an instrument as his deed, will never be heard to question its validity, upon the ground that it was not acknowledged by him, nor proved at the time of the delivery. It is the sealing and delivery that gives efficacy to the deed; not proof of its execution. And this principle applies to all bonds, whether executed by public officers or private persons, unless there is a statute making the acknowledgment, or proof in court essential to the validity of the instrument. *Board of Sup. of Wash. Co. v. Dunn*, 27 Gratt. 609. See also, *State v. Proudfoot*, 38 W. Va. 736, 18 S. E. Rep. 949.

A deed not acknowledged or not certified according to law, though actually admitted to record, cannot be read in evidence as a recorded deed, but as between the parties it is valid. *Raines v. Walker*, 77 Va. 92.

Same—Conclusiveness of Clerk's Certificate.—A certificate of a clerk endorsed on a deed that it was exhibited in his office, acknowledged and admitted to record, is conclusive of the fact and is not open to contradiction. *Carper v. McDowell*, 5 Gratt. 212.

Where the clerk's office of a county court with all the records therein was consumed by fire and a paper purporting to be an official copy of a will of record in that office, and to be certified by a former clerk of the court, was admitted under the act of Feb. 19, 1840, the act of the clerk in admitting the paper to record is conclusive upon the question whether the paper is what it purports to be; and evidence to prove that the copy was not certified by the clerk whose name is affixed to the certificate is inadmissible in a collateral action. *Tallaferrro v. Pryor*, 12 Gratt. 277.

Admission to Record—Direction Not to Record—Second Deed on Same Property.—A deed of trust to secure a debt was duly admitted to record by the proper clerk and so endorsed by the clerk, and the creditor secured was notified of that fact by his attorney, but before it was actually engrossed on the deed book the attorney instructed the clerk not to record it till further ordered. Ten days before such further order was given, a second deed of trust on

the same property, securing a different creditor, was duly recorded. After the first deed was recorded, the date of the former endorsement was erased, and the date of its actual record was endorsed thereon, and it was forwarded to the creditor secured. A year or more after the first deed, with the endorsements thereon, was delivered to the creditor secured thereby, the creditor secured by the second deed assigned his debt to a third party for value received of him. The creditor secured by the first deed took no steps, prior to said assignment, to have the date of the recordation of his deed corrected. *Held*, the endorsement on the first deed of trust was notice to the creditor secured of the date when his deed purported to have been admitted to record, and, having taken no steps to have the record corrected, he is estopped to assert his lien as against the assignees of the debt secured by the second deed, and they take priority over him. *Mercantile Co-Operative Bank v. Brown*, 96 Va. 614, 32 S. E. Rep. 64, 4 Va. Law Reg. 837.

Deed Affected with Fraud.—Where a commissioner has been induced to execute a deed of conveyance by the purchaser's fraud or wilful misrepresentation, or by misrepresentation upon an honest mistake of fact as to the payment of the purchase money, the purchaser cannot rely on the deed as an estoppel, but may be proceeded against to have the deed annulled and the property subjected to sale. *Williams v. Blakey*, 76 Va. 264.

A married woman is not estopped from claiming as against her husband's creditors, a resulting trust in land paid for by her father and intended to be hers, but deeded to the husband by his collusion with the grantor, by reason of the failure of her father and herself to take positive action during his lifetime, if she did not then know how the title stood, nor what her father's intentions were, and did assert her title before it was assailed. *Steagall v. Steagall*, 90 Va. 73, 17 S. E. Rep. 756.

C. Estoppel against Estoppel.—A recital in a bond that it was given to secure a loan of money does not estop the obligor from pleading and proving that the consideration was Confederate treasury notes. *Calfee v. Burgess*, 3 W. Va. 274.

D. and wife conveyed the wife's realty in N. city and N. county to L. in trust to secure two notes to M., to whom D. was also indebted in open account. Subsequently D. and wife conveyed the N. county realty to A., receiving in payment cash which was paid on the notes and certain notes which were applied on the open account, L. and M. releasing the N. county realty to A. by deed reciting that the two notes, to secure which said realty had been conveyed in trust, had been paid—D. and wife not being parties to the release. By M.'s order L. advertised N. city realty for sale to pay the balance of the trust debt. D. and wife enjoined. *Held*, that the intention being to recite that the two notes were paid *quoad* the N. county property and its purchaser A., the recital can be deemed an estoppel for that purpose only. *McCullough v. Dashiell*, 78 Va. 684.

In an action of ejectment, a man is estopped to set up his own possession for twenty years against his own deed given within that time. *Duval v. Bibb*, 3 Call 362.

Sale of Land—Growing Trees—Knowledge of Sale to Another.—A purchaser of real estate who has full knowledge at the time of his purchase that his vendor has sold certain trees growing on the land and conveyed them to the purchaser, and who thereafter accepts from his vendor a deed with covenant

of general warranty and for quiet enjoyment, and pays the cash payment for the land, and executes his notes for deferred payments, and pays one of the notes and part of another, cannot, after the lapse of five years, claim an abatement for the value of the trees. *Southwest Va. M. Co. v. Chase*, 95 Va. 50, 27 S. E. Rep. 826.

D. Persons Affected by Estoppel.—Formal statements and admissions, which were perhaps looked upon as unimportant when made, and by which no one was even deceived, are not conclusive. And, as estoppels are founded on intention, they will be limited by it and will not extend to objects that the parties cannot reasonably be supposed to have had in view. A recital may consequently be an estoppel for some purposes and not for others. The estoppel of a deed will be limited to suits based upon it or growing out of the transaction in which it was executed, and will not extend to a collateral action, where the cause is different, although the subject-matter may be the same. *McCullough v. Dashiell*, 78 Va. 684.

Where a recital in a deed is intended to be a statement which all the parties to the deed have mutually admitted to be true, it is an estoppel upon all. But where it is intended to be the statement of one party only, the estoppel is confined to that party; and the intention is to be gathered from the deed. *Bower v. McCormick*, 28 Gratt. 310.

Grantors and Privies.—A grantor in a deed of trust cannot impeach or disparage his own title to prevent a sale under such trust. *Martin v. Kester*, 46 W. Va. 438, 33 S. E. Rep. 238.

Where a person holding a contingent interest executes a deed for personal property, he is estopped to deny the passing of his interest by such deed. *Dewing v. Hutton* (W. Va.), 37 S. E. Rep. 670.

Cancellation of Deed—Laches—Estoppel of Grantor.—Where a deed is executed and placed in the hands of depositary to be held subject to the joint order of the grantor and grantee, and the grantee has possession of the property by its agent, who surreptitiously obtains such deed and places it on record, and then conveys the property to an innocent holder for value, and places him in possession thereof, and a period of seven months is permitted to elapse before the original grantor makes inquiry about the deed or property, and then permits the fraudulent agent to escape without arrest, a court of equity will refuse to cancel such deed and restore the property to such grantor, but will hold him estopped from setting up title to such property, as against the innocent purchaser. *McConnell v. Rowland* (W. Va.), 37 S. E. Rep. 586.

Privies of Grantor.—A purchaser from a person who has previously conveyed the estate to a trustee by deed duly recorded is estopped at law, though not in equity, from impugning, on the ground of fraud, a deed regularly executed by the trustee to a purchaser from such trustee. *Taylor v. King*, 6 Munf. 358, 8 Am. Dec. 746.

Where a testator empowers his executors to make conveyances of lands, which he sold but did not convey in his lifetime;—until the power is executed, the lands descend to the heir; but a conveyance from him as one of the executors, would operate as an estoppel against him, should he claim as heir. *Shaw v. Clements*, 1 Call 420.

Grantees.—Under W. Va. Code 1891, ch. 68, § 2, providing that, unless the contract of sale expressly provide otherwise, "every survey, whether original or not, shall be made by horizontal measurements,"

it was held that, where a deed was lodged in the clerk's office and recorded, the purchaser, after taking it out and discovering that the quantity of land was ascertained by surface measurement, was not estopped to demand a horizontal measurement, when he at once informed the vendor that he would not accept a surface measurement. *Bartlett v. Bartlett*, 37 W. Va. 235, 16 S. E. Rep. 450.

V. executed a deed by which he conveyed to A. and I. his lands, on the consideration that they should pay his debts and should pay him \$500 a year for his life. A. and I. did not execute the deed, but they accepted it and took possession and held the lands. *Held*, that they were personally liable for the debts of V. *Vanmeter v. Vanmeters*, 3 Gratt. 148.

A grantee in a deed who has released all interest in the property conveyed, in consideration of the conveyance to her of other property by the grantor, which last mentioned conveyance was made on condition that she should execute such release, cannot thereafter assert any title or interest under the first mentioned deed. *Townsend v. Outten*, 95 Va. 536, 33 S. E. Rep. 958.

E. Operation as to After-Acquired Title.

Where Conveyance Contains Covenant of General Warranty.—Where a person conveys land with general warranty whereof he has not the title at the time, but afterwards acquires it, such acquisition enures to the benefit of the grantee, because the grantor is estopped to deny, against the terms of his own warranty, that he had the title. *Burners v. Keran*, 24 Gratt. 42; *Raines v. Walker*, 77 Va. 92; *Baugh v. Walker*, 77 Va. 99; *Gregory v. Peoples*, 80 Va. 355; *Young v. Young*, 80 Va. 675, 17 S. E. Rep. 470. See also, *Doswell v. Buchanan*, 8 Leigh 355; *Mitchell v. Petty*, 2 W. Va. 470, 98 Am. Dec. 777.

Conveyances under the statute of uses only pass such estate as the grantor had at the time; the warranty merely serving as a remedy, or operating to estop the grantor from denying the ownership of the estate at the time the conveyance was executed. *Burners v. Keran*, 24 Gratt. 42.

Where one having only the equitable title, conveys the land with general warranty; then is discharged in bankruptcy; and afterwards, with another's money, buys the land, at a resale thereof for the unpaid purchase money, and obtains to himself a conveyance thereof such title does not enure to his grantee, and he is not estopped to deny he had the title, because a trust resulted in favor of him whose money bought the land. *Gregory v. Peoples*, 80 Va. 355.

Same—Such Conveyance Does Not Operate as Actual Transfer.—An estoppel by general warranty in a conveyance does not operate actually to transfer the estate subsequently acquired. *Burners v. Keran*, 24 Gratt. 42.

Where Conveyance Contains Covenants of Special Warranty.—H. executed a deed to W. by which he sold all his claim in and to a certain piece of land called the C. place, which was conveyed to C. by H., sr.; which deed contained the following clause: "And the said H., for himself and his heirs, the said right, as it was vested in H., sr., to the said W. and his heirs, against himself and his heirs, will warrant and defend. It is fully understood, that if said title should prove insufficient in law or equity, the said W., and his heirs, are to have no recourse, he knowing the whole circumstances." *Held*, that H. was not estopped from purchasing another adversary title to said land, and setting it up against his vendee. *Wynn v. Harman*, 5 Gratt. 157.

If at the time of the execution of a grant or bargain and sale of land, with covenant of special warranty, the title to the land be in a third person, not because of any act or default of the covenantor, and the covenantor himself afterwards acquires the title to the land, the title does not, by reason of the special warranty, vest in the covenantee, and the covenantor is not estopped to assert it or to grant it to another. *W. M. & M. Co. v. Peytona C. Co.*, 8 W. Va. 406.

Where Conveyance Recites That Grantor Is Seised of a Particular Estate.—A grantor is estopped to claim a title subsequently acquired not only where he has conveyed with a warranty, but also where the deed of conveyance recites, or affirms, expressly or impliedly, that the grantor is seised of a particular estate which the deed purports to convey, and upon the faith of which the bargain is made. *Townsend v. Outten*, 95 Va. 536, 28 S. E. Rep. 958.

Where a conveyance recites or affirms, expressly or impliedly, that the grantor is seised of a particular estate which it purports to convey, he will be estopped to deny that such estate passed, although the deed contains no covenant of warranty at all. And such grantor is therefore estopped from setting up an after-acquired title to the estate thereby conveyed. *Reynolds v. Cook*, 83 Va. 817, 8 S. E. Rep. 710, 5 Am. St. Rep. 317.

Same.—Married Woman Uniting with Trustee to Convey Equitable Separate Estate.—A grantor of land, who has conveyed with a warranty or covenant of title is estopped from setting up an after-acquired title against his grantee, and, although there is no warranty, the grantor will be estopped from asserting an after-acquired title against his vendee where the deed of conveyance recites or affirms that the grantor is seised of a particular estate which the deed purports to convey and upon the faith of which the sale was made. But this doctrine does not apply to a married woman holding an equitable separate estate, who unites with her trustee merely for the purpose of showing that the trustee was making the conveyance with her knowledge and by her direction, and who makes no warranty or other covenant of title, nor any averment or affirmation that she was seised of or entitled to a particular estate in the land which the deed purports to convey. *Nye v. Lovitt*, 92 Va. 710, 24 S. E. Rep. 345, 2 Va. Law Rep. 29.

Where Conveyance Contains No Covenant of Warranty.—H., having only an equitable estate in land, conveyed the same without warranty to M. and F. in trust to secure a debt to B. This deed of trust was duly recorded. Afterwards, H. acquired the legal title and sold the land to D. with warranty. *Held*, that as H. did not have the legal title at the time he executed the deed of trust, and as it contained no warranty, the legal estate subsequently acquired by H. did not enure to the trustees to secure the debt to B. *Doswell v. Buchanan*, 3 Leigh 305, 23 Am. Dec. 280.

Where a party sells and conveys, without warranty, a particular claim or title to land, he is not thereby estopped from purchasing a superior adverse or outstanding title and holding the land under such superior title against the grantee of such particular claim or title, where there was no fraud or concealment in the sale of said particular claim. An estoppel is never extended beyond what is called for by the plain import of the terms employed by the grantor in the conveyance. *Kent v. Watson*, 23 W. Va. 561.

A bargain and sale of land intended under the statute to operate as a present conveyance or transfer is not an assertion of title that will estop the bargainor, his heirs or assignees, from subsequent assertion of an after-acquired title, and does not imply a covenant of warranty. *W. M. & M. Co. v. Peytona C. Co.*, 8 W. Va. 406.

A party verbally contracted to purchase land from a commissioner authorized to sell, subject to the approval of the court, and entered upon and improved the land; but the sale was never reported, and no part of the purchase price was paid. He afterwards, by a written contract without warranty, sold his improvements to a third person, stating that the title was outstanding, but not referring to his verbal purchase. More than 10 years afterwards, he purchased the land by a written contract from the commissioner. *Held*, that he was not estopped from asserting this latter claim against the assignee of the person to whom he sold his claim, there having been no covenant of warranty and no concealment on his part. *Kent v. Watson*, 23 W. Va. 561.

IV. ESTOPPEL IN PAIS.

A. General Nature and Essentials.—An estoppel *in pais* is one that arises from the acts, conduct or declarations of a person, whereby he designedly induces another to alter his position injuriously to himself. It is founded on fraud. But the acts, etc., alleged as such estoppel must be executed, and not merely executory. *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. Rep. 713.

"After a review and careful analysis of the English and American cases, Mr. Bigelow, in his able book on Estoppel, p. 487, deduces the rule, 'that all of the following elements must be present in order to an estoppel by conduct: 1. There must have been a representation or concealment of material facts; 2. The representation must have been made with knowledge of the facts; 3. The party to whom it was made must have been ignorant of the truth of the matter; 4. It must have been with the intention that the other party should act upon it; 5. The other party must have been induced to act upon it.' In explanation of these essential and indispensable elements of an estoppel, the same author states, that the representation must generally be a statement of facts, and that it can rarely happen that the statement of a legal proposition will conclude the party making it from denying its correctness, except when it is understood to mean nothing but a simple statement of fact. The rule in this regard is, that when the statement or conduct is not resolvable into a statement of fact, as distinguished from a statement of law, the party making it is not bound. The representation must, in all ordinary cases, have reference to a present or past state of things; for if it be concerning something in the future, it must generally be either a mere statement of an intention or opinion. The intent of a party, however positive and fixed, is necessarily uncertain as to its fulfillment, and must depend on contingencies, and be subject to change and modification by subsequent events and circumstances. A person cannot be bound by any rule of morality or good faith not to change his intention. *Howard v. Hudson*, 2 El. & B. 1; *Plumer v. Lord*, 9 Allen 455. Certainty is essential to all estoppels. The representation must, therefore, be plain, and not be a mere matter of inference or opinion. *Belle of Sea*, 20 Wall. 421; *Johnson v. Owen*, 33 Iowa 512; *Lawrence University v. Smith*, 32 Wis. 587. The representation

must be false or untrue; that is, it must be a misrepresentation and different from that sought to be established on the trial; for, if it is true, there can be no fault or ground for an estoppel. The very essence of the doctrine is, that the party shall not be allowed to prove a state of things different or in conflict with his previous representations or conduct." *SNYDER, J.*, in *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 630. Mr. Bigelow's statement as to the elements of an estoppel is quoted with approval in *Taylor v. Cussen*, 90 Va. 40, 17 S. E. Rep. 731.

Element of Fraud or Deceit.—The statements, acts, or acquiescence of the owner or claimant of land, are generally evidence against him, under all the circumstances, more or less forcible. But, unless they are vitiated by actual fraud, or culpable negligence tantamount to actual fraud, and are relied on by another as the foundation of a material action or acquiescence, they do not estop the owner of the land from asserting and proving his title or boundary. *W. M. & M. Co. v. Peytona C. C. Co.*, 8 W. Va. 406.

Whenever an act is done or a statement is made by a party which cannot be contradicted without fraud on his part and injury to the other party, whose conduct has been influenced by the act or admission, the character of estoppel will attach to what would otherwise be a mere matter of evidence. *Repass v. Richmond* (decided June 27, 1901), 99 Va. —.

A vendor's lien may be reserved on the face of a deed conveying an equitable as well as a legal estate, and, in the absence of fraud or injustice, the vendor may take a reconveyance of the property conveyed in discharge of the balance of the purchase price. If, however, such reconveyance be set aside, the vendor's lien, in the absence of such fraud or injustice, will be revived and enforced for the benefit of the vendor. The doctrine of estoppel has no application to such a case. *Dingus v. Minneapolis Imp. Co.*, 98 Va. 737, 37 S. E. Rep. 353.

Estoppel Must Be Mutual.—Where the plaintiff, as mayor and as a member of the common council, assisted in securing the erection of wharves on land owned by him, he was not thereby estopped from asserting title to such land, since an estoppel must be mutual, and there was nothing in the plaintiff's acts to bind the city. *Bolling v. Mayor, etc.*, of *Petersburg*, 3 Rand. 563.

Must Be Certain.—Every estoppel, since it concludes a man to allege the truth, must be certain to every intent, and not to be taken by argument or inference. *Vanbibber v. Beirne*, 6 W. Va. 168; *Lorentz v. Lorentz*, 14 W. Va. 809; *Taylor v. Cussen*, 90 Va. 40, 17 S. E. Rep. 721; *Bolling v. Petersburg*, 3 Rand. 563.

The doctrine of estoppel will not be applied, where it rests upon the ground of fraud, upon an uncertain or speculative state of facts. *Repass v. Richmond* (decided June 27, 1901), 99 Va. —; *Bargamin v. Clarke*, 20 Gratt. 544.

Act Relied on Must Be Prejudicial.—It is of the essence of an estoppel that the act relied upon as such should have been injurious and prejudicial to him who relies upon it as an estoppel. *Smith v. Powell*, 98 Va. 431, 36 S. E. Rep. 522; *Repass v. Richmond* (decided June 27, 1901), 99 Va. —.

Where the plaintiff repudiates the acceptance of a note by his attorney in satisfaction of a decree, he is not estopped from enforcing the decree on the ground that the defendants were prevented by such

acceptance from taking an appeal. *Smith v. Powell*, 98 Va. 431, 36 S. E. Rep. 522.

Void Contract Cannot Create an Estoppel.—A contract that is void as against public policy cannot create an estoppel. *Tate v. Building Ass'n*, 97 Va. 74, 33 S. E. Rep. 382.

Does Not Apply against State.—No question of estoppel can arise between a citizen and the state owing him money for services rendered. *Montague v. Massey*, 76 Va. 307.

Equity the Proper Forum.—A court of equity is the proper forum in which to assert an equitable estoppel. *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. Rep. 536.

The mere fact that the maker of a note secured by deed of trust on land left in the hands of a purchaser, to whom he had sold the land, sufficient funds to pay all the liens thereon, is no defence to an action by the holder of the note, or his assignee, against the maker, thereof. Nor is such assignee estopped to deny payment out of such funds by the fact that he was attorney for the purchaser, and examined the title to the land for him before the purchase was completed. *Flick v. Stauffer*, 97 Va. 649, 34 S. E. Rep. 476.

A court of equity will not consider whether, if a widow accepts the dower assigned her and surrenders possession of her husband's real estate to those claiming to be his heirs, she is thereby estopped from claiming that she is his sole heir and as such entitled to all his real estate, or the effect on such estoppel, if it be one, of her acts being done under a misapprehension of the facts or of the law. These questions properly arise in an action at law. *Jones v. Fox*, 20 W. Va. 870.

B., Misrepresentation or Concealment of Facts.

1. **In General.**—A party who by his acts, declarations, or admissions, or by failure to act or speak under circumstances when he should do so, either designedly or with wilful disregard of the interests of others, induces or misleads another to conduct or dealings which he would not have entered upon but for this misleading influence, will not be allowed afterwards to come in and assert his right to the detriment of the person so misled. That would be a fraud. *Norfolk & W. R. Co. v. Perdue*, 40 W. Va. 422, 21 S. E. Rep. 755.

Where one, by words or conduct, intentionally causes another to believe in the existence of a certain state of things, or such words or conduct are of such nature as he has reason to believe will cause him to so believe, and such other, not knowing to the contrary, acts thereon, the former will be estopped from averring or claiming under a different state of things, then existing and known to him, to the prejudice of the other party. *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. Rep. 874.

"A man to whom a particular and distinct representation has been made is entitled to rely on the representation, and need not make any further inquiry." "No man can complain that another has relied too implicitly on the truth of what he himself stated." *Brown v. Rice*, 26 Gratt. 474; *Anderson v. Phlegar*, 93 Va. 415, 25 S. E. Rep. 107.

Measure of Estoppel.—The measure of the operation of an estoppel is the extent of the representation made by one party and acted on by the other. The estoppel is commensurate with the thing represented, and operates to put the party entitled to its benefit in the same position as if the thing represented were true. *Anderson v. Phlegar*, 93 Va. 415, 25 S. E. Rep. 107.

Requisite Certainty as to Evidence.—As fraud is not presumed, but, when charged, must be strictly proven, the authorities uniformly hold that the evidence to establish an estoppel by conduct must be clear, precise and unequivocal. *Bolling v. Mayor of Petersburg*, 3 Rand. 568; *Taylor v. Cussen*, 90 Va. 40, 17 S. E. Rep. 721; *Vanbibber v. Beirne*, 6 W. Va. 168; *Lorentz v. Lorentz*, 14 W. Va. 809.

Statements of Opinion.—A representation, to work an estoppel, in all ordinary cases must have reference to a present or past state of things, not to a future matter or the expression of a mere intention, or opinion. *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 639. See also, *Garber v. Bresee*, 96 Va. 644, 82 S. E. Rep. 89.

Representations Inducing Conveyance of Property.—One owning or having any interest in or charge upon land, knowing that another is about to purchase it, who declares to such other person that he has no interest in the land, and that the one proposing to sell has the absolute right to the land, cannot set up any ownership, interest, or charge, then existing, hostile to the right acquired by such purchaser. *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. Rep. 874. See also, *Bodkin v. Arnold*, 45 W. Va. 90, 30 S. E. Rep. 154.

Representations Inducing Allowance of Credit.—A grantor in a deed, releasing an existing lien on land in favor of a debt to be secured by a deed of trust thereon, who recites in his deed of release that his mother has become the purchaser of a life estate in the land, and that he has acquired a lien on such life estate by virtue of having paid a part of the purchase money, therefor as surety for his mother, is estopped by the recital of his deed from asserting, as against the trust creditor, that he, and not his mother, was the purchaser of said life estate. It is immaterial that the records would show who the purchaser was. Having represented that his mother was the purchaser, and his representations having been acted on by the trust creditor, it must be taken as true. *Anderson v. Phlegar*, 93 Va. 415, 26 S. E. Rep. 107.

A. applied to B. for a loan of money upon the security of a mortgage of slaves then held by A., and B. being doubtful as to A.'s title to the slaves and apprehensive that C. had some title to them, applied to C. to know whether he had such claim, explaining his reason for the inquiry; upon which, C. informed him that he had no right to the slaves, being at the time apprised of all the facts on which his right, if any he had, depended. B. loaned the money, and took the mortgage of the slaves. *Held*, that C. cannot be allowed, in equity, to assert the right he had disclaimed against the mortgagee. *Dickenson v. Davis*, 2 Leigh 401.

The fact that a husband negotiated a loan with which to improve his wife's separate estate will not estop him from asserting the invalidity of a deed of trust, executed by her to secure the loan, on the ground that he did not join therein, where he was not guilty of any fraud or misrepresentation in negotiating the loan. *Taylor v. Cussen*, 90 Va. 40, 17 S. E. Rep. 721.

A wife is not estopped to set up a resulting trust in land, the title to which is in her husband's name, unless credit was knowingly extended to her husband because of such apparent ownership. *Standard Mercantile Co. v. Ellis* (W. Va.), 37 S. E. Rep. 598.

Representation as to Validity of Notes or Bonds.—Where the maker of a promissory note tells a prospective purchaser thereof that there is no defense to the note, he is estopped from setting up any

defense in a suit by such purchaser. *Davis v. Thomas*, 5 Leigh 1.

A wife refused to unite with her husband in a conveyance of land, unless one of the four equal purchase money bonds should be given her in lieu of dower. This being agreed to, she asked if the clause against transfer would keep her out of the money. She was told in the vendee's presence, and with his acquiescence, that it would not, and that the other bonds were ample to pay all liens and leave her the bond. Thus assured, she executed the conveyance, and the bond was assigned to her. Afterwards, the vendee refused to pay her the bond, saying that he had used all the purchase money to pay the encumbrances, and that the bond was not transferable. *Held*, that the vendee was estopped from making such defense. *Nicholas v. Austin*, 82 Va. 817, 1 S. E. Rep. 122.

Where, after notice of assignment, the debtor expressly or impliedly promises to pay the debt, he is estopped from setting up any defense against the assignor. *Feazle v. Dillard*, 5 Leigh 80. Mere silence will not operate such estoppel. *Stebbins v. Bruce*, 80 Va. 389.

2. Acquiescence, Silence and Negligence.

a. In General.—"Silence, where it is so intended, or where it has that effect, to mislead a party, to his disadvantage, and to the other party's advantage, is an equitable estoppel; and passive acquiescence estops equally with active interference. He who is silent when conscience requires him to speak shall be debarred from speaking when conscience requires him to be silent." *Nicholas v. Austin*, 82 Va. 824, 1 S. E. Rep. 122; *Anderson v. Phlegar*, 93 Va. 415, 26 S. E. Rep. 107.

Silent acquiescence, misleading a party to his disadvantage, works an equitable estoppel. *Nicholas v. Austin*, 82 Va. 817, 1 S. E. Rep. 122.

Even where the evidence is sufficient to establish fraud on the part of the vendor, the vendees may be estopped by their acquiescence, by the lapse of time and other circumstances from setting up such defence. *Smith v. Henkel*, 81 Va. 524.

When a party, with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all material circumstances of the case, freely and advisedly does anything which amounts to the recognition of a transaction, or acts in a manner inconsistent with its repudiation, or freely and advisedly abstains for a considerable length of time from impeaching it, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity. *Mann v. Peck*, 45 W. Va. 18, 30 S. E. Rep. 206.

Failure to Assert Title or Right.—Where a father purchases a tract of land in the name of his son, and in the written contract the vendor is required upon the payment of the purchase money to convey the land to the son, and the father pays the purchase price, the son is not estopped to compel conveyance to himself by the fact that he was silent as to his claim for many years, during which time he occupied the land under a deed of trust to his wife and children. *Lorentz v. Lorentz*, 14 W. Va. 809.

The owner of land is not estopped to claim title thereto by the fact that he kept silence while his title was disparaged in his presence, the disparaging remarks not being addressed to him. *Fry v. Stowers*, 92 Va. 13, 23 S. E. Rep. 509.

b. Permitting Sale of Property.—If the owner of real estate, whether he has the legal title in him or not, permit such real estate to be sold, in his pres-

ence, by one who claims he has full power and authority to dispose of the same, it thereby becomes his duty to assert his claim then, and if he does not, but stands by and permits an innocent purchaser to buy such land, he is estopped thereafter from claiming such land of such innocent purchaser on the ground that the person of whom he purchased had no authority to sell such land. *Stone v. Tyree*, 80 W. Va. 687, 5 S. E. Rep. 878; *Engle v. Burns*, 5 Call 463.

A purchaser at a judicial sale becomes a *quasi* party to the suit. If he stands silent and suffers to be confirmed, without objection, the sale to himself, and also a sale to another, and makes no complaint until the land last referred to has been conveyed for value to a third party, he is not entitled to be heard asking for the correction of an alleged mistake; certainly he would be estopped *quoad* such third party. *Shirley v. Rice*, 79 Va. 442.

Where land is sold at public auction, and a third person makes a declaration in the hearing of the vendor and the bidders, that he is agent for persons having a claim to part of the land, but that an agreement has been made between him and the vendor, by which the purchaser shall not be injured by the conflicting claims, and the vendor remains silent, he shall be bound by such declaration. *Allen v. Winston*, 1 Rand. 65.

By articles of agreement under seal, S. sold to H. a lot of land of which, at the time, H. was in possession as tenant of S. Sometime afterwards, H. informed S. that he could not pay for the lot but that P. was willing to take it at the same price. S. thereupon, with the consent and at the request of H., conveyed the lot to P. *Held*, that the sale to P. having been at the instance of H. and with his concurrence, even if the contract could not be rescinded by a subsequent parol agreement, H. would be estopped in equity, by his own acts, from setting up the written contract. *Phelps v. Seely*, 22 Gratt. 573.

c. Permitting Improvements or Expenditures.—Where a party, who claims to be the owner of a tract of land has notice of the fact that a railroad company is excavating a tunnel through a mountain located on said land, under claim of title thereto, remains silent as to his ownership of the land, with full knowledge of his right, and assists in the construction of said tunnel from its commencement until its completion, and the railroad is constructed through the same, without asserting any claim to the land through which the tunnel passes, and then institutes an action for damages against the railroad company for taking his land, he will be estopped from recovering in said action, and may be enjoined from further prosecuting such action for damages. *Norfolk & W. R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. Rep. 755. See also, *Tufts v. Copen*, 37 W. Va. 623, 16 S. E. Rep. 793.

If one claiming sole right to another's land spends money in improving or operating upon it, though ignorant of that other's right, the mere silence of that other will not estop him from asserting his title. He need not seek the other to tell him of his right, or speak at all, unless placed in such a situation as calls upon him to declare his right. *Williamson v. Jones*, 43 W. Va. 562, 37 S. E. Rep. 411.

Where land has been reserved and "dedicated" to some public, charitable or pious use, an estoppel arises precluding the owner from revoking the dedication; especially is such dedication irrevoca-

ble where it was created by agreement. *Benn v. Hatcher*, 81 Va. 25.

Where property in a town is set apart for public use, and is enjoyed as such, and private and public rights are acquired with reference to it, and to its enjoyment, the law presumes an acceptance on the part of the public as will operate an estoppel *in pais*, and preclude the owner from revoking the dedication. *Harris v. Com.*, 20 Gratt. 833. See, *infra*, Estoppel in Contracts of Municipal Corporations.

d. Assent to or Ratification of Acts of Others.—A party having an option to purchase the timber growing upon a tract of land, which is not limited as to time by his agreement, may by his own acts and by acquiescence in the acts of another in cutting and removing such timber, and by assisting in the removal of the same, pointing out the timber to the men engaged in cutting it, and raising no objection to the disposal of such timber by the party asserting an adverse claim thereto, estop himself from asserting any claim under his option. *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. Rep. 536.

Where a vendee, knowing that the contract cannot immediately be carried out by the vendor, and that it is a nullity as to him, goes on for years acting as if it were a valid contract, he is estopped to deny the validity thereof. *Dodson v. Hays*, 29 W. Va. 577, 2 S. E. Rep. 415.

Where the terms of a contract were not clear as to whether royalties on ore were to be computed when the ore was wet or dry, the acceptance by the mine owner for seven years of settlement on a dry weight, with full knowledge of the facts, estops him to claim a different construction. *American Manganese Co. v. Virginia Manganese Co.*, 91 Va. 273, 21 S. E. Rep. 466.

Executor Borrowing Money—Acquiescence of Legatees.—An executor borrowed money of his wife to pay the debts of the estate. The testator's widow urged the wife to loan the money, and the widow, the executor, and his wife all understood that the wife should be reimbursed from the estate. A legatee testified that there had been frequent family conferences between the legatees, and that it was agreed to borrow money to pay the estate debts, but other legatees testified that they had heard the matter spoken of, but only in a general way. *Held*, not sufficient to show an acquiescence of the legatees which would estop them from objecting to the payment of the money so loaned. *Robertson v. Breckinridge*, 98 Va. 569, 37 S. E. Rep. 8.

e. Assent to or Participation in Judicial Proceedings.—Where a court, having jurisdiction of plaintiffs' ancestor's estate and person, orders sale of latter's property to satisfy his indebtedness, and the record shows that plaintiffs appeared and were made parties, and that they acquiesced in the sale and took no steps to avoid it for thirteen years, knowing that the purchasers had sold property, such plaintiffs cannot annul the sale on the ground that they were never summoned or appeared in the cause; and where it appears that the attorney for plaintiffs' ancestor was authorized to represent him in such suit, and that plaintiffs were aware of such facts and did not, after their ancestor's death, revoke or question his authority pending said suit, such plaintiffs, after such sale has been made, are estopped from denying the said attorney's authority to represent them in said suit. *Marrow v. Brinkley*, 85 Va. 55, 6 S. E. Rep. 606. See also, *Robertson v. Tapscott*, 81 Va. 533, where a person was held to be estopped to

deny that he was the purchaser at a judicial sale, after his acquiescence in the proceedings treating him as such.

A creditor agreed to accept less than the amount due from his debtors in satisfaction of his debt. He then assigned the entire debt. Of this assignment the debtors had notice. They permitted a decree to be entered against them for the entire debt. *Held*, that the debtors are estopped from falling back upon the compromise and release. *Smith v. Chilton*, 84 Va. 840, 6 S. E. Rep. 142.

Although an appeal once allowed cannot be regularly dismissed from the appellate court except in the mode prescribed by the statute, the party obtaining it may, by his express consent, or by acts indicating such consent, estop himself from objecting the pendency thereof, and may by such acts or consent with the concurrence of the adverse party, restore the jurisdiction of the court below. *Fairfax v. Muse*, 4 Munf. 124.

Although the answer of an infant defendant over fourteen years of age to a bill for the sale of lands in which she has an interest was in fact neither signed nor sworn to by her, yet where the record shows an answer both signed and sworn to by her, and she has full knowledge of all the proceedings in the suit for the sale of the lands, and fully consents to a decree for the sale, and is regularly proceeded against as an infant on the record, and the sale is not made until eighteen months after she becomes of age, and she makes no objection to a confirmation of the sale, of which she has full knowledge, and about which she is consulted, such infant will thereafter be estopped from setting up against a *bona fide* purchaser of said land for value the fact that she had not signed and sworn to her answer. *Lancaster v. Barton*, 92 Va. 616, 24 S. E. Rep. 261.

A party may be concluded by his acquiescence in a decree affecting his rights made in the progress of the cause, under which decree he takes a part of the fund affected by it, and makes no objection to it until after the final decree in the cause made twenty-two years after it. *Burton v. Brown*, 23 Gratt. 1.

The mere lapse of ten years will not estop a party to a pending suit from filing a petition to rehear an interlocutory decree in the suit. *Todd v. McFall*, 96 Va. 754, 33 S. E. Rep. 472.

Where a suit in equity is brought in the names of several heirs, all having the same interest, if one of them is dead at the time the suit is brought in his name, and his heirs, or their agent, are conversant of the fact that the suit is so brought, and make no objection, but intend to claim the benefit of the decree, they will be bound by the decree dismissing the bill. *Doggett v. Helm*, 17 Gratt. 96.

1. Acceptance of Benefits.—In June, 1866, a hotel company borrowed \$10,000 to complete their building, which sum was secured by a deed of trust on the property. Afterwards they employed W., a builder, to complete the building, contracting to give him a deed of trust upon it, subject to the first lien, to secure any balance due him on its completion. The company, out of the money borrowed, paid W. \$8,000, and when the work was completed there was due him \$5,791.50. He had recorded the contract to secure the mechanic's lien, and on the 1st of January, 1867 the company conveyed the property, subject to the lien of the first deed, in trust to secure said balance. *Held*, that W. was estopped from claiming against the deed of trust executed to secure

the return of the money loaned. *Wroten v. Armat*, 31 Gratt. 228.

A party who leases the river bank in front of his land to another for the use of a boom to be operated in the river opposite said land, and who, after the boom is constructed, receives rent, year after year, from the boom company for said land without protest, is estopped from objecting to the manner in which the boom is constructed. *Rogers v. Coal River Boom & Driving Co.*, 39 W. Va. 272, 19 S. E. Rep. 401. See *Miller v. Hare*, 48 W. Va. 647, 28 S. E. Rep. 722.

About a year before his death, a father put each of his four children into possession of a tract of land, but did not convey it. By his will he gave each child the property in his or her possession. In a codicil to his will he stated that he was the guardian of his children and required that each of them should execute a receipt for all claims against him as guardian before they should be entitled to receive their portion under the will. The children continued in possession of said property for a number of years, but did not give the required receipt. *Held*, that they were estopped to demand a settlement of their guardian's accounts. *Lewis v. Overby*, 31 Gratt. 601.

A legatee who is also heir of the testator is not estopped by accepting payment of the legacy from attacking the validity of the residuary clause of the will, when the provisions of the will are such as neither require an election on his part, nor amount to a condition annexed to the legacy. *Fifield v. Van Wyck*, 94 Va. 557, 27 S. E. Rep. 446. As to estoppel of a beneficiary under a will to question act of testator, see *Hughes v. Wilson* (Va.), 24 S. E. Rep. 240.

An injunction was obtained by a ferry owner restraining a bridge company from operating a toll bridge near his ferry until damages should be ascertained and paid. While the injunction was in force, the company, in consideration of the ferry owner dismissing his injunction, agreed to pay him a *per diem* until the damages were ascertained and paid. The decree fixing the damages directed that the company should either pay the damages and let the injunction be dissolved, or refuse to pay them and not use the bridge. The damages were not paid, but, under the aforesaid agreement, the bridge was kept open and the *per diem* paid until after notice by the ferry owner informing the company of the decree, and stating that it must elect to pay the damages or close the bridge. Some time thereafter, the company closed the bridge, and refused longer to pay the *per diem*. *Held*, that the notice did not estop the ferry owner to sue for the *per diem* after the company closed the bridge, and until it paid the damages. *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 639.

A Party Who Has Enjoyed the Benefit of a Bond Cannot Question Its Validity.—Where a forthcoming bond has been voluntarily entered into, and the party executing the same has enjoyed the benefit of said bond by retaining in his possession the property levied upon under a distress warrant, he cannot, in an action of debt on the bond, declare that it was invalid. *Hall v. Wadsworth*, 35 W. Va. 375, 14 S. E. Rep. 4.

Guardian De Facto Estopped to Deny Guardianship.—Where a guardian *de facto* receives the money of an infant and used it, he is estopped to deny that he received it as guardian. *Martin v. Fielder*, 32 Va. 455.

Agreement to Waive Statute of Limitations.—If an

heir, in consideration of concessions made him by the other heirs and administratrix, agree not to object to payment by her of just claims presented by another heir, though barred by the statute of limitations, he will be estopped from excepting to her account on the ground that she improperly paid them. *Radford v. Fowkes*, 85 Va. 820, 8 S. E. Rep. 817.

Agreement to Accept Payment in Confederate Money.—A judgment creditor agreed to accept payment of his debt in Confederate money, so as to enable his debtor to sell his land, extinguish the lien thereon and make a good title to the purchaser. The debtor immediately sold and conveyed his land, accepting such depreciated currency in payment therefor. *Held*, that the agreement was binding on the creditor. *Poague v. Spriggs*, 21 Gratt. 230.

Estoppel to Question Validity of Act by One Accepting Benefits Thereunder.—No irrevocable privilege is acquirable under act March 4th, 1884, § 6, as the right of revocation is expressly therein reserved to the legislature. Whether said act be constitutional or not, a party, who has taken the benefit thereof and claimed under it in his bill, is estopped from contesting its validity. *Purcell v. Conrad*, 84 Va. 557, 5 S. E. Rep. 545.

A county court laid the county levy and directed the sheriff to pay certain claims upon the county out of it, and the sheriff, having received the commissioner's books, collected the levy as far as possible, and returned a list of insolvents. Upon a motion by one of the creditors of the county, whose claim was directed to be paid out of the levy, against the sheriff and his sureties to recover the amount, it was held that the defendants could not object that the county court was not legally constituted to be authorized to pay the levy when it was done; nor that the commissioner's book was irregularly made out, and not properly authenticated. *Cook v. Hays*, 9 Gratt. 142.

g. Where Surety in Bond Estopped to Set Up Defence.—Where the official bond of an executor was made payable to four justices, one of whom was not a member of the court at the time, the surety having executed the bond is estopped from pleading that it is not his bond because so executed. *Franklin v. Depriest*, 18 Gratt. 257.

Where an injunction bond has been signed, sealed and acknowledged by the obligors in the presence of the court, and has been accepted and acted on as their bond, the obligors are estopped to deny that the penalty of the bond conforms to the direction of the judge who awarded the injunction. *Harman v. Howe*, 27 Gratt. 676. See *Wray v. Davenport*, 79 Va. 19.

The record of the county court states that F, a sheriff who had been required to give a new bond, "this day appeared in court and executed and acknowledged such new bond, and the security thereto being considered sufficient by the court, the same is ordered to be certified." In the absence of fraud, this record is conclusive that the bond was properly executed; and evidence will not be admitted to contradict it. *Vaughn v. Com.*, 17 Gratt. 386. See also, *Calwell v. Com.*, 17 Gratt. 391.

Upon a motion by a high sheriff against a deputy and his sureties, they file a special plea; and the plaintiff replies specially, and relies on the facts therein stated and especially on the bond as an estoppel; though the replication has not the peculiar commencement and conclusion of a pleading by way of estoppel. *Held*, that a demurrer to the

replication should not be sustained. *Cecil v. Early*, 10 Gratt. 198.

3. The Intent or Design.—In order to create an equitable estoppel, or an estoppel based on a party's conduct, it must be shown by the party claiming the benefit of the estoppel that he was ignorant of the truth in regard to the misrepresentations made, and that he was permissibly ignorant thereof. Furthermore, the representation made must have been made with the intention, either actually or reasonably to be inferred by the person to whom it was made, that it should be acted on. In the case in judgment neither of these requisites exists, and the appellant is not estopped to set up her vendor's lien as against the appellees. The amount due the appellant was a part of the original purchase price of land for which a vendor's lien was reserved. It has never been paid, and the conduct of the appellant has not been such as to estop her from asserting her lien. *Jordan v. Buena Vista Co.*, 95 Va. 285, 28 S. E. Rep. 321, 8 Va. Law Reg. 835.

Abandonment of easements by matters *in pais* is founded upon the doctrine of estoppel, but to establish such estoppel it is necessary that the representation or conduct relied upon as such should have been intended to influence the other party to act; and, if there was no such intention, the estoppel is not made out. *Scott v. Moore*, 98 Va. 608, 27 S. E. Rep. 242.

4. Knowledge of Facts or Title.—It may be stated as a general rule that it is essential to the application of the principle of equitable estoppel that the party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the state of the facts, but was also destitute of any convenient and available means of acquiring such knowledge; and that, where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel. *Taylor v. Cuseen*, 90 Va. 40, 17 S. E. Rep. 721. See *Jordan v. Buena Vista Co.*, 95 Va. 285, 28 S. E. Rep. 321.

Actual notice of the truth of facts represented or concealed is not necessary to an equitable estoppel. *Mercantile Co-Operative Bank v. Brown*, 96 Va. 614, 23 S. E. Rep. 64.

It is the duty of a purchaser of real estate to look to the title papers under which he buys. He is charged with notice of all that the records disclose affecting his title, and also of all to which the knowledge there acquired would have led him. Means of knowledge with the duty of using them, are, in equity, equivalent to knowledge itself. In the absence of fraud or deception, where the same means and opportunities of tracing the title to real estate are equally open to both parties, the doctrine of equitable estoppel does not apply. *Jameson v. Rixey*, 94 Va. 342, 26 S. E. Rep. 861.

One of the requisites necessary to create an equitable estoppel, or an estoppel based upon a party's conduct, is that the party who claims the benefit of the estoppel must show that he was ignorant of the truth in regard to the misrepresentation made; and must have been permissibly ignorant thereof. *Jordan v. Buena Vista Co.*, 95 Va. 285, 28 S. E. Rep. 321.

If a purchaser has knowledge of any fact or circumstances sufficient to put him upon enquiry as to the existence of some right or title in conflict with that which he is about to purchase, and makes the enquiry suggested by such fact or circumstances, and anything detrimental to the

right he is about to acquire is concealed or withheld from him, he cannot afterwards be charged with notice of it, or be affected by an undisclosed encumbrance or latent equity. In the case in judgment the vendor of real estate who had not conveyed the legal title, also held an unrecorded deed of trust from his vendee on the same land for money advanced to him. Upon enquiry by a proposed purchaser as to what was necessary for the vendee to do to acquire title he disclosed the balance of purchase money due but said nothing about the unrecorded deed of trust. Under these circumstances the vendor is estopped to assert his deed of trust against the purchaser from the vendee. *Kelly v. Fairmount Land Co.*, 97 Va. 237, 33 S. E. Rep. 598.

A vendor, who has contracted to deliver a good and sufficient deed to land, and who knows that he has not the legal title thereto, and cannot make such deed, cannot complain of the failure of the vendee to notify him of objections thereto. He cannot deny knowledge of the condition of his own title. *Newberry v. French*, 98 Va. 479, 36 S. E. Rep. 519, 6 Va. Law Reg. 352.

The mistaken view of a testatrix that her marriage subsequent to the execution of her will was not a revocation thereof, does not estop her heirs from claiming that the will was revoked under Va. Code, § 2517. *Hale v. Hale*, 90 Va. 723, 19 S. E. Rep. 739.

The complainants in a suit to cancel a lease on the ground of fraud promised to dismiss their suit in consideration of an order for \$50. The suit, however, was not dismissed, but was merely continued to the next term. And the order for \$50 was not presented or paid, but was returned unpaid; and thus the agreement was not executed. *Held*, that the complainants were not estopped by such agreement from prosecuting their claim, although one of the defendants had expended money relying on the information that the suit had been settled, it not appearing that his information as to the dismissal of the suit came from the complainants, since, having notice of the existence of the suit, he was bound to know its termination. *Rorer Iron Co. v. Trout*, 88 Va. 397, 2 S. E. Rep. 713, 5 Am. St. Rep. 235.

A sale of land to satisfy judgments was confirmed, half the purchase money paid, and a writ of possession awarded. Two sons of the former owner, 15 months after the sale, filed a bill, claiming portions of the land under oral contracts with their father, accompanied by full payment and possession, and conveyances made during the proceedings under which the sale was made. The only direct testimony proving the sale was complainants' own, which was materially contradicted by written evidence. They pretended to have paid a portion of the money to the assignee in bankruptcy of their father, but neither the assignee's nor the father's testimony was taken. One of the sons was a defendant to the suits in which the sale was had, and present at the sale, but never set up any claim to the land, and the father admitted ownership in his answer. Both complainants were in the vicinity pending these proceedings, and must have known of them. *Held*, that this evidence would not sustain the bill. *McGee v. Johnson*, 85 Va. 161, 7 S. E. Rep. 374.

g. Reliance upon Act or Representation.—No concealment or misrepresentation can have the effect of barring the rights of a party, unless another person is thereby induced to part with his money, or unless it be so gross as to amount to fraud. *Stuart v. Laddington*, 1 Rand. 403, 10 Am. Dec. 550. See

Repass v. Richmond (decided June 27, 1901), 99 Va. —.

To bind one by estoppel *in pais* from statement or conduct, he must have stated, or led another to believe in, something as a fact, and that other must be ignorant of the contrary, and must rely on it, and act to his injury differently from what he would have done but for such statement or conduct. *Bettman v. Harness*, 43 W. Va. 433, 26 S. E. Rep. 371.

The mere statement of an appellant to an appellee that he did not intend to or would not appeal does not prevent an appeal, unless there was a consideration for the statement, or the appellee has acted on it to his prejudice. *Southern Ry. Co. v. Glenn*, 98 Va. 309, 36 S. E. Rep. 395, 6 Va. Law Reg. 223.

C. Acceptance of Conveyance or Possession.

Estoppel to Deny Title from Common Source.—Where the plaintiff and defendant claim title from the same source, neither can question its validity. *Bolling v. Teel*, 76 Va. 437.

Estoppel of Tenant to Deny Landlord's Title.—In an action by a landlord against his tenant, whether the action be debt, assumpsit, covenant, or unlawful detainer, where neither fraud nor mistake is shown in the procurement of the lease, no proof of title is required by the landlord, for in such case the tenant is estopped from denying the title of his landlord. *Voss v. King*, 88 W. Va. 607, 18 S. E. Rep. 763.

Where a person claiming title to land takes a lease of the same land under a different title, in the absence of fraud or mistake, he is estopped to deny his landlord's title or possession. *Bodkin v. Arnold*, 45 W. Va. 90, 30 S. E. Rep. 154.

The general rule that a tenant cannot deny his landlord's title is not affected by the fact that the tenant is in actual possession under a contract of purchase at the time he accepts the lease. *Jordan v. Katz*, 89 Va. 623, 16 S. E. Rep. 866; *Locke v. Fraisher*, 79 Va. 409; *Emerick v. Tavener*, 9 Gratt. 320, 58 Am. Dec. 217.

Estoppel of Trustee to Deny Title of Beneficiary.—The acceptance of a trust estops the trustee to deny the title of his beneficiary. *Morris v. Morris* (W. Va.), 37 S. E. Rep. 570.

D. Estoppel in Insurance Contracts.—Where an insurance company clothes a person with apparent authority to deliver policies and receive premiums, it is estopped, after the policy is delivered to an innocent holder, to set up the defence that the agent acted without written authority. *Wytheville Ins., etc., Co. v. Teiger*, 90 Va. 277, 18 S. E. Rep. 195. As to the liability of insurer for acts of agents and their clerks, see *Goode v. Ga. Home Ins. Co.*, 92 Va. 392, 23 S. E. Rep. 744. As to estoppel of executor of insured to deny right of insurance company to indemnify itself against judgments recovered against him as garnishee, from the amount of the policy, see *Spooner v. Hillbush*, 92 Va. 333, 23 S. E. Rep. 751. As to estoppel in insurance contracts, see generally, monographic note on "Insurance" appended to *Mutual, etc., Soc. v. Holt*, 29 Gratt. 612; *McLean v. Piedmont, etc., Life Ins. Co.*, 29 Gratt. 361.

When Knowledge of Agent Binds Company.—Where the agent of an insurance company knows the real condition of the risk, his knowledge is imputable to the principal and estops him from setting up any warranty inconsistent therewith. *Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. Rep. 437; *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575; *Wytheville Ins. Co. v. Stultz*, 87 Va. 639, 13 S. E. Rep. 77; *Manhattan Fire Ins. Co. v. Weill*, 28 Gratt. 389. See *Woody v. Old Dominion Ins. Co.*, 31 Gratt. 333. See espe-

cially, monographic *note* on "Insurance" appended to *Assurance Society v. Holt*, 29 Gratt. 612.

Facts relating to the risk, communicated to the agent of an insurance company before or at the time of issuing the policy, bind the company, whether communicated to it by such agent or not, unless it is shown that special limitations on the powers of the agent were known to the assured. *Mutual Fire Ins. Co. v. Ward*, 95 Va. 231, 28 S. E. Rep. 209; *Farmers', etc., Ins. Ass'n v. Williams*, 95 Va. 248, 28 S. E. Rep. 214. See also, *McCall v. Ins. Co.*, 9 W. Va. 237.

Where the company's agent inspected the property, was as well informed as to its cost as the insured, and concurred in her estimate and inserted it in the application, the company is estopped to set up that the insured exaggerated the cost of the property. *Va. F. & M. Ins. Co. v. Saunders*, 86 Va. 900, 11 S. E. Rep. 794.

Where an incumbrance on the property was mentioned to the agent of an insurance company at the time of the application, and he informed the insured that it was too small to note in the application, the company is estopped to set up such incumbrance as a defense to an action on the policy. *Georgia Home Ins. Co. v. Goode*, 95 Va. 751, 30 S. E. Rep. 366.

Notwithstanding the provision in an insurance policy which avoids the policy if there be "other insurance" on the property, unless it be made known to the company and endorsed on the policy or otherwise acknowledged in writing, if the existence of such "other insurance" was communicated to a general agent of the company, the company is estopped to enforce the forfeiture, although the agent may have neglected to communicate his knowledge to the company, and the company was in ignorance of the fact at the time the policy was issued, unless the limitation upon the agent's powers was in some way brought home to the assured. *Mutual Fire Ins. Co. v. Ward*, 95 Va. 231, 28 S. E. Rep. 209.

Waiver of Condition.—Conditions inserted in policies of fire insurance for the benefit of insurers may be waived by them, and so may forfeitures incurred, and such waiver may be in writing, or by parol, or by the acts, declarations, or course of dealing by the insurer with the knowledge of the facts constituting the breach, and when so waived the insurer will be estopped from setting up such conditions or forfeitures as defence, when sued for subsequent loss. *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88; *Morotock Ins. Co. v. Pankey*, 91 Va. 250, 21 S. E. Rep. 487.

Where a policy provides for suit within six months after loss, and there is a promise within such time to pay the policy, it is a waiver of the limitation and estops the company from pleading it. *Galloway v. Standard Fire Ins. Co.*, 45 W. Va. 237, 31 S. E. Rep. 909. As to waiver of defects or informalities in the notice and proof of loss, see especially, monographic *note* on "Insurance" appended to *Mutual Assur. Soc. v. Holt*, 29 Gratt. 612.

Payment of Premiums and Assessments.—In an action on a policy in a mutual life insurance company, which, according to its terms, has become forfeited, by reason of failure to pay assessments, if the plaintiff relies upon a waiver of such forfeiture, or upon an estoppel to assert it, it is not sufficient, in order to overcome such forfeiture, to show former indulgence to the insured, when it appears that he knew when his assessments fell due that

his policy stood forfeited for failure to pay, and that his restoration to membership was granted as a favor to him, upon a proper certificate of unimpaired health; nor is it sufficient to show former indulgence to other members of which plaintiff's intestate had no knowledge. *Easley v. Valley Mut. L. Ass'n*, 91 Va. 161, 21 S. E. Rep. 235.

Where a policy of insurance has not been delivered, and the blank in the application for the amount of the premium has not been filled, there is no such acknowledgment of the receipt of the premium as will estop the company from showing by parol evidence that the premium has not been paid, or the payment waived. *Mutual Life Ins. Co. v. Oliver*, 95 Va. 445, 28 S. E. Rep. 594.

Instructions.—It is not error to refuse to give instructions offered, where those given by the court clearly and plainly announce the law. And, in a motion on policy of insurance to recover for the loss of property destroyed by fire, it is not error to so instruct the jury as to permit them to take into consideration all the dealings of the parties, the knowledge of the insurer of the character of the property and its use, both at the time of the issuance of the policy and afterwards, so as to enable them to determine whether or not the insurer became estopped from setting up the breach of the contract relied on as a defense. *Morotock Ins. Co. v. Pankey*, 91 Va. 250, 21 S. E. Rep. 487.

Pleading and Evidence.—Estoppel may be given in evidence by the plaintiff only when the defense is the general issue. When defense is by special plea, matter of estoppel must be set up in special replication. *Hayes v. Va. Mutual Protection Ass'n*, 76 Va. 225.

Where Parol Evidence Admissible.—Where the agent in preparing the application or policy fails to follow the correct descriptions of the assured, or where he uses his superior knowledge to mislead the assured as to the true import of the contract, parol evidence is admissible, not to contradict the writing, but to prevent its use as equitable estoppel. *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575.

In actions upon insurance policies it is permissible to show by parol evidence that representations, as written in the application for the insurance, ought not to be used against the assured upon the ground of equitable estoppel. *Va. F. & M. Ins. Co. v. Goode*, 95 Va. 752, 30 S. E. Rep. 370.

E. Estoppel in Contracts of Agency.—A person accepting the benefits of a contract procured by false representations cannot repudiate the agency of the person procuring the contract. *Owens v. Boyd Land, etc., Co.*, 95 Va. 560, 28 S. E. Rep. 950.

As between principal and his agent, a traveling salesman, if a current account be rendered, and the agent receiving it retains it beyond such time as is reasonable, under the circumstances, and according to the usage of the business, for examining and returning it, without communicating any objections, he is considered to acquiesce in its correctness, and he becomes bound by it as an account stated. On the contrary, if, within such reasonable time, he calls on the other party to explain it, or objects to such account, he is not so bound. *Shrewsbury v. Tufts*, 41 W. Va. 212, 23 S. E. Rep. 692.

If an agent notifies his principal of unauthorized acts committed by himself, the principal, to escape responsibility therefor, must promptly repudiate the same before the rights of third parties are affected; otherwise, he will be estopped to deny

that such acts of such agent were authorized. *Dewing v. Hutton* (W. Va.), 37 S. E. Rep. 670.

A principal who holds a lien on real estate which has been purchased by one who has assumed the payment of the lien is not bound by the undisclosed statements of an agent, acting beyond the scope of his agency, made to such purchaser before his purchase, as to the amount of the balance due on the lien, and, in a suit by the purchaser against the principal, to enjoin the enforcement of the lien, a mere prayer in the answer of the principal for a personal decree against the purchaser for any balance that may remain after exhausting the real estate, does not operate by estoppel or otherwise to prevent the principal from denying the agency. *Day v. Building Association*, 96 Va. 484, 31 S. E. Rep. 902.

As to estoppel in contracts of agency, see generally, monographic *note* on "Agencies" appended to *Silliman v. Fredericksburg, etc.*, R. Co., 27 Gratt. 119.

F. Estoppel in Partnership Contracts.—Where partners make a valid settlement of their partnership transactions, they are concluded by such settlement as to any matters embraced therein. *Foster v. Rison*, 17 Gratt. 331. See generally, monographic *note* on "Partnerships."

G. Estoppel in Contracts of Municipal Corporations.—The agents, officers, or governing body of a municipal corporation or a county, cannot bind the corporation or county by a contract which is beyond the scope of its powers. Such contracts are *ultra vires* and void, and, in actions thereon, the want of power to execute is a complete defense, and the county or corporation is not estopped from setting it up. *Alleghany v. Parrish*, 98 Va. 615, 25 S. E. Rep. 882. See generally, monographic *note* on "Municipal Corporations" appended to *Danville v. Pace*, 25 Gratt. 1.

The books kept by the treasurer are conclusive evidence of the balance actually in the treasury at any given time, both against the treasurer, and his sureties, without being pleaded as an estoppel. *Baker v. Preston, Gilmer* 235.

The fact that a suit to enjoin the collection of municipal taxes is brought against a town, on the ground that it has forfeited its charter, does not admit that the charter is not forfeited. *Hornbrook v. Town of Elm Grove*, 40 W. Va. 543, 31 S. E. Rep. 851.

Dedication to the Public—Estoppel to Deny.—Where property in a town is set apart for public use, and is enjoyed as such, and private and public rights are acquired with reference to it and to its enjoyment, the law presumes an acceptance as will operate as an estoppel *in pais*, and preclude the owner from revoking the dedication. *Harris v. Com.*, 30 Gratt. 883; *Richmond v. Stokes*, 31 Gratt. 713; *Buntin v. Danville*, 98 Va. 200, 24 S. E. Rep. 530; *Norfolk v. Nottingham*, 96 Va. 24, 30 S. E. Rep. 444; *Ralston v. Town of Weston*, 46 W. Va. 544, 33 S. E. Rep. 226; see monographic *note* on "Municipal Corporations" appended to *Danville v. Pace*, 25 Gratt. 1. See also, *Benn v. Hatcher*, 31 Va. 25.

H. Estoppel in Contracts of Private Corporations.—A corporation may contract with one of its stockholders as with a stranger. There is nothing in the mere relation of stockholder to a corporation which will estop the stockholder from asserting any claim against the corporation which he might, under similar circumstances, assert against an

individual. *Biggs v. Elliston*, 93 Va. 404, 25 S. E. Rep. 113.

Where a vendor's lien exists on the real estate of a corporation, represented by a past due note, and the stockholders agree with the creditors of the corporation, that if the latter shall give the corporation further time, the corporation will satisfy the vendor's lien, and convey its property free from liens, in trust, to secure those creditors, and one of the stockholders satisfies the lien and takes an assignment thereof to himself, he is estopped from claiming the lien as his own property, and an assignee from him without notice, if the note be past due, or an assignee from him with notice, if the note be not past due, stands in no better position than his assignor; and the trust deed lien of the creditors has precedence. *Hardy v. Norfolk Mfg. Co.*, 80 Va. 404.

To the extent of his stock, each stockholder is liable individually for the debts of the corporation. Where a stockholder pays a debt of the corporation and takes an assignment thereof to himself, he cannot revive the debt by assigning it to a third party. *Hardy v. Norfolk Mfg. Co.*, 80 Va. 404. See monographic *note* on "Stock and Stockholders" appended to *Osborne v. Osborne*, 34 Gratt. 392.

As to what judgment recovered by a corporation will operate as an estoppel to allege the previous extinction of such corporation, see *May v. State Bank of N. C.*, 3 Rob. 56.

I. Pleading and Evidence.—Matter of estoppel may be given in evidence by the plaintiff only when the defence is the general issue. When the defence is by special plea, matter of estoppel must be set up in special replication. *Davis v. Thomas*, 5 Leigh 1; *Carroll Co. v. Collier*, 23 Gratt. 302; *Hayes v. Va. Mutual Protection Ass'n*, 76 Va. 225. See also, *Despard v. County of Pleasants*, 23 W. Va. 334; *Long v. Campbell*, 37 W. Va. 665, 17 S. E. Rep. 197.

Waiver of Errors and Objections.—A submission to arbitration is a waiver of objections to previous proceedings in the cause. *Ligon v. Ford*, 5 Munf. 10.

Where a decree is entered for less than the party claims, receiving payment of the sum so decreed is not a waiver of errors, nor does it estop him from appealing from the decree as to sums not allowed. *Southern Ry. Co. v. Glenn*, 98 Va. 309, 36 S. E. Rep. 395, 6 Va. Law Reg. 222.

In an action of debt on a bond, the defendant pleaded that the bond was obtained by false suggestions and representations by the plaintiff "as per preamble in the said bond." The plaintiff joined issue as to the fact, which issue was found against him by the jury. *Held*, that the plaintiff, by joining issue and not demurring, had waived any estoppel which he might have had to such plea. *Chew v. Moffett*, 6 Munf. 120.

A decree was entered in favor of the plaintiff for less than he claimed, and the defendant procured a suspension of the decree with a view to appeal. Before the appeal was had, the plaintiff accepted from the defendant satisfaction of the decree, but without any agreement as to the appeal. *Held*, that the acceptance of such satisfaction was not a release or waiver of errors by the plaintiff, and did not estop him from appealing from the decree. *Morriss v. Garland*, 78 Va. 215.

When Parol Evidence Admissible.—Where the purchaser of a single bill claims that, before purchasing the same, he informed the maker of his intention, and such maker replied it was all right,

and that he would as soon pay him as the original payee, which is denied by the maker, such claim must be sustained by a preponderance of testimony to constitute an estoppel. *Heavner v. Morgan*, 41 W. Va. 428, 28 S. E. Rep. 874.

Parol evidence to establish a case of equitable estoppel, and upon that to recover in ejectment, is inadmissible. *Suttle v. R. F. & P. R. Co.*, 76 Va. 284.

A party to instruments in writing, in the absence of all pretence of fraud, is estopped from proving that he did not read the instruments before executing them, and thus by parol obviate the effect of written evidence. *So. Mut. Ins. Co. v. Yates*, 28 Gratt. 585; *Ware v. Starkey*, 80 Va. 192.

Where legal title is vested in a person, no mere parol disclaimer can divest that title. A disclaimer of a freehold can only be by deed or in a court of record. *Suttle v. R. F. & P. R. Co.*, 76 Va. 284; *Bryan v. Hyre*, 1 Rob. 94.

V. INCONSISTENT POSITIONS.

A. Effect in Same Proceedings.—A party cannot assume successive positions in the course of a suit or series of suits in reference to the same fact or state of facts which are inconsistent with each other and mutually contradictory. Having assumed one position, he and his privies are thereafter estopped from assuming a conflicting position touching the same subject-matter. In the case at bar, those under whom the defendant in error claims having heretofore recovered damages for unlawfully erecting a dam, he is now estopped from recovering damages for failure to keep in repair the same dam. *C. & O. Ry. Co. v. Rison*, 99 Va. —, 37 S. E. Rep. 330, 6 Va. Law Reg. 655.

Where the defendant relies on an inquisition and judgment of the court authorizing the construction of a mill dam as the grounds of his defense, he cannot deny the ownership of the land by the applicant for the mill. *Calhoun v. Palmer*, 8 Gratt. 88.

Admissions of Statement in Pleading.—A party who files a petition in a cause praying to be admitted as a party defendant, and in his petition admits a fact, cannot thereafter, when so admitted, deny that fact in his answer to the bill. *McClanahan v. Hockman*, 96 Va. 392, 31 S. E. Rep. 516.

The fact of incorporation of a company or the existence of any other fact, cannot be called in question by a party who has alleged that fact in his pleading, or expressly admitted it in the facts agreed in the case. *National Building, etc., Ass'n v. Ashworth*, 91 Va. 706, 23 S. E. Rep. 521, 1 Va. Law Reg. 519.

Defendants in a suit in chancery who deny in their answer that they are bound by a personal decree rendered against them on a bond in a foreclosure suit in another state, cannot afterwards claim that the bond was merged in the decree the validity of which they deny. They must be held to the defenses set up in their pleadings. *Tatum v. Ballard*, 94 Va. 370, 26 S. E. Rep. 871.

Instructions.—After verdict, a party cannot avail himself of an erroneous instruction when he has asked for an instruction containing the same error. After inviting the court to commit error, he cannot have the verdict set aside for the error into which the court has been thus misled. *Richmond Traction Co. v. Hildebrand*, 96 Va. 22, 34 S. E. Rep. 888; *Home Ins. Co. v. Sibert*, 96 Va. 408, 31 S. E. Rep. 519; *Kimball v. Friend*, 96 Va. 125, 27 S. E. Rep. 901.

B. Effect on Appeal.—Where an instruction has been asked for by a party, and is modified by the

court so as to confirm exactly to another instruction asked for by such party and given by the court, he cannot be heard in the appellate court to object to the modification which thus conforms to what he has asked for and obtained. *B. & O. R. Co. v. Few*, 94 Va. 82, 26 S. E. Rep. 406.

One is estopped to deny in appellate court that an injunction was providently awarded, or that the bond was proper in form and substance, where he has sued out and maintained the injunction for a long time, given the bond, and kept and used the property. *Wray v. Davenport*, 79 Va. 19.

C. Effect in Another Suit.—A person who relies on an adjudication as an estoppel cannot dispute the truth of a material fact upon which such adjudication is predicated. *Buford v. Adair*, 43 W. Va. 211, 27 S. E. Rep. 300.

The vendee of property sold under decree in a creditors' suit against D. had notice of a suit setting up the claim of D.'s children thereto in the right of their deceased mother. The property was deeded to such vendee, though knocked off to the insolvent, and, as he had asserted title as the actual purchaser in the children's suit, he was held to be estopped to deny that he was such purchaser. *Simpson v. Dugger*, 86 Va. 263, 14 S. E. Rep. 760.

In a suit in chancery, though the defendants are in default, the record of proceedings in another suit *inter alios* is not competent evidence against them. *Frazier v. Frazier*, 3 Leigh 642.

Where the assignment of a chose in action is absolute in its terms, and judgment has been obtained thereon in the name of the assignor, for the benefit of the assignee, which judgment has subsequently been declared void in a suit brought by the assignee to enforce the collection of said judgment out of the lands of judgment debtor, the assignor of the debt is bound by the decree against his assignee, and is estopped from setting up said judgment as a lien on the lands of his judgment debtor, even though said assignment was merely a collateral security for a debt, or intended to carry only a partial interest. The assignor and assignee are at least privies in the transaction, and the question of the lien of said judgment is *res judicata*. *Cox v. Crockett*, 92 Va. 50, 22 S. E. Rep. 840.

A party to a suit, who claims title adverse to a former adjudication of the court, by which he is not bound, cannot rely on such adjudication as an estoppel against parties to such former suit. An estoppel, to be binding, must be mutual. *Buford v. Adair*, 43 W. Va. 211, 27 S. E. Rep. 300.

Admissions or Statements in Pleadings.—Where the defendants in a suit claim under a third person, they are not estopped by statements in the answer of such third person in another suit, as such statements have only the effect of admissions not made in the pleadings in the cause. *Tabb v. Cabell*, 17 Gratt. 160.

A tenant obtained an injunction to restrain a trespass and declared in his bill that the defendant was a sole trespasser, and afterwards brought his action against his landlord for committing the trespass and dispossessing him of the property he claimed to have leased from him. *Held*, that a plea of estoppel in the second action to deny what he claimed in the first was properly rejected. *Robrecht v. Marling*, 29 W. Va. 765, 2 S. E. Rep. 827.

A conveyance of land was made upon consideration that the grantee pay the grantor's debt, and the grantee subsequently conveyed a portion to the grantor's mother in satisfaction of one of said

debts. F. and G., creditors of the grantor, filed a petition in bankruptcy to set aside the conveyance as fraudulent. A compromise was made, wherein the bankruptcy proceedings were abandoned, and the grantor's mother gave her notes, with the land conveyed to her as security, to pay certain of her sons' debts. Afterwards another creditor sued, and the trust property was sold under decree of court to satisfy his debt, and F. became one of the purchasers. *Held*, in an action by another creditor to set aside all these conveyances as in fraud of creditors, that the allegations of fraud in the bankruptcy proceedings instituted by F. did not estop him from maintaining that he was an innocent purchaser. *Penn v. Penn*, 88 Va. 361, 18 S. E. Rep. 707.

A party in a suit will not be estopped from setting up a defence on the ground that it is inconsistent with the defence he made in another suit by other plaintiffs, unless the fact of such inconsistency distinctly appears. Nor is the judgment in the first suit, or the opinion of the judge in it competent evidence for the plaintiffs in the second suit, to show the nature of the title set up in it by the defendants. *Bargamin v. Clarke*, 20 Gratt. 544.

Where, in a suit by a depositor against a bank to recover a balance alleged to be due, the plaintiff stated that the suit was for the benefit of certain other parties, and he recovered judgment, such statement did not estop him from claiming the funds in a subsequent suit in which the bank endeavored to set off against the balance a debt due from the others, the depositor explaining that what he meant was that, in case he failed to recover the alleged balance, the other parties would be liable for it to him, and it appearing that the debt due the bank had been contracted prior to the statement. *Nutting v. National Bank of Virginia (Va.)*, 37 S. E. Rep. 804.

331 *Leonard v. Henderson.

March Term, 1873, Richmond.

1. **Ejectment for Rent—Saving in Favor of Infants, etc., Inapplicable.**—The saving in favor of infants, married women or insane persons in the 36th section of ch. 135 of the Code, in relation to actions of ejectment does not apply to actions of ejectment, brought by the lessee to recover possession of the leased premises, which had been recovered by the landlord under the 16th section of ch. 138 of the Code.
2. **Same—Same—Case at Bar.**—H. the owner of a ground rent in fee secured upon a lot of ground owned in fee by L., brought ejectment against V., the tenant in possession, to recover the lot for the failure of L. to pay the rent; and there was a judgment by default in favor of H., who proved by his own testimony that the rent was due; and there was no sufficient distress upon the premises; and H. was put into possession of the premises. At this time L. was an infant under twenty-one years of age. After one year from the time H. was put into possession, but within five years after L. came of age, he brought ejectment against H. to recover the lot. *Held*:
 1. **Same—Same—Lessee Barred in Twelve Months.**—L. is barred by the statute, ch. 138, s. 17, and cannot recover.
 2. **Same—Defendant—Tenant in Possession.**—Though L. was not a party to the action of H., yet V., the

tenant in possession, was, and that under s. 16 of ch. 138, is sufficient. And the proof by H. was sufficient.

In April 1866 John Leonard brought his action of ejectment in the Circuit court of Alexandria county, against Daniel Carson, to recover a lot of ground in the city of Alexandria; and Willis Henderson made himself a defendant and pleaded "not guilty;" on which plea issue was made up.

Upon the trial of the cause it appeared both the plaintiff and the defendant
332 Henderson claimed under a deed *executed in October 1795, by which George Coryell and wife conveyed to Leonard Doucher the lot of ground in question, reserving a perpetual ground rent of three pounds twelve shillings current money of Virginia, with right of distress, and of forfeiture and re-entry for the failure to pay the rent for thirty days after it fell due, and no effects upon the premises out of which the rent could be made. Leonard had become the owner of the lot, and Henderson of the ground rent.

In 1855 Henderson brought his action of ejectment in the Circuit court of Alexandria county against Thomas Valentine to recover the said lot. Valentine appeared and pleaded not guilty; but in May 1856, when the cause came on to be tried he withdrew his plea, and the record says, it appearing by affidavit that the rent claimed in the declaration was due, and that no sufficient distress was upon the premises, the court rendered a judgment that the plaintiff recover possession of the lot, with costs. In July 1856, an execution was issued upon this judgment, directing the sheriff to put Henderson in possession of the lot; and the return of the sheriff shows that this was done on the 28th of July 1856.

It was a fact agreed in the case that at the time Henderson instituted his action against Valentine, Leonard was under the disability of infancy; and that he instituted this action within five years after the removal of such disability.

After the evidence had been introduced Henderson moved the court to instruct the jury as follows: If the jury believe from the evidence, that the defendant had a right of re-entry on the premises, in the plaintiff's declaration mentioned and described, by reason of any rent issuing thereout being in arrear; or by reason of any covenant or condition recovered a judgment for said premises, and had execution therefor,
333 and that the plaintiff *or other person for him, did not pay the rent in arrear with interests and costs, nor file a bill in equity for relief against such forfeiture, within twelve calendar months after such execution executed, then the said plaintiff is barred of all right, in law or equity, to be restored to the said premises, and cannot recover in this action.

The court refused to give the instruction, and the plaintiff excepted. The jury thereupon found a verdict for the plaintiff, and that he was entitled to the premises in fee

simple; and the court rendered a judgment accordingly.

Upon the petition of Henderson he was allowed a supersedeas to the District court of Appeals, at Fredericksburg; where the judgment of the Circuit court was reversed; and a new trial of the cause was directed. And then Leonard applied to this court for a supersedeas; which was allowed.

A. & C. E. Stuart, and C. E. Stuart, jr., for the appellant.

Lawrence B. Taylor, for the appellee.

STAPLES, J., delivered the opinion of the court.

A brief statement of the facts of this case is necessary to a proper understanding of the questions to be decided. In the year 1795 George Coryell conveyed to Leonard Doucher a lot of ground contiguous to the Town of Alexandria, reserving an annual rent of £3 12 shillings current money of Virginia, with covenants of distress and re-entry for non-payment. In the year 1855 John Leonard had become the owner of this lot and Willis Henderson the owner of the rent. How these parties respectively became so entitled, does not appear; but the fact is conceded. In January of the same year Henderson filed his declaration in ejectment in the Circuit *court of Alexandria county to recover the lot in question. The declaration was served upon Thomas Valentine the tenant in possession. He appeared and pleaded; but subsequently, at the May term, 1856, withdrew his plea. Henderson having made affidavit that the rent claimed in the declaration was in arrear, and no sufficient distress on the premises, judgment was rendered in his favor; execution was issued, and he was placed in possession in July 1856. He remained in possession without interruption until the year 1866; when the present action of ejectment was brought against him by Leonard the former owner, to recover back the lot in question. Leonard claims that in 1856 (and the fact is admitted,) upon the trial of the first ejectment, he was an infant, and consequently the verdict and judgment in that case cannot bar his recovery in this, nor affect his right of property. In support of this view, he relies upon the 36th section of chapter 135 of the Code of 1849, which provides that a judgment recovered under that chapter against an infant, a married woman, or insane person, shall be no bar to an action commenced within five years after the removal of such disability. Does this section apply to the case? To determine that, we must advert briefly to the common law doctrines upon the subject of rent, and the modification of those doctrines as effected by our statutes.

At common law, when there is a condition of re-entry reserved for rent in arrear, the lessor, upon breach of the condition, may re-enter and re-occupy the demised premises. Such re-entry, however, was always at-

tended with great particularity and many inconveniences. A formal demand of the exact rent due must have been made—made at a convenient time before sunset on the day, and at the place stipulated by the parties; and, if no place was appointed, at the most notorious place on *the premises.

And this demand must have been actually made, though the possession was vacant, and no one was present to make the payment. These requisites being complied with, if the tenant failed to pay the rent in arrear, the forfeiture was complete: the lessor might re-enter at once, and bring his ejectment to obtain the actual possession. 1 Lomax Digest, Marg. 593; Duppa v. Mayo, 1 Wms. Saund. R. 287.

The courts of common law, however, often stayed the proceedings in the action of ejectment, and relieved the tenant from the forfeiture upon his bringing into court before the lessor obtained possession, the rent in arrear, and making compensation to the latter for all the damage he had sustained. Courts of equity, also acting upon the idea that the clause of re-entry was inserted mainly for the landlord's security, and that it was against conscience to allow him to pervert it to a different purpose, usually granted the tenant the necessary relief, upon his satisfying the rent and paying all the costs incurred. This right of the tenant was without limitation. It continued as long as he was in a condition to offer the landlord satisfactory indemnity. Taylor, Landlord and Tenants, 495; Bowser v. Colby, 1 Hare's R. 109; Atkins v. Chilson, 11 Metc. R. 112.

These doctrines of the common law gave rise to statutes in England, and most of the American States, regulating the rights of landlords and tenants in this class of cases. The provisions contained in chapter 138, Code of 1849, relating to this subject, are taken from the revised statutes of New York, which are transcripts of the English statutes. The 16th section of that chapter provides, that any person having a right of re-entry, by reason of any rent being in arrear, may serve a declaration in ejectment on the tenant in possession; or if the session be vacant, by affixing the dec-

laration at *any notorious place on the premises, which service shall be in lieu of a demand and re-entry; and upon proof that the rent claimed was due, and no sufficient distress on the premises, and also that the plaintiff had power thereupon to re-enter, he shall recover judgment and have execution for said land. The 17th section provides, "should the defendant, or other person for him, not pay the rent in arrear, with interest and costs, nor file a bill in equity for relief against such forfeiture, within twelve calendar months after execution executed, he shall be barred of all right in law or equity to be restored to such lands or tenements."

It will be perceived that these sections make a material change of the common law rules, and the practice of the courts. They substitute the service of a declaration

in ejectment on the tenant in possession, for a formal demand of the rent and a re-entry; and thus relieve the landlord of many embarrassments attending the exercise of that right. They deprive the tenant of all claim to relief in courts of law or equity, unless his application is made within twelve months after execution executed. They are applicable, not only to rents arising upon leases for life or years, but to conveyances in fee, with clauses of distress and re-entry. *Van Rensselaer v. Ball*, 19 New York, 100.

In *Hutchings v. Lewis*, 1 Burr. R. 614, Lord Mansfield said: "The true end and professed intention of the act of Parliament was to take off from the landlord the inconvenience of his continuing always liable to an uncertainty of possession," "from its remaining in the power of the tenant to offer him a compensation at any time, in order to found an application for relief in equity, and to limit and confine the tenant to six calendar months after execution executed for his doing this; or else

that the landlord should from thenceforth hold the *demised premises discharged from the lease." It is fair to

presume that the Legislature had the same object in view in incorporating into our Code the provisions herein before cited. If, however, the construction sought to be given to the 36th section of chap. 135 be correct; if the saving in that section, in favor of infants and others, applies to ejectments brought under chapter 138, it is apparent that the landlord is thereby placed in a worse condition than at common law. Although the rent may have been long in arrear, and no distress on the premises, the tenant of an infant (under this construction) may, after the lapse of more than twenty years, bring his ejectment, and be restored to the land, without compensating the landlord for his damage or losses sustained, or even paying the rent in arrear. In the case of married women and persons insane, who are also embraced by that section, such recovery might be had without any terms imposed, even after the lapse of fifty years. This goes far beyond the practice of courts of law or equity in any case. These courts, as has been seen, only interposed in behalf of the tenant, upon the terms of his satisfying the rent due and any damages sustained by his omission. The error of this construction is the more palpable when it is considered that the landlord, instead of his ejectment, may, under our statutes, still resort to his remedy by actual re-entry. A certificate of the facts is required to be returned to the proper clerk's office, and publication made in a newspaper. After this is done, if the tenant, or some one for him, does not pay the rent and costs within twelve calendar months, he is forever barred of all claim to the land in law or equity. In the event the landlord adopts this remedy, as he certainly may, where the possession is vacant, what becomes of the rights of the infant? Where is the exception in his favor? It is

338 certainly not to be *found in the 36th

section already cited. That section only applies to judgments recovered against infants, married women, and persons non compos mentis. There is no saving in their favor in any of the statutes, in case of mere entry by the landlord. And we are brought to the conclusion that the judgment of a competent court is of no effect against the infant, while the mere private act of the landlord is conclusive of his rights.

The 36th section, so much relied on by the plaintiff in error, is taken from the provisions found in the Revised Code of 1819, upon the subject of Writ of Right. That section, as it now stands in chap. 135, Code of 1849, applies only to judgments in ejectment brought under that chapter as a substitute for the Writ of Right and the former action of ejectment. The various provisions of chapter 138 in respect "to re-entry," contained all the statutory law on that subject. They were intended to embrace fully the rights and remedies of landlords and tenants. As they impose limitations without any saving or exception, the presumption is, that none was intended. And this upon the principle that when the matter is regulated by statute, the limitation will run even against infants, except where they are specially exempted from its operation. General words of a statute must receive a general construction; and unless there can be found in the statute itself some ground for restraining it, it cannot be restrained by arbitrary addition or retrenchment. It was declared by Sir Eardley Wilmot, in the House of Lords, that infants, like other persons, would be barred by an act for limiting suits at law, if there was no saving clause in their favor. The same doctrine is recognized by the American authorities. Angell on Limitation, sec. 194; Taylor on Infancy & Coverture, p. 160-162, §§ 109-113.

339 *It may be conceded, however, that the judgment in the first ejectment is not an absolute bar to an action by the infant within the prescribed period. Still, it does not necessarily follow that the plaintiff is entitled to recover in this case. If the rent was in arrear, and no sufficient distress on the premises, the grantor, or those claiming under, had the right to re-enter and re-occupy the premises by the express provisions of the deed. This right could not be affected, or in any manner restricted, because in the course of events an infant acquired title to the property. If a feoffment be made, reserving rent with a condition of re-entry in default of payment, if the person entitled under the feoffment be an infant and fail to pay, his laches will bar him. *Coke Litt.* 246 b. And so the grantee of an estate, subject to a condition, is bound to perform it, though an infant or feme covert. 4 Kent Com. 125; *Griffin v. Griffin*, 1 Sch. & Lef. R. 362. It is clear, then, that infancy alone will not prevent a forfeiture of the estate. And if in such case the landlord re-enter and re-occupy the premises, or obtain possession under ejectment, all his proceedings being

regular, that possession will avail him as effectually as though an adult were the claimant. The only question, then, is as to the regularity of the proceedings in the first ejectment.

It is objected, first, that the declaration was not served upon the real owner, but upon a person having no connection or privity with him; and that no guardian ad litem was appointed for the infant. It is sufficient to say, the statute provides that the declaration may be served upon the tenant in possession. No other mode of service is prescribed where the premises are occupied, and none other would be regular. No notice is required to be given to the owner. The plaintiff is not authorized to bring him before the court, and as
340 a necessary consequence, *can have no guardian ad litem appointed for him, though an infant.

It is also objected, there was no sufficient proof of any rent in arrear. The statute provides that in case of judgment by default, the plaintiff may prove by his own affidavit that the rent claimed was due, and no sufficient distress upon the premises. This judgment is substantially a judgment by default; the defendant having withdrawn his plea. The affidavit of the plaintiff states that the rent was in arrear for seven years, the amount due; and that at no time since it was in arrear could any sufficient distress, to make any part of the rent, be found on the premises. In *Jackson v. Wilson*, 3 John Cas. 295, the court said: It would presume the first judgment regular, and that every thing necessary to entitle the landlord to recover, had been performed. It would consider the necessary affidavit as having been filed; or if otherwise, that all the requisites attending an actual entry at common law were previously complied with. In the present case it is not necessary to rely upon any such presumption, as the proceedings in the first ejectment appear to have been in strict compliance with the statute. The defendant's instruction does not assume that the judgment in that case is conclusive. It asks the court to tell the jury, if they believed the defendant had a right of re-entry into the premises, by reason of any rent being in arrear, that the defendant recovered a judgment for said premises, and had execution therefor, and that the plaintiff, or other person for him, did not pay the rent in arrear, nor file a bill in equity for relief within twelve months, the plaintiff is barred of all right in law or equity to be restored to the premises; and could not recover. The instruction substantially follows the language of the statute. There is
341 no valid reason, as the record is now presented, why it should *not have been given, unless the infancy of the plaintiff protected him. This, I have already attempted to show, does not relieve the tenant or grantee of the obligation to pay the rent according to the contract; nor does it impair the force and effect of a judgment in ejectment fairly recovered by

reason of its non-payment. I am, therefore, of opinion, the judgment of the District court was right, and must be affirmed.

Judgment of the District court affirmed.

342 *Morrison's Ex'ors v. Grubb.

March Term, 1873, Richmond.

1. *Case at Bar—Bill for Discovery—Averments insufficient.*—W. executor of M. files a bill against G. in which he says that his testator in his lifetime owned a number of bonds or notes amounting to about \$4,000, which were drawn payable to him, and were in his possession a few days before his death. That after his death they were in the possession or under the control of said G., and were not assigned to him; and that G. gave no consideration for them. The averments do not make a case against G., and do not entitle the plaintiff to any discovery or relief against him.

2. *Same—Same—Answer Denies Allegations of Bill—Latter Must Be Proved.*—The bill further alleges that the bonds, &c., were the property of M. at his death, and became assets of said estate which should come to plaintiffs' hands: that he is entitled to know what bonds of said M. said G. holds, and to recover them for the said M.'s estate. And he calls for a full answer. G. answers and denies that he had in his possession or under his control, at the time of M.'s death, or at any time since, any bonds which were at his death his property, or to which plaintiff as his executor or otherwise had any right, title or interest. These averments of the bill are facts, and necessary to sustain it, and being positively denied by the answer, must be proved.

3. *Same—Same—Same—Whole Answer Taken Together.*—The defendant, having denied the allegations of the bill, proceeds to state that the bonds were the property of M. and were given to him by M., and when and how it was done. The whole statement must be taken together as his answer.

**Answer in Chancery.*—See monographic note appended to *Tate v. Vance*, 37 Gratt. 571; *foot-note* to *Corbin v. Mills*, 19 Gratt. 438.

Gifts—Possession—Inter Vivos—Mortis Causa.—In *Yancey v. Field*, 85 Va. 762, 8 S. E. Rep. 731, the court said: "In *Lee v. Boak*, 11 Gratt. 182, the gift was held good, because there the bonds and other evidences of the debts forgiven in that case were actually delivered by the donor to the donee; and so in *Morrison v. Grubb*, 23 Gratt. 342, where the donor delivered to the donee a pocket-book containing the bonds in question, saying, 'Here, Joe, take this, take it home with you and keep it'; these words being construed as importing a gift, although the word 'give' was not used."

See also, *Thomas v. Lewis*, 60 Va. 79, 15 S. E. Rep. 289, which cites *Lee v. Boak*, 11 Gratt. 182, as authority for the proposition that all valid gifts, except by will, must be attended by delivery of possession; and which cites *Lee v. Boak*, 11 Gratt. 182, and also the principal case, as authority for the proposition that as far as the delivery of possession is concerned there is no distinction to be made between donations *inter vivos* and *mortis causa*, but that the same kind of delivery of possession which is necessary to make good the one is necessary to make good the other.

In March 1860 Archibald J. Wightman and Joseph Wightman, executors of Joseph Morrison, deceased, filed their bill in the Circuit court of Loudoun county against Jos. P. Grubb, in which, after stating the death of said Morrison in March 1856, his will, and their qualification as his executors, they charge that their testator

343 *owned a considerable number of bonds which he had in his possession within a few days of his death, and that after his death they were found to be in the possession of a certain Joseph P. Grubb, who still retains them. That with the exception of a few of the bonds they are unable to ascertain from the defendant, or in any other way, any account thereof. They charge, however, that there are now, or have been, since the death of said Morrison, about \$4,000 worth of bonds in the said Grubb's possession, drawn by the obligors therein, payable to said Morrison, and that Grubb has no assignment and gave no consideration for them. They claim the said bonds as of the estate of said Morrison; that the same was the property of said Morrison at his death, and became assets of said estate which should come to their hands. And making said Grubb defendant they call upon him to answer specifically as if each allegation of the bill were the subject of a special interrogatory; and they pray that he may be compelled to produce with his answer all the bonds in his possession payable to the late Joseph Morrison; and that the court will decree the delivery of them to the plaintiffs; and for general relief.

Grubb answered the bill. He says: That he had not in his possession, or under his control, at the time of the death of the said Joseph Morrison, or at any time since his death, any bonds which were at the death of said Joseph Morrison his property, or to which the complainants as his executors or in any other character have any right, title or interest. It is true Joseph Morrison died on the 8th of March 1856, having made his will; by which it will be seen he gave to the complainants a large portion of his estate, worth, as respondent charges, from eight to ten thousand dollars at least. They were his nephews, as was the respondent,

and as he avers his favorite nephew; 344 and yet nothing is left *him by the will. He says he had rendered many services to his uncle Joseph Morrison, and it was his declared intention long before his death to make a provision in his lifetime for respondent to an amount something like equal to that which by his will he made to each of the complainants. He at one time authorized a neighbor of his to purchase for respondent a tract of land adjoining the lot on which respondent lived, at a cost of about \$4,000, but the negotiation was not closed because the owner declined selling at that time.

A very short time before his death, and when satisfied he had but a short time to live, he requested one of his neighbours who was with him, to overlook one of his

drawers and hand him a tin box; he unlocked the box and took out a bundle of papers, and requested his neighbour to select from it the bonds and notes which were in it; which he did, and handed them to Morrison, who then handed to him his pocket-book and the same notes he had handed to him, and told his neighbour to put the notes in his pocket-book; which was done, and the pocket-book with its contents was handed back to Morrison, who put it in the tin box and locked it up, saying I will keep them till Joe Grubbs comes, and then I will give them to him.

Joseph Morrison died on Saturday. On the Saturday preceding he had a severe hemorrhage. On the Tuesday before his death respondent paid him a visit. He remained until late in the evening, and just before he left him his uncle unlocked his drawer and took out of it the pocket-book into which the bonds and notes had been put as above stated, and handed it to respondent, saying as he did so, "here Joe, take this, take it home with you, and keep it." Respondent did not open the book until he arrived at home, when he opened it in the presence of his family, when he found it contained bonds and notes including interest to about the amount

345 *of \$4,000. He declines to produce and file the bonds unless expressly ordered by the court so to do.

The plaintiffs excepted to the answer, because the bonds were not produced with it; and 2d: Because it does not furnish any description of them or any discovery of the several bonds, the amounts and obligors in each, or to whom they are severally payable. They also filed an amended bill; but the allegations as to the bonds seem to be about the same as in the original bill.

The court sustained the exceptions to the answer; and the defendant thereupon answered, setting out a description of the bonds, and brought them into court.

Many witnesses were examined by both the plaintiffs and defendant. The defendant introduced the evidence of Joseph R. Moore, the neighbour referred to in his answer, who stated what occurred between Joseph Morrison and himself, as it is stated in the answer. There is some other evidence which goes to show a purpose on the part of Morrison to give some bonds to the defendant; and there is proof of his having authorized the purchase of a piece of land with the intention to give it to the defendant.

The plaintiffs introduced a number of witnesses to show by circumstances, that the statement of the answer, and of Moore should not be credited; but it is impossible to give them; and they were met on the part of the defendant, by other witnesses to disprove the plaintiff's conclusions.

The cause came on to be heard on the 9th day of March 1868, when the court dismissed the bill; but without costs. And the executors thereupon applied to this court for an appeal; which was allowed.

346 *M. Harrison, for the appellants.

Hunton and R. T. Scott, for the appellee.

ANDERSON, J., delivered the opinion of the court.

Joseph Morrison was the owner of a considerable real estate, which he disposed of by will, and appointed appellants his executors, whom he made also devisees, and his residuary legatees. They filed their bill, and afterwards an amended bill, in the Circuit court of Loudoun county, against Joseph P. Grubb, the appellee, in which they allege that their testator in his lifetime owned a number of bonds or notes amounting to about \$4,000, which were drawn payable to him, and were in his possession a few days before his death. That they were, after his death, in the possession or under the control of said Grubb, and were not assigned to him; and that he gave no consideration for them.

Thus far the bills do not make a case against the appellee. The averments do not show them entitled to any discovery or relief against him. Interest in the subject of the suit, or a right in the thing demanded, are essentially necessary to sustain a bill; and if they are not fully shown by the bill itself the defendant may demur. Mitford's Eq. Plead. top p. 177, Library Edition. It might be true that the decedent, in his lifetime, was the owner of bonds which he had in his possession a few days before his death; and that those bonds came into the possession of the defendant without assignment, and that he paid no consideration for them; all of which may be true, and not incompatible with his right of property in them. Indeed, he having the possession without the imputation of any fraud or unfairness in its procurement, it is prima facie evidence of his right of property. The bills do not, therefore,

347 thus far upon *their face, show a right in the plaintiffs to the possession of the bonds in question, or a right to call upon the defendant concerning them; and without further averments they are consequently demurrable. But they do allege further, that they "were the property of said Morrison at his death, and became assets of said estate which should come to their hands." And they allege that they "are entitled to know what bonds of said Morrison said Grubb holds, and to recover them for the said Morrison's estate." And they call upon the defendant to answer their bill as specifically as if each allegation were the subject of special interrogatory: And their prayer is that he be compelled to produce with his answer all the bonds in his possession payable to the late Joseph Morrison; and that the court may decree the delivery of said bonds to them; and for general relief.

The defendant, in his answer, denied that he had in his possession, or under his control, at the time of Joseph Morrison's death, or at any time since his death, any bonds

which were at his death his property, or to which the complainants, as his executors, or in any other character, have any right, title or interest. This is a positive denial of, and directly responsive to the last allegation above mentioned, as contained in the bill. And it is a material allegation; so material that without it the bill would have been demurrable.

But it is contended that it is not an allegation of a fact, but only an inference of law from the facts previously alleged. But we have seen that the facts previously alleged do not justify such an inference of law. If it had been alleged only as an inference of law, it would have raised this question of law, whether, upon the facts alleged, the bonds were the property of the decedent at his death, and became 348 assets to which his executors *were entitled? And in that case, for reasons before given, we think the bill would have been demurrable. But we do not regard it as merely the allegation of an inference of law from the facts before alleged, but as a distinct substantive allegation, that the bonds were the property of the decedent at his death, and that his executors were entitled to them as assets. And the facts before averred are relied on as tending to sustain that allegation. But they are not sufficient of themselves. There is an important link in the chain wanting; the averment that the appellee did not acquire the title or beneficial interest in these bonds, by the transfer and delivery to him by the decedent in his lifetime. That deficiency is not supplied by the averments, that they were "not assigned to him, and that "he gave no consideration for them," because the right might have passed, as well by transfer and delivery, as by assignment, and by gift as well as by sale. But the defect we think is supplied by the general averment under consideration, which negatives the idea that they passed by gift or otherwise to the appellee, by the act of the decedent in his lifetime.

The allegation in the bill that the bonds in question were the property of the decedent at the time of his death, is not only an averment of the inference of law, but it includes all the facts necessary to such an inference. It is in fact an averment that the decedent did no act in his lifetime, by which his right of property in said bonds was extinguished, or transferred to the defendant by gift or otherwise. And this allegation is positively denied by the answer. And whilst it admits that the decedent was the owner of the bonds and had possession of them until a few days before his death, it says *uno flatu* that he transferred and delivered them to him shortly before his death, as a gift. We think

349 the *whole should be taken together as the answer of the defendant, responsive to the allegations of the bill; just as if evidence had been offered to prove that the defendant had admitted that he had the bonds in possession, by gift from the decedent shortly before his death. It would

be improper to allow the first part of his declaration as to the possession, and to exclude the latter part as to the means by which he obtained it. *Fletcher & al. v. Froggatt*, 2 Car. & Payne, 568; *Randle v. Blackburn*, 5 Taunt, 245; *Blount v. Burrow*, 1 Vesey, jr., R. 546; *Hill v. Chapman*, 2 Bro. ch. C. 612; *Tate v. Hillbut*, 4 Bro. ch. C. 286.

The answer also, in confirmation of its direct responses to the allegations of the bill, avers affirmatively what occurred between decedent and others bearing on the subject of the gift, and the fact of his having possession of the bonds being known to others before the death of decedent; also that he and the plaintiffs were equally near of kin to decedent, being his nephews; that he was his favorite nephew; and that decedent had some time previous to this gift, authorized a friend to purchase a tract of land for him, at a cost of about the amount of said bonds, who failed to effect the purchase in consequence of the owner declining to sell; and that it was the purpose of his uncle to give him what he intended to give him, in his lifetime; and to give to plaintiffs by his will what he intended for them; and that his bequests to each of them were at least equal in value to the bonds he gave to him.

The court is of opinion, that the weight of the testimony is in support of these affirmative allegations, and that it is corroborative of so much of the answer as is responsive to the allegations of the bill; and that the answer is evidence so far as it is responsive, though the bill is not a pure bill of discovery; and according to 350 the *well established rule, so far as it is responsive, it is to be taken as true, unless it be contradicted by two witnesses, or one witness and corroborating circumstances. *Fant v. Miller & Mayhew*, 17 Gratt. 187.

But if the answer is not so responsive to the bill, as to throw upon the plaintiffs the onus of disproving the statement in the answer that the bonds were delivered to the defendant by the decedent in his lifetime as a gift, by two witnesses, or by one witness and corroborating circumstances, it at least traverses the allegation of the bill, that the said bonds were the property of the decedent at his death, and are assets of his estate belonging to the plaintiffs. And the defendant having possession of them under a claim of ownership, (it is not material that it should be by donatio causa mortis, if it is inter vivos,) which possession he is proved to have had before the death of decedent, and no fraud or unfairness being shown or alleged in the procurement of the possession, the onus is upon the plaintiffs to prove their allegation that they were the property of the decedent at his death; which we think, in this case, is not proved by showing by the admission of the defendant or otherwise, that they were property of decedent several days before his death. The admission that they were the property of the decedent several days

before his death, cannot be taken to be an admission of the allegation of the bill that they were the property of the decedent at his death, because it is accompanied with the declaration of the defendant, that they were afterwards, in the lifetime of the decedent, delivered to him as a gift. And it matters not whether it was a gift, causa mortis or inter vivos.

The statement in the answer that the said bonds were delivered to the defendant by decedent as a gift is supported, we think, by the preponderance of evidence in the record. Although in delivering the 351 pocket-book containing *the bonds, to the defendant, he did not use the word "give," but according to the averment of the answer accompanied the delivery with these words: "Here Joe, take this, take it home with you, and keep it," we are clearly of opinion that these words, taken in connection with the other evidence of the previous acts and declarations of intention by the decedent, and surrounding circumstances, must be interpreted to import a gift. Upon the whole, we are of opinion that there is no error in the decree of the Circuit court to the prejudice of the appellants.

Decree affirmed.

352 *Dobson v. Culpepper & Wife.*

March Term, 1878, Richmond.

Case at Bar—Sale of Wife's Land—Unlawful Detainer.

—C. and wife sell her land to D., but do not convey it to him. D. fails to comply with his contract; and C. and wife convey the land to G. the son of C.'s wife; and then C. and wife bring unlawful detainer against D. to recover the land. **Held:**

1. *Same—Same—Same—Defense.*—If D. had complied with his contract, so that he was entitled to a conveyance, he might have set up the defense under the statute in this proceeding.
2. *Same—Same—Same—Same.*—Though D. cannot question the title of C. and wife as at the time of

*For monographic note on Unlawful Detainer, see end of case.

Appellate Court—Demurrer to Evidence.—*Backhouse v. Selden*, 29 Gratt. 586, citing the principal case as authority, said, "The whole matter of fact and law in this case having been submitted to the court, neither party requiring a jury, and the judgment of the court being upon the evidence which is certified in the bill of exceptions as all the evidence in the cause, the bill of exceptions must be regarded as a demurrer to the evidence, by the plaintiff in error." See also, *Randolph v. Longdale Iron Co.*, 84 Va. 459, 5 S. E. Rep. 30; *Weiss v. Hobbs*, 84 Va. 490, 5 S. E. Rep. 387; *foot-note* to *Backhouse v. Selden*, 29 Gratt. 586. But see monographic note on "Bills of Exceptions" appended to *Stoneman v. Com.*, 25 Gratt. 887, where the above laid down principle is placed under the exceptions to the old rule in Virginia when the evidence was certified. This has now become the statutory rule in Virginia (Va. Code 1887, § 3484).

the sale, he may show in his defense that they had since conveyed the land to G.

3. **Same—Same—Same—In Whose Name.**—By their conveyance to G. C. and wife lost their right to recover the land from D.; and the action should have been in the name of G.; and D. could not question the title of G.

The case is sufficiently stated in the opinion of the court.

Seawell, for the appellant.

Godwin & Crocker, for the appellees.

MONCURE, P., delivered the opinion of the court.

This is a supersedeas to a judgment of the Circuit court of Gloucester county, affirming a judgment of the county court of said county, in favor of the plaintiffs against the defendant in that court, in an action of unlawful detainer, to recover possession of a tract of land lying in said county. The case was tried upon the general

1353 entered of record, *waived the right to have a jury; and thereupon the whole matter of law and fact was heard and determined, and judgment given by the court. No exception appears by the record to have been taken to the said judgment, or to any ruling of the court in the progress of the trial. There is copied, after the judgment of the county court, in the transcript of the record, what is certified by the clerk to be "the evidence adduced upon the trial of the foregoing case;" but it is not made a part of the record by any order or act of the court; and unless it can be considered as made a part of the record by consent of the parties, there is certainly nothing in the case that can show any error in the judgment, and it must, of necessity, be affirmed. But in the petition to this court for a supersedeas to the judgment of the Circuit court, it is said that, "when the county court rendered its judgment neither of the counsel for plaintiffs or defendant being present, no statement of the evidence heard at the trial was certified by the court. But a statement of all the evidence offered at the trial was written out by the counsel for the plaintiffs, signed by him, the counsel for Dobson, and the judge of the court, and presented and used by the parties at the hearing before the Circuit court, and is now with the record of the case, as used before the Circuit court." And in the argument of the case before this court, no objection was made to the correctness of what is said in the petition as aforesaid, but the said statement of the evidence was treated by the counsel on both sides as being properly a part of the record. However irregular this may be, we must, therefore, consider the case, as if a bill of exceptions had been taken to the judgment of the County court, and the said evidence had been set out and certified in said bill. So considering the case, we have now to enquire, whether there be any error in the judgment.

354 *Before we enter upon this enquiry we will notice an agreement signed by the parties by their counsel, and placed by them, with their notes of argument, in the hands of the court to be acted upon as we might think proper. That agreement is in these words: "We the undersigned counsel for appellant and appellees, in Dobson v. Culpepper & wife, agree and request, that in the event the court shall reverse the decision of the Circuit court below, on the point that the action is brought by the wrong parties, the court shall decide all the points in the case upon the merits of the case. We do this from the fact, that the subject matter is small, and that the pecuniary circumstances of our clients are such as to illy afford farther costs in the premises." We will comply with this request; but in doing so will first consider the case upon the merits; that is, whether the defendant in the court below, who is the plaintiff in error here, Dobson, is entitled to the possession of the property in controversy; and if not, then, secondly, whether the plaintiffs in the court below, who are the defendants in error here, Culpepper and wife, are entitled to such possession, or rather were so entitled when the action was brought. If Dobson be not so entitled, then Culpepper and wife, with whom or with one of whom, Culpepper, Dobson made a contract to purchase the land in controversy, on the 28th day of December 1860, are entitled, unless they lost their title by reason of the deed of gift made by them for the land to Walter T. Simcoe, dated the 31st day of August 1869, and constituting a part of the evidence in the case; the said Dobson contending that if he is not entitled, then the said Simcoe is entitled by virtue of the said deed of gift, and not the said Culpepper and wife. Then we proceed to enquire:

First: Is the said Dobson entitled to the possession of the said land?

355 *On the 28th day of December 1860, Dobson contracted with Culpepper to purchase the said land of them at the price of \$275, of which the sum of \$80 was payable in cash, and the balance, \$195, twelve months after date; and on the same day, Culpepper and wife executed a receipt to Dobson for the \$80, the cash payment, and for his note at twelve months for the said balance of \$195; about the same time, it seems, Dobson received possession of the land, and has been in possession of it ever since, but has never received any deed for it. Culpepper and wife, not having, as he says, received any part of the purchase money from Dobson for the land, not even the cash payment of \$80, made a formal demand upon him for possession, in July 1870, which possession he, Dobson, refused to deliver, and he has held the land adversely to the claim of Culpepper and wife ever since. On the 1st day of April 1872, they brought this action of unlawful detainer against him for the land.

There can be no doubt, and it is not controverted, but indeed admitted, by the coun-

sel for Dobson, that either Culpepper and wife or their donee Simcoe are entitled to recover the said land of him in an action of unlawful detainer, unless at the time of the bringing of such action there had been such payment or performance of what was contracted to be paid or performed on the part of the vendee, as would in equity entitle him, or those claiming under him, to a conveyance of the legal title of such land from the vendors, or those claiming under them, without condition, according to the Code of 1860, chapter 135, section 20. That provision of the Code is contained in the chapter concerning the action of ejectment; but it is not confined to that action, either in its literal terms, or its substantial meaning. It applies, as well to the action of unlawful detainer, as to the action of ejectment, which are concurrent remedies in such a case as this. Williamson, 356 *trustee, v. Paxton, trustee, 18 Gratt.

475, 505. A vendor of land who had put the purchaser in possession, whilst the contract remains executory has the legal title as to such purchaser; and unless the said provision of the Code apply to the case, may demand possession of the purchaser, and recover it of him by an action of ejectment or unlawful detainer; at least, unless, since the date of the purchase, the interest of the vendor in the land has terminated, or been transferred by him to another. That the vendor may recover possession of the land in an action of ejectment in such a case is clearly shown by the case *Burnett v. Caldwell*, 9 Wall. U. S. R. 290; and the case just cited from 18 Gratt., shows that there is no difference between ejectment and unlawful detainer in this respect. Whether such subsequent transfer would destroy the right of such recovery by the vendor himself, is a question to be hereafter considered.

But it is contended in behalf of Dobson in this case, that there has been such payment or performance, or at least a tender or offer of such payment or performance, of what was contracted to be paid or performed on his part, as would, in equity, entitle him to a conveyance of the legal title of the land from the vendors or those claiming under them without condition; and that therefore there can, according to the aforesaid provision of the Code, be no recovery of the land against him at law any more than in equity, by the vendors or any claiming under them. On the other hand it is contended by Culpepper and wife that no part of the purchase money has ever, in fact, been paid by Dobson. How stands the case upon the record?

If we regard this case as upon evidence embodied in a bill of exceptions to the judgment of the court below, which is the most favorable view that can be taken of it for the plaintiff in error, Dobson, we must consider it *as upon a demurrer by him to the evidence; and so must regard as true all the evidence that is against him, and disregard all the evidence that is in conflict therewith. In that view

of the case, we must regard as true the evidence of Culpepper himself, who proves that not a dollar of the purchase money has ever been paid, but on the contrary that Dobson yet owes him, in addition to the purchase money of the land, (considering the contract as still in force,) \$70, the amount of two notes of Dobson which were transferred to him. He says: "The understanding of all the parties to the contract was, that Mr. Dobson was to pay for the tract of land in twelve months; and if he failed to pay for it in twelve months, he was to be considered a renter from the expiration of the twelve months, at the sum of \$40 per year. He, the witness, further says that no money was paid to him or his wife by Dobson, at the time of the purchase; that he and his wife agreed to take a lot of furniture valued at \$125, in part payment of the purchase money, which said lot of furniture was to be delivered to them in a few days, but has never been delivered. According to this evidence, Dobson is not only not entitled to the land in law or equity, but is largely indebted to Culpepper and wife for rents and otherwise.

But even if we regard the evidence of Dobson himself, which is directly in conflict with the evidence of Culpepper, and with other evidence in the case, it certainly does not show full payment of the purchase money, or even payment of any part of it, except the cash payment of the \$80 mentioned in the receipt, and \$75 which he says he let Mrs. Culpepper have in 1864, while her husband was from home, and in the Confederate lines. This \$75 was no doubt Confederate money, and worth little or nothing. The witness further says, that

he had become security for the plaintiff, Z. Culpepper, in a bond *to Mrs. Williamson, on which bond a judgment was recovered on the 15th of January 1866, for \$137 with interest from the 29th day of April 1861 till paid, and costs \$6 72; that he would not pay the whole of the purchase money for the tenement in controversy, while that judgment was unpaid; but he had offered, if plaintiffs would consent for him to settle the judgment out of what he owed for "Cuba," he would pay the balance; which offer, plaintiffs refused to accept. That he, the defendant, had agreed to let plaintiffs have some furniture, but before he could deliver it, the war commenced, and thereby he was prevented from delivering it. The defendant further stated on cross examination, that after the 5th of March 1869, the date of a certain deed made by him, he became an involuntary bankrupt; that he did not name the tenement in controversy in the schedule of property rendered by him in the court of bankruptcy; that his assignee in bankruptcy had not claimed the said tenement; and that he, the defendant, had received a discharge under the bankrupt law of the United States. The defendant does not pretend that he ever paid a dollar of the debt for which he says he became bound as surety as aforesaid; and having received his discharge as a

bankrupt, he can never have it to pay. His omission of any reference to the land in his schedule, seems to be a disclaimer by him of any interest therein. This evidence of the defendant, if taken alone and fully credited, would certainly make out no title in him, in law or equity, to the land, and shows that he would be found to be indebted to the plaintiffs on a settlement of all accounts between them in regard to the land.

The other evidence in the case tends rather to support the evidence of Culpepper than that of Dobson, and to show that nothing was ever paid by Dobson for the
359 land *but \$75 in Confederate money, worth little or nothing, and perhaps two bottles of brandy, which he let Mrs. Culpepper have in 1864, during the absence of her husband. John T. Daniels, who wrote and witnessed the contract, says he saw no money pass; and from the evidence of John S. Stubbs, the counsel for Dobson, it appears probable that the \$80 mentioned in the receipt as having been paid, was not in fact paid, but was intended to be paid in furniture, which Dobson himself admits, was never delivered.

The merits of this case, therefore, are clearly against the plaintiff in error, Dobson, who has no title to the land in law or equity. And the only remaining question is, whether this action was brought by the wrong parties, in being brought by Culpepper and wife, the vendors of Dobson, instead of being brought by Simcoe, their donee.

We have no doubt but that this action was brought, as it certainly was prosecuted, with the knowledge and perhaps the assent, and for the benefit of Simcoe. He was a witness for the plaintiffs in the action, gave testimony in support of their claim, and set up none for himself. It is not pretended by Dobson that he ever paid any rent to Simcoe for the land, or that Simcoe ever claimed any rent of him. Under these circumstances we would be very glad to be able to affirm the judgments of the County and Circuit courts in this case, instead of reversing them upon a mere technicality, when the merits of the case are so clearly against the plaintiff in error. But we must follow the law, whithersoever it goeth, and even though it lead us to apparent injustice and hardship. What, then, is the law on the subject?

There is no rule of law better settled than that a tenant is estopped from disputing his landlord's title; and as a general rule,

he is bound to surrender possession at
360 *the end of his term to his landlord.

No matter how destitute of title the landlord may be, or how clear the title of a stranger may be in the land, the tenant cannot deny the title of the former, nor affirm that of the latter, in his defence to the landlord's action for the land. No reference to authority on this subject can be necessary. The same principle applies to the relation of vendor and vendee. The latter is estopped from denying the title of the former in an action at law to recover

possession of the subject of the sale. This principle is not denied, nor is its application to the case of vendor and vendee; and it would be very clear in this case that if the plaintiff in error be not entitled to the land, the defendants in error are entitled to recover it of him in this action, unless they are deprived of that right by means of the deed of gift to Simcoe, before mentioned. The question is not, whether that deed confers a right of action on Simcoe, to recover possession of the land, but whether it takes away the right of Simcoe's donors to recover such possession. Two persons may each have a right to recover possession of the same land. The lessor always has a right to recover it of his lessee, at the end of the term, even though the lessor has not a shadow of title. But that does not affect the right of the real owner to recover it. If the real owner recovers it of the lessee, before the lessor does, that recovery of course discharges the lessee from the lessor's right of action.

But the question is, whether this right of the lessor or vendor to recover possession of the property does not cease when he conveys away his title to another? Whether the estoppel of the lessee or vendee, to set up title in a stranger, as a defence to the action of the lessor or vendor, applies to the title of a person to whom the lessor or vendor may have conveyed his interest in the subject, after making the lease or contract of sale.

361 *Although a tenant "cannot show that his lessor had no title to the premises when the tenancy commenced, he may show that the landlord holds in violation of the laws of the State, or that his interest has since expired, or that he has sold and conveyed the land, or that he has been evicted by title paramount; and that, therefore, he has no right to bring the suit." Thus is the law laid down in Taylor's Landlord and Tenant, § 707; and the authorities cited in the notes to that section fully sustain the author. See also Adams on Ejectment, ed. of 1854, p. 315, marg. 276, and notes. In 3 Saund. Rep. p. 418, it is said in note c, that "the rule is now settled, that though the tenant cannot deny that the person by whom he was let into possession had title at that time, he may show that such title is determined." Gravenor v. Woodhouse, 1 Bing. 38, 8 Eng. C. L. R. 235; Hopcraft v. Keys, 9 Bing. 613, 23 Eng. C. L. R. 399; Doe v. Edwards, 5 B. & Ad. 1065, 27 Eng. C. L. R. 268. In the last case it was held by the court of King's Bench, that "in ejectment by a landlord for forfeiture, it is a good defence that the landlord, after the execution of the lease, conveyed away his title to the premises by a mortgage; although it be not shown that any interest in the mortgage is in arrear, or that the mortgagee has made any claim, or otherwise enforced his rights as against either landlord or tenant." Patterson, J., said: My brother Parke thinks that the tenant was entitled to make this defence, because, in doing so, he did not

set up any thing adverse to the right of his landlord to grant the lease, but merely showed that he had parted with his title subsequently. See *Pope v. Biggs*, 9 B. & C. 245, 17 Eng. C. L. R. 368. And *Denman, C. J.*, said: "We agree with my Brother *Parke*, that he (the lessor) cannot, after this, recover for a forfeiture." See 362 also *Syburn's lessee v. Slade*, *4 T. R. 682; 16 Eng. C. L. R. 409; *Doe v. Barton*, 11 Ad. & El. 307, 39 Eng. C. L. R. 97; *Downs v. Cooper*, 2 Ad. & El. N. S. 256, 42 Eng. C. L. R. 663; and *Doe v. Watson*, 2 Stark R. 230, 3 Eng. C. L. R. 328. In this last case, *Lord Ellenborough, C. J.*, allowed the defendant in ejectment to show that his landlord, pending the term, sold his interest in the premises; his lordship saying that the defence was not inconsistent with the admission of the landlord's title by the defendant, during the time for which he paid rent. This decision seems to be rather adverse to another nisi prius decision of the same judge, made eight years before; *Balls v. Westwood*, 2 Camp. 11; in which very strong language was used by him, in denying the right of a tenant to dispute the title of his landlord. But that case must stand upon its peculiar circumstances, if it can stand at all, and certainly can be of little weight against the uniform current of authority in favor of the right of the tenant to show that his landlord's title has expired, or been conveyed away by him since the date of the lease. The American authorities run in the same channel with the English on this subject. 1 A. K. Marshall 99, 1 K'y Rep. 73; *Binney v. Chapman*, 5 Pick. R. 124; *Jackson v. Johnson*, 5 Cow. R. 75; *Jackson v. Rowland*, 6 Wend. R. 666; *Den v. Ashmore*, 2 Zabriske's R. 261; and *Tilghman, &c. v. Little*, 13 Ill. R. 239, are some of the cases. There seems to be no conflict among them. We have no direct decision of this court on the subject; but in *Miller v. Williams*, 15 Gratt. 213-219, the law was admitted to be as above stated, and some of the authorities were cited in support of it.

If the defendant, in the court below, can be considered as having been in adverse possession of the land, when the deed was made by the plaintiffs to *Simcoe*, still that deed was operative under the Code, 363 ch. 116, § 5, *and transferred to him their right of entry and action. *Carrington v. Goddin*, 13 Gratt. 587, 600.

We are, therefore, brought to the conclusion, reluctantly so far as this case is concerned, that it is a competent defence for the defendant in this case to show, that since his contract of purchase from the plaintiffs, they have conveyed the land in controversy, by deed of gift to *Simcoe*, the son of the female plaintiff, and that this action ought to have been in his name instead of theirs. On principle, the authorities referred to seem to be sound. The lessee or vendee does not dispute the title of his lessor or vendor, in showing that the former has conveyed his title to another since the lease or the contract of sale; but

thereby rather confirms that title. The benefit of the estoppel created by the lease or the contract of sale, is not destroyed, but merely transferred by the lessor's or vendor's own act from him to his assignee; and the lessee or vendee can thereafter no more dispute the title of such assignee than he could before dispute the title of the lessor or vendor. The former flows from the latter, and is in effect the same title. The principle is, that to maintain ejectment or unlawful detainer for land, the plaintiff must have the legal title to the possession of the land. Where the relation of landlord and tenant, or vendor and vendee exists between the parties, the defendant is estopped from denying the plaintiff's title, which stands in the stead of proof of such title, indeed conclusive proof of it. But when the lessor or vendor, after the lease or contract of sale, conveys his title to another, he loses the benefit of the estoppel, or rather transfers it to his assignee. In the language of *Lord Denman* in *Downs v. Cooper*, supra, he is estopped by his conveyance from claiming the benefit of the estoppel arising from the lease or contract of sale. There is no necessity 364 for an attornment to perfect *the right of the assignee in such case. It is rendered unnecessary in England by the statute of 11 Geo. II. c. 19, and in this State by the Code, ch. 138, § 3, p. 617.

We are therefore of opinion that the judgments of the Circuit and County courts are both erroneous, and must be reversed and annulled, and judgment rendered in lieu thereof, for the plaintiff in error.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the merits of this case are against the plaintiff in error, who is not entitled to the land in controversy nor the possession thereof. But the court is further of opinion, that this action was brought by, or in the names of the wrong parties; having been brought in the names of the defendants in error, *Culpepper and wife*, instead of the name of *Walter T. Simcoe*, to whom they conveyed the said land by deed dated the 31st day of August 1869, and copied in the record, and who thereby became entitled to the said land and the possession thereof, and to sue for and recover the same in his name.

Therefore it is considered by the court, that the said judgments of the said Circuit and county courts are erroneous, and that the same be reversed and annulled, and that the plaintiff in error recover against the defendants in error his costs by him expended in the prosecution of his writs of supersedeas here and in the said Circuit court. And this court proceeding to render such judgment as the said county court ought to have rendered, it is further considered by the court upon the whole matter of law and fact, that the said defendants in error take nothing by their bill, but for their false clamor be in mercy, &c.; and

that the plaintiff in error go thereof
365 *without day and recover against the
defendants in error his costs by him
about his defence in the said county court
expended, which is ordered to be certified
to the said Circuit court of Gloucester
county.

Judgment reversed.

UNLAWFUL DETAINER.

- I. Nature of the Action of Unlawful Detainer.
- II. Forcible Entry.
- III. Who May Bring the Action.
- IV. Statute of Limitations.
- V. Summons.
- VI. Evidence.
- VII. Notice and Demand.
- VIII. Formal Defects.
- IX. Courts.

I. NATURE OF THE ACTION OF UNLAWFUL DETAINER.

The remedy for an unlawful or forcible entry was designed to protect the actual possession, whether rightful or wrongful, against *unlawful* invasion, and to afford summary redress and restitution. The entry of the owner is unlawful, if forcible; and the entry of any other person is unlawful, whether forcible or not. If the defendant enter unlawfully, the plaintiff is entitled to recover without any regard to the question of his right of possession. *Ollinger v. Shepherd*, 13 Gratt. 471; *Moore v. Douglass*, 14 W. Va. 732; *Davis v. Mayo*, 82 Va. 97; *Fore v. Campbell*, 82 Va. 812, 1 S. E. Rep. 180; *Mears v. Dexter*, 86 Va. 828, 11 S. E. Rep. 538.

The action of unlawful detainer does not try title. Even the owner cannot by this form of action recover against a person rightfully in possession though such person may have no title or claim of any kind to the land. *Hays v. Altizer*, 24 W. Va. 505; *Ollinger v. Shepherd*, 13 Gratt. 462; *Emerick v. Tavener*, 9 Gratt. 228; *Davis v. Mayo*, 82 Va. 97; *Van Gunden v. Kane*, 88 Va. 501, 14 S. E. Rep. 334.

One in possession of land under *bona fide* claim of title, never having abandoned such possession, may recover in an action of unlawful entry and detainer against the owner who enters without the consent of the party in possession. *Mitchell v. Carder*, 21 W. Va. 277.

Possession.—In order to maintain the action of unlawful entry or detainer, it is essential that the plaintiff shall have actual possession or the right to the possession, and that defendant should be a wrongdoer; but where he has the right it is not essential that he should also have the actual or physical possession, the *pedis possessio*, at the time the unlawful entry is made by defendant. *Storrs v. Felck*, 24 W. Va. 606; *Duff v. Good*, 24 W. Va. 682; *Chancey v. Smith*, 25 W. Va. 407.

Constructive Possession.—Actual possession under a *bona fide* claim of the whole and color of title thereto, is possession of the whole, or so much thereof as is not in the actual possession of others. *Moore v. Douglass*, 14 W. Va. 732; *Ollinger v. Shepherd*, 13 Gratt. 473; *Hays v. Altizer*, 24 W. Va. 505; *Duff v. Good*, 24 W. Va. 682.

When Right of Possession Depends upon Title.—The Code Va. 1860, ch. 124, § 1, gives the remedy of unlawful detainer where there has been an unlawful entry upon land, or where the entry having been

lawful, retains possession unlawfully for a term less than three years; and this action is allowed though the right of possession may depend altogether upon the validity of the title under which defendant claims. *Corbett v. Nutt*, 18 Gratt. 624-643.

Possession—Several Claimants.—Only one claimant can have possession, and if defendant is in possession, plaintiff could only acquire possession expelling defendant or by defendant's abandonment of possession. *Mitchell v. Carder*, 21 W. Va. 277; *Hays v. Altizer*, 24 W. Va. 505.

II. FORCIBLE ENTRY.

A forcible entry, under our statute giving civil redress by summary proceedings, is precisely what would constitute a forcible entry for which at common law a party might be punished criminally. It therefore lies when a party enters on land in the possession of another, and, either by his behavior or speech, gives those who are in possession just cause to fear he will do them some bodily harm if they do not give way to him; whenever the entry is "with strong hand or multitude of people." *Franklin v. Geho*, 80 W. Va. 27, 3 S. E. Rep. 106; *Pauley v. Chapman*, 2 Rob. 235.

Actual Force.—To sustain a complaint for forcible entry, the force must be actual, not constructive; otherwise the remedy given for an unlawful entry would be unnecessary. *Pauley v. Chapman*, 2 Rob. 235.

III. WHO MAY BRING THE ACTION.

In an action of unlawful entry the plaintiff must show that the defendant's entry was unlawful and that he unlawfully withholds the possession. In such case defendant may show a right of entry at the trial, but in cases of forcible entry, he is precluded from so doing. *Pauley v. Chapman*, 2 Rob. 237; *Power v. Tazewells*, 25 Gratt. 790; *Hurst v. Dulany*, 84 Va. 701, 5 S. E. Rep. 803; *Kincheloe v. Tracewells*, 11 Gratt. 587; *Thomas v. Hukill*, 34 W. Va. 385, 12 S. E. Rep. 522.

Trustee.—The trustee of a married woman in whom her property is vested to her sole and separate use, may maintain the action of unlawful detainer against the lessee of her husband, he having no power to make such lease without the consent of the trustee. *Pannill v. Coles*, 81 Va. 380.

Remainderman.—A remainderman may recover in an action of unlawful detainer land conveyed by the life tenant to a third party provided he himself did not join in the grant. Such action may be brought within three years from the death of the life tenant. *Hope v. N. & W. R. Co.*, 79 Va. 283.

Municipal Corporation.—The city of Norfolk is the owner of the ground which she has not disposed of, covered by water, lying between Parker street and the portwarden's line, both as riparian proprietor and as having had long possession thereof; and the city may maintain an action of unlawful entry and detainer, against any intruder upon said water lots. See *Alex., etc., Ry. Co. v. Faunce*, 31 Gratt. 761, and *note*, citing the principal case; also, *Barre v. Flemings*, 29 W. Va. 319, 1 S. E. Rep. 735; *Ravenswood v. Flemings*, 23 W. Va. 64, in both of which cases the principal case is cited with approval. The principal case is also cited by MR. JUSTICE GRAY in *Shively v. Bowlby*, 14 Sup. Ct. Rep. 557, 152 U. S. 1. See monographic *note* on "Municipal Corporations" appended to *Town of Danville v. Pace*, 35 Gratt. 1.

Party Who Has No Interest.—One who has sold to another a tract of land on condition and has afterwards conveyed such tract to a third party, cannot,

on failure to perform the condition, maintain the action of unlawful detainer for possession of that tract in his own name. *Dobson v. Culpepper*, 23 Gratt. 352.

Landlord and Tenant.—As a general rule a tenant is not allowed to question his landlord's title; and this is true though the tenant is in actual possession at the time he accepts the lease. *Voss v. King*, 28 W. Va. 607, 18 S. E. Rep. 763; *Marmet Co. v. Archibald*, 27 W. Va. 778, 17 S. E. Rep. 299; *Emerick v. Tavener*, 9 Gratt. 220; *Locke v. Frasher*, 79 Va. 400; *Allen v. Paul*, 24 Gratt. 332; *Campbell v. Fetterman*, 20 W. Va. 398.

Same—Fraud.—But a person in possession of land and claiming title to it, who is by fraud or mistake induced to believe that another has a better right to it, and to take a lease from him, may set up such fraud or mistake and show that he has good title. *Alderson v. Miller*, 15 Gratt. 279; *Locke v. Frasher*, 79 Va. 400; *Turpin v. Saunders*, 23 Gratt. 27; *Suttle v. R. F.*, etc., R. Co., 76 Va. 289.

Vendee—Contract Executory.—The vendee in an executory contract, having a mere equitable right, cannot maintain an action of unlawful detainer against his vendor. His remedy at law is an action for damages. *Hawkins v. Wilson*, 1 W. Va. 117.

A vendee in an executory contract who was not in possession at the time of the alleged unlawful entry, cannot maintain the action of unlawful entry and detainer against his vendor or his vendor's alienee. *Supervisors v. Ellison*, 8 W. Va. 308.

Vendor—Contract Executory.—The provision of the Va. Code 1887 that "A vendor, or any claiming under him, shall not, at law any more than in equity, recover against a vendee, or those claiming under him, lands sold by such vendor to such vendee, when there is a writing, stating the purchase and the terms thereof, signed by the vendor or his agent, and there has been such payment or performance of what was contracted to be paid or performed on the part of the vendee, as would in equity entitle him, or those claiming under him, to a conveyance of the legal title of such land from the vendor, or those claiming under him, without condition." Va. Code (1887), ch. 124, § 2741, is held to apply as well to an action of unlawful detainer as to an action of ejectment. *Dobson v. Culpepper*, 23 Gratt. 355; *Suttle v. R. F.*, etc., R. Co., 76 Va. 284; *Nelson v. Triplett*, 81 Va. 236; *McClung v. Echols*, 5 W. Va. 204; *Gas Co. v. Wheeling*, 8 W. Va. 320; Code W. Va. 1899, ch. 90, p. 749.

Defendant in unlawful detainer was put in possession under a written contract of sale with general warranty. Defendant had paid part of the purchase price but plaintiff could not give good title because of certain incumbrances outstanding. Plaintiff served notice on defendant to deliver possession. *Held*, plaintiff could not have maintained an action on contract for the unpaid purchase money and a *fortiori* not for unlawful detainer. *Rosenberger v. Bowen*, 84 Va. 675, 5 S. E. Rep. 609.

Mortgagor.—The provision of the Va. Code 1887 that, "The payment of the whole sum, or the performance of the whole duty, or the accomplishment of the whole purpose, which any mortgage or deed of trust may have been made to secure or effect shall prevent the grantee, or his heirs, from recovering at law, by virtue of such mortgage or deed of trust, property thereby conveyed, wherever the defendant would in equity be entitled to a decree, revesting the legal title in him, without condition." Va. Code (1887), ch. 124, § 2742, applies to an action of

unlawful detainer. *Davis v. Teays*, 3 Gratt. 288; *Faulkner v. Brockenbrough*, 4 Rand. 245.

IV. STATUTE OF LIMITATIONS.

If defendant has held adverse possession of the land in controversy for more than two years previous to the bringing of the action, the action of unlawful detainer cannot be maintained, and in the absence of evidence to the contrary the holding is presumed adverse. *Hays v. Altizer*, 24 W. Va. 505.

It is incumbent on the plaintiff in an action of unlawful detainer to show that the defendant has not *unlawfully* held possession for three years or more before the date of the summons. *Pettit v. Cowherd*, 23 Va. 25, 1 S. E. Rep. 302; *Fore v. Campbell*, 23 Va. 512, 1 S. E. Rep. 180; *Williamson v. Paxton*, 18 Gratt. 502; *Allen v. Paul*, 24 Gratt. 323.

V. SUMMONS.

Return.—Under ch. 170 of the Code of 1860 and ch. 125 of the same Code a summons in unlawful detainer should be returnable to the court and not to the rules. *Gorman v. Steed*, 1 W. Va. 1; *Gas Co. v. Wheeling*, 7 W. Va. 22.

A writ of unlawful detainer returnable to the "next term" of a circuit court after its date, not to the first day of the next term, was held sufficient. *Gas Co. v. Wheeling*, 7 W. Va. 22; *Hare v. Niblo*, 4 Leigh 350.

In an action of unlawful detainer the writ need not state at what place in the county the court, to which the writ is returnable, will be held. *Cunningham v. Sayre*, 21 W. Va. 440.

Service.—On warrant of unlawful detainer when the warrant is served on only one of two defendants the plaintiff may proceed against him alone. *Harman v. Odell*, 6 Gratt. 207.

Description of Premises.—The summons, in an action of unlawful detainer, should so describe the premises that their locality may be ascertained and the premises identified with reasonable certainty, having in view the delivery of possession thereof from such description. *Board of Education v. Crawford*, 14 W. Va. 790; *Allen v. Gibson*, 4 Rand. 468; *Gorman v. Steed*, 1 W. Va. 1; *Hawley v. Twyman*, 24 Gratt. 516; *Turberville v. Long*, 3 H. & M. 314; *Simpkins v. White*, 43 W. Va. 125, 27 S. E. Rep. 361.

VI. EVIDENCE.

Extent of Possession.—A deed under which plaintiff claims, though it be voidable or even void, may be admitted in evidence to show the extent of plaintiff's claim in order to determine the extent of his possession. *Olinger v. Shepherd*, 12 Gratt. 462; *Cales v. Miller*, 8 Gratt. 6; *Hassler v. King*, 9 Gratt. 120; *Harrison v. Middleton*, 11 Gratt. 527.

Nature of Possession—Parol Lease.—On trial of a writ of unlawful detainer, if defendant sets up title in himself, plaintiff may show that defendant entered by virtue of a parol lease from himself, although such lease was to continue more than one year. *Adams v. Martin*, 8 Gratt. 107.

Notice.—In an action of unlawful detainer where defendant admits plaintiff's title, a notice to defendant to quit the premises is proper evidence on behalf of plaintiff. *Zink v. Wilson*, 3 W. Va. 503.

Husband and Wife.—In an action of unlawful detainer against a wife, her husband is incompetent to testify though it appeared that he was not withholding the premises. The common-law disability is unchanged here. *Farley v. Tillar*, 81 Va. 275.

Evidence—Judgment—Another Action.—In an action of trespass on the case for unlawful distress, it

appeared that the rent distrained for was payable monthly. *Held*, a judgment in unlawful detainer rendered three months before such distress and another rendered two months after, were not evidence to show that no rent was due at the time of the distress. *Fishburne v. Engledove*, 91 Va. 548, 23 S. E. Rep. 354.

VII. NOTICE AND DEMAND.

A vendor in an executory contract for the sale of land put the vendee in possession, it being part of the contract that if certain conditions were not performed the contract should not take effect but that in such case the vendee should hold as tenant for one year. *Held*, that on failure to perform the condition, the vendor might maintain the action of unlawful detainer without notice to quit, it appearing that the tenant was not a tenant from year to year, but a tenant by sufferance. The court said in this case, "if any demand and refusal were necessary to determine any right of possession of defendant, there had been such demand and refusal." Ch. 135, § 20, Va. Code 1860 did not apply in this case. *Williamson v. Paxton*, 18 Gratt. 475. See *Twyman v. Hawley*, 24 Gratt. 513; 2 Min. Inst., p. 308; *Allen v. Bartlett*, 20 W. Va. 46; *Voss v. King*, 38 W. Va. 607, 18 S. E. Rep. 762.

Where a lease provides that the same shall terminate and cease whenever the lessee, from any cause, ceases to work for the lessor, and it appears that the lessee had ceased to work for the lessor before the action was commenced, said lessee is not entitled to notice to quit. *Marmet Co. v. Archibald*, 37 W. Va. 773, 17 S. E. Rep. 290.

If defendant holds land not adversely but under the plaintiff, notice to quit or demand of possession must be shown before the action of unlawful detainer can be maintained. *Bowyer v. Seymour*, 13 W. Va. 12; *Hays v. Altizer*, 24 W. Va. 506; *Williamson v. Paxton*, 18 Gratt. 506; *Pettit v. Cowherd*, 33 Va. 25, 1 S. E. Rep. 393; *Johnston v. Hargrove*, 81 Va. 118; *Jones v. Temple*, 87 Va. 210, 13 S. E. Rep. 404.

Where a lease for years contains a clause of forfeiture for breach of its covenant to pay rent or other covenant, but no clause of re-entry for such forfeiture, demand and re-entry is not the only mode by which the landlord may enforce the forfeiture; he may do so by making a new lease, to another person. In such case the second lessee may, after notice, maintain unlawful detainer against the first lessee in possession. *Guffey v. Hukill*, 34 W. Va. 40, 11 S. E. Rep. 754.

Disclaimer.—A lessee who disclaims to hold of his lessor is liable to an action of unlawful detainer without notice to quit. *Emerick v. Tavenor*, 9 Gratt. 250; *Allen v. Paul*, 24 Gratt. 333; *Voss v. King*, 38 W. Va. 607, 18 S. E. Rep. 762.

A person who, while in the possession of land, accepts a lease therefor from one claiming to be the owner, may, after his term expires, by disclaimer and notice to such person, terminate his tenancy; and he will not, in such case, be required to surrender the possession before he will be allowed to set up an adverse title in himself, or a third person. *Voss v. King*, 38 W. Va. 236, 10 S. E. Rep. 402.

If a tenant takes a secret lease or conveyance for the land from a third party, claiming to be the owner, without the knowledge of his landlord, the character of his possession will not be changed. *Voss v. King*, 38 W. Va. 236, 10 S. E. Rep. 402.

VIII. FORMAL DEFECTS.

In unlawful detainer before a justice, or on its

appeal, a verdict, on full trial on the merits will not be set aside because there was no plea and issue. The statute puts in a plea of not guilty. *Simpkins v. White*, 43 W. Va. 125, 27 S. E. Rep. 361.

Failure to File a Plea.—In an action of unlawful detainer defendant appears; but, though the case is continued for years, he does not file any plea. The cause is proceeded in precisely as if there was a plea filed—the jury are sworn to try the issue joined, and the defendant makes full defense. Defendant cannot, in the appellate court, take advantage of his own failure to file a plea. *Bartley v. McKinney*, 23 Gratt. 750; *Frazier v. Va. Military Inst.*, 81 Va. 63; *Olinger v. Shepherd*, 13 Gratt. 462.

Substitution of Real Party in Interest.—When in an action of unlawful detainer the lessor is, on his own motion, substituted for the lessee as defendant, it is no objection to the judgment for plaintiff that defendant was not in actual possession. *Van Gunden v. Kane*, 88 Va. 591, 14 S. E. Rep. 334.

Issue.—Where the case appears to have been decided on the merits, it is immaterial that the jury was sworn to "try the issue joined" instead of being sworn "to try whether the defendant unlawfully withholds the premises in controversy." *Chancy v. Smith*, 26 W. Va. 404; *Todd v. Gates*, 20 W. Va. 464; *Griffe v. McCoy*, 8 W. Va. 201; *Huffman v. Alderson*, 9 W. Va. 617; *Southside R. Co. v. Daniel*, 20 Gratt. 244.

Non-Joiner.—One joint tenant or tenant in common may, in an action of unlawful detainer, recover the possession of the whole land, without joining his co-tenant in the action. *Voss v. King*, 38 W. Va. 236, 10 S. E. Rep. 402.

Verdict.—In an action of unlawful or forcible entry and detainer, a verdict finding that the defendant unlawfully withholds from the plaintiff the land in the summons described, is sufficient, and a judgment may be properly entered upon it. *Franklin v. Geho*, 30 W. Va. 27, 3 S. E. Rep. 166; *Gorman v. Steed*, 1 W. Va. 1; *Mann v. Bryant*, 13 W. Va. 516.

In W. Va. a verdict "We the jury find for the plaintiff the premises in the summons mentioned" is held to be sufficient. *Lawson v. Dalton*, 18 W. Va. 766; *Mann v. Bryant*, 12 W. Va. 516. See in general, Code Va. 1897, §§ 2259, 2300, 2372.

IX. COURTS.

Equity.—A court of equity, without prejudice to the title of either party, will enjoin an attempt to reverse a judgment on a writ of forcible entry in which a second writ of restitution has been granted, the first having been destroyed without fault of plaintiff in equity. *Ashby v. Kiger*, Gilmer 153.

Justice's Court.—Under the act of Jan. 3, 1834, p. 74, when on trial of an action of unlawful detainer, the justices summoned to form a court fail to meet, and no court is formed on the day appointed, such failure does not operate to discontinue the cause but the same stands adjourned until the next regular court of the county or corporation. *Mann v. Gwinn*, 8 Gratt. 58.

Removal.—The action of unlawful detainer under the Virginia statute is a *civil* action, which by virtue of the act of March 23, 1843, may be removed to the circuit court, on motion without notice, after it shall have remained undecided in the county court for the period of one year or upwards. *Kincheloe v. Tracewells*, 11 Gratt. 598; *Harrison v. Middleton*, 11 Gratt. 527.

On the trial of a warrant issued by a justice in unlawful detainer, if answer of title is filed by the

defendant setting forth therein the facts showing that such title will come in question on the trial thereof, which answer shall be properly verified by his affidavit or that of his agent or attorney, if the justice be of opinion that the facts therein stated show that the title of real property will so come in question he shall dismiss the action at the costs of the plaintiff, unless the plaintiff or his agent or attorney shall file an affidavit denying the truth of such facts. *Watson v. Watson*, 45 W. Va. 290, 31 S. E. Rep. 399; *Hughes v. Mount*, 23 W. Va. 180.

Revival.—When either plaintiff or defendant in an action of unlawful detainer dies pending an appeal the action cannot be revived. *Chapman v. Dunlap*, 4 Gratt. 86; *Moran v. Eldridge*, 3 W. Va. 574.

Under W. Va. Code 1899, ch. 127, § 2, this action is held to survive whether the death be that of plaintiff or defendant. *Cunningham v. Sayre*, 21 W. Va. 440.

Appeal—Jurisdictional Amount.—The constitutional provision that the court of appeals shall have jurisdiction of cases involving "the title or boundaries of land" without regard to the amount in controversy includes cases of unlawful detainer; for possession is an element necessary to make up complete title to land. *Pannill v. Coles*, 81 Va. 890; *Gorman v. Steed*, 1 W. Va. 1; *Rathbone, etc., Co. v. Rauch*, 5 W. Va. 79; *Const. Va.*, Art. VI, § 2.

New Trials.—In proceedings under the act of assembly concerning forcible entries and detainers, if a verdict be rendered for the plaintiff, a new trial may be granted by the court to the defendant; and upon the dissolution of the court, the plaintiff must proceed *de novo*. *Hammock v. Wilson*, 2 Va. Cas. 321 (1822).

Verdict of Competent Court.—Va. Code, 1887, § 2721, provides that a judgment in an action of unlawful detainer shall not "bar any action of trespass or ejectment between the same parties, nor shall any such judgment or verdict be conclusive, in any such future action, of the facts therein found." *Morris v. Deane*, 94 Va. 572, 27 S. E. Rep. 432; *Harrison v. Manson*, 95 Va. 593, 29 S. E. Rep. 430; *Almond v. Wilson*, 75 Va. 613; *Code W. Va.*, 1899, ch. 89, p. 746. See monographic *note* on "Dower" appended to *Davis v. Davis*, 25 Gratt. 587; monographic *note* on "Adversary Possession" appended to *Nowlin v. Reynolds*, 25 Gratt. 187; *W. Va. Code* 1899, ch. 65, § 10; *W. Va. Code* 1899, ch. 50, p. 492, ch. 50, p. 523, ch. 89, p. 746; *Va. Code* 1887, ch. 123; *Supp.* 1900, § 2716; *Va. Code* 1887, § 2412; *Report of Rev.* 1849, p. 547 and *note*.

366 *Bennett v. Claiborne & als.

March Term, 1873, Richmond.

1. **Guardians—Expenditures—Case at Bar.**—D qualified as guardian of C, in August 1858, and acted as such until his death in April 1861. His executor W acted as guardian of C until April 1862, and had the account of D settled, showing due from him to C \$4,133.98; for which sum W gave his bond to B, who qualified as guardian of C in April 1863; and afterwards paid B, at different times, \$2,551. B ceased to act as guardian of C in December 1863, when S became guardian. The income of the estate of C in the hands of the guardians was not equal to the expenditures upon her; but her whole income, including that in the hands of her father's ex'ors, during the whole period of the guardianship, was equal to her expenses; and

these were only suitable to her estate and condition in life. **Held:**

1. **Same—Same—Scaling.**—The estate of D is to be charged with the amount found due from him; and credited for the money paid by his ex'or W at its scaled value.

2. **Same—Same—Same.**—B having received the amount of an ante-war bond, and paid ante-war expenses of C incurred during the guardianship of D, these payments to the amount of said bond are not to be scaled; but all other disbursements of B are to be scaled.

3. **Same—Same—Income of Ward Liable.**—The guardians are entitled to have the whole income of C applied to pay their expenditures upon her.

In December 1866 Ellen A. Claiborne filed her bill in the Circuit court of Pittsylvania county, in which she set out, that in 1858 Leonard Claiborne, her father, died; she being then an infant of every tender years: That David H. Clark was appointed her guardian at the August term 1858 of the County court of Pittsylvania, and 367 *continued to act as such until his death: That he left a will, by which he appointed John W. Wilson his executor: That on the 21st of April 1862 Coleman D. Bennett was appointed her guardian, and acted as such until December 1863, when he relinquished the guardianship, and Samuel D. Drewry was appointed, and acted until the plaintiff arrived at the age of twenty-one years. She says that no one of these guardians has returned an inventory of her estate: That Clark settled but two accounts of his guardianship; and after his death, and during the minority of the plaintiff, Wilson undertook to render an account of Clark's and his own transactions as guardian; which she insists is erroneous, and should not have been confirmed. The balance found due to the plaintiff on this settlement, of \$4,133.98, was never paid by said Wilson to Bennett, but was in some way so arranged between them as to have that appearance. She, therefore, objects to the allowance of said credit to Wilson, as executor of David H. Clark. That in Clark's settlement of his account of 1859 he is credited with expenses of the plaintiff beyond her income, which she is advised is illegal; and she objects to the same for that reason. She also objects to the account settled in 1860 on several grounds. She says that Bennett has settled no account; and she is utterly in the dark as to his proceedings; but judges, from the charge of \$4,133.98 made as so much money received by him from said Wilson, as ex'or of Clark, that some arrangement was made between them, by which, without paying money, the indebtedness of Clark was transferred to Bennett. She is advised that nothing short of paying what was due her by the first to the second guardian, can discharge the former, though it may subject the second guardian to her; and as to both, she insists on such relief and responsibility as the law imposes on them.

368 *On the surrender of said Bennett as guardian as aforesaid, Samuel H.

Drewry was appointed; and he has failed to render any account, or return any inventory as such guardian; and she is utterly unacquainted with his proceedings. How far he may have settled, if at all, with Bennett; how much money he may have received, if any, from him, she knows not; certain it is, that the transactions of said Clark and his executor Wilson, Bennett and Drewry, are so blended and dependent one upon another, that without an investigation of the transactions of all of them she cannot obtain her rights or show what they are. And making Wilson, in his own right and as executor of Clark, Bennett, Drewry, and the sureties of the several guardians parties, she prays for a settlement of the accounts; that each of them may show what he has received of her estate, and how he has disposed of it, and that any balance due to her may be decreed in her favor; and for general relief.

Wilson and Bennett answered separately, Bennett not until May 1868, and the bill was taken for confessed as to Drewry and the sureties. Wilson insisted that though the income of the ward's estate was not sufficient in the first year of Clark's guardianship, to meet the expenses of his ward, yet up to the death of Clark, which occurred on the 23d of April 1861, her income was sufficient to cover the expense incurred during the whole period of guardianship, and he was entitled so to apply it. He said that after Clark's death he had his account settled by a commissioner, and this account was confirmed by the court; and upon this settlement there was due to the ward from his testator \$3,756.50 of principal and \$246.06 profit, up to the 4th of October 1861, which amount with the interest thereon to the 21st of April 1862 amounted to \$4,133.98;

and for this amount he, (Wilson,) accounted with C. D. Bennett, *who had before that time qualified as guardian of the plaintiff; and on that day, the 21st of April 1862, he executed his bond to Bennett for that amount, and sometime afterwards he paid to Bennett \$2,500 of said amount.

Bennett says he qualified as guardian of the plaintiff on the 21st of April 1862, and acted as such until December 1863. He insists that the expenditures upon the plaintiff were not more than became her estate and her condition in life, and not more than the income of her whole estate, some of which was in the hands of the executors of her father; and that the whole income for the whole period of her wardship was to be applied, if necessary, to her expenditures during the same period.

As to the sum of \$4,133.98 referred to in the bill, as the amount turned over by Wilson, the executor of Clark, the former guardian of the plaintiff, it is true respondent gave Wilson a receipt for that amount, and it is also true the whole amount was not then paid to him; but the sum of \$2,551.11 has been paid. The receipt was given for the whole amount, to facilitate a settlement between the parties, and for no other reason;

and he submits to the court the question, whether the estate of Clark, or both, shall be responsible to the plaintiff for the amount. Said Wilson is responsible to respondent on his bond.

He further says, there is filed among the vouchers sundry bonds taken by David B. Clark, the plaintiff's former guardian, from her mother and brothers, all of which are believed to be solvent, and they all come within the stay law. He did not suppose the plaintiff desired her mother and brothers to be sued on said bonds; and he is willing they shall be delivered over to her.

370 *At the May term, 1867, the court made a decree directing commissioner Neal to take an account of the several guardianships, and make report thereof to the court.

The commissioner returned his report, by which he made Clark debtor to the plaintiff on the 21st of April 1861, of principal and profit, aggregated \$4,237.81. This sum was carried into Wilson's account, and he is charged with it and credited by the amount of his bond to Bennett for \$4,133.98, and he is made debtor of principal \$103.83, and creditor of profits \$36.81.

The commissioner reported Bennett to be indebted to his ward on the 21st of December 1863, when his guardianship terminated, in the sum of \$4,854.62; reduced by a payment to Drewry of \$3,000, leaving due from him \$1,854.62; and Drewry to be debtor on the 24th of December 1865 of \$124.11, and creditor on the account of profits \$104.39.

The commissioner further reported that the expenditures for the plaintiff were not more than her income in the hands of the executors of her father and her guardian, during the time that Bennett was her guardian, and that they were suitable to her estate and condition in life. To this report Bennett filed five exceptions:

1st. Because on the 14th page of the account there is an error in the addition of his credits of \$200—\$781 should be \$981.

2d. Because he is not allowed interest on the sums paid by him for plaintiff for taxes and clerk's tickets.

3d. Because the commissioner has not credited the defendant with the sum of \$40 paid on the 4th of January 1864, Confederate tax on the property of the plaintiff, assessed whilst the plaintiff was guardian, and has not credited him with the further sum of \$76.00, her *tax account for the year 1864; nor with the stamps on bonds sued on, \$1.00.

4th. Because he has scaled a balance found due said defendant December 21, 1863, of \$879.45, down to \$348 63 cts., contrary to the act of 1865-66, when part of that balance had been paid by defendant to satisfy debts contracted by D. A. Clark, her former guardian, before the war.

5th. Because the commissioner has charged said defendant with the following bonds, to wit: Wm. C. & Thos. P. Claiborne's bond for \$205 54, with interest; bond of same for \$50 with interest; Mrs. L. W. Claiborne's bond for \$138 90 with

interest; Bettie Claiborne's bond for \$138 90 with interest; when all said bonds are solvent and all under the stay law, and all executed to her former guardian, and all due from the mother, brothers and sisters of the plaintiff; and all of said bonds were tendered to the plaintiff before the commissioner, and she agreed to take her mother's bond, and not have it sued on.

As to the first exception, the error is plain. The second need not be noticed. The receipts show the payment of the taxes referred to in the third exception, and that they were for taxes of 1863, though paid in 1864. Upon the fourth exception the account shows that the payments made by the guardian for the expenses of his ward were scaled; of these payments upwards of \$400 were for expenses incurred whilst Clark was the guardian, and due in 1860 and 1861; and Bennett received during the period of his guardianship, the amount of the bond of P. T. Harvey, \$249 75.

The bonds mentioned in the fifth exception, were as stated in the exception, except that it may be doubtful whether since the war the brothers and sisters are able to pay.

They were all subject to the stay law; but the *commissioner thought the guardian should have brought suits upon the bonds and obtained judgments, which would have been liens upon the real estate of the obligors.

The cause came on to be heard on the 9th of June 1868, when the court sustained the third and fifth exceptions of Bennett to the report of commissioner Neal; and having a statement made according to his views, made a decree against Wilson, executor of Clark, for the sum of \$763 49, with interest from the 21st of April 1862; against Bennett for \$3,953 83 with interest from the 21st of December 1863; and against the defendant Drewry, for \$19 72.

In the statement made out by the order of the court, the amount of the bond of Wilson to Bennett is not charged to Clark or Wilson, but is charged to Bennett; and the \$3,000 paid by Bennett to Drewry, is credited to Bennett and charged to Drewry at its scaled value in gold, and fixed at \$139 48.

From this decree Bennett applied to a judge of this court for an appeal, which was allowed.

Ould & Carrington, for the appellant.

Marshall, Jones & Bouldin, and Crump, for the appellee.

ANDERSON, J., delivered the opinion of the court.

The court is of opinion, that the execution of the bond for \$4,133 98 cents, by John W. Wilson, executor of David H. Clark, to C. D. Bennett, the second guardian, does not discharge the estate of said Clark from its primary liability to the appellee, for so much of her estate as was received by said Clark as guardian. And it appearing that the said David H. Clark departed this life

on the 23d of April 1861; that John W.

Wilson qualified as his executor, and as such was guardian *in fact of the said appellee, until the qualification of the appellant, on the 21st of April 1862; and that the estate of said Clark was indebted to his said ward in the sum of \$4,237 81 cents; and that the disbursements made by his executor for her benefit, from the death of the decedent to the 21st of April 1862, exceeded the profits which came into the hands of the said executor by the sum of \$36 81 cents; the court is of opinion, that the estate of David H. Clark, on the 21st day of April 1862, was liable to the said appellee for the said sum of \$4,237 81, less the sum of \$36 81 aforesaid, balance due the executor on profit account.

And it appearing further, from the answers of both said Wilson and Bennett, that the former paid to the latter, upon the bond aforesaid, the sum of \$2,551 11 cents, at different periods, in Confederate currency, the court is of opinion, that the said appellee, Ellen A. Claiborne, is entitled to a decree against the estate of David H. Clark, for the said sum of \$4,237 81, less the sum of \$36 81, with interest from the 21st of April 1862 till paid, subject to a credit for the sum of \$2,551 11 at its scaled value, at the dates of payment.

The court is further of opinion, that the appellant, in the re-statement of his guardianship account should be debited with the sum so to be credited as aforesaid, to the estate of David H. Clark, and with the scaled value of all monies received by him, except the sum of \$249 75, D. T. Harvey's bond and the interest he received thereon, being a land bond executed to his predecessor, D. H. Clark; he should be charged with the face thereof, and should be credited by only the scaled value of the disbursements made by him, including the amount paid by him to S. D. Drewry, his successor, except to the amount of the principal and interest he collected on said bond, and to that extent should be credited *for his disbursements without scaling; it appearing that he paid off old debts without scaling, exceeding that amount. The balance struck will show the state of the account between the appellant and his ward.

The court is of opinion that there is no error in the decree sustaining appellant's exceptions No. 3 and 5, to report of commissioner G. D. Neal; and that the appellant should be allowed to discharge his liability for the bonds referred to in said 5th exception, by bringing them into court and filing them with the papers in the cause, to be turned over to the appellee, Ellen A. Claiborne. The court is also of opinion, that as the expenditures for the ward by her guardian Bennett, and the executor Wilson did not exceed the aggregate of her income from the whole of her estate, and were not greater than her station in life, and her estate justified, the said guardians are entitled to be credited for said disbursements. Foreman v. Murray & wife, 7 Leigh 412.

But the court is of opinion that there is error in the decree, in not sustaining the first exception of appellant to said commissioner's report, in crediting him for \$200 less than he was entitled to; which seems to be an error in addition, and is not likely to occur in remodelling the account.

There is no exception to the statement of the guardianship account of Samuel D. Drewry: and there is no error in the decree against him. It is considered therefore, by the court, that the decree of the Circuit court, so far as it is in conformity with the principles herein declared, be affirmed; and so far as it is not in conformity thereto, be reversed and annulled; and that the appellee, John W. Wilson, executor of D. H. Clark, out of the assets in his hands to be administered, pay to the appellant his costs in prosecuting his appeal here; and that the cause be remanded to the Circuit court of Pittsylvania county, with instructions to recommit the guardianship account of C. D. Bennett to a commissioner thereof, to be restated, in conformity with the principles herein declared; and for further proceedings to be had therein.

Decree reversed.

376 *Whitehead's Adm'r v. Whitehead & als.*

March Term, 1878, Richmond.

1. **Commissioners in Chancery Statute—Authority of County Court.**—The provisions of s. 16, ch. 182, Code of 1860, prescribing what shall be done by a commissioner in settling the accounts of fiduciaries, apply to the report, regular or special, mentioned in § 84, of the same chapter; and therefore, under this § 84, a County court is not authorized to make any order for investing or loaning out the money or funds therein referred to, unless the commissioner has previously conformed to the provisions of § 16, by posting the notice as therein required.
2. **Same—Same—Motion.**—If in such a case, the order is made by the County court, without the report required by the statute, the County court has jurisdiction on the motion of the parties whose money is invested, upon notice to the other party, to annul the order.

At the November term 1863 of the County court of Pittsylvania, on the motion of Sally A., Emily R. and Pincy Whitehead, by Wm. C. Tate, their next friend, it was ordered that John D. Glenn, administrator of A. J. Whitehead, deceased, be summoned to appear at the next term of the court, to show cause, if any he can, why the order made at the last term of the court, authorizing said administrator to deposit in the Pittsylvania Savings Bank the balance due them from A. J. Whitehead, their late guardian, should not be set aside.

The order of court referred to was made at the October term of the court, and

*For monographic note on Commissioners in Chancery, see end of case.

reciting that A. J. Whitehead, guardian of Sally A., Pincy and Emily R. Whitehead, having died; and it appearing to the court,

from the report of commissioner Banks, 377 that there is a balance in the hands of the said A. J. Whitehead due the said wards, on the 18th of August 1862, to the said Sally A., of \$1,782.00 of principal and \$87.26 of profit; to the said Pincy of \$1,782 of principal and \$223.99 of profit; and to the said Emily R. of \$1,782 of principal and \$296.28 of profit, on the motion of John D. Glenn, administrator of said A. J. Whitehead, deceased, the court doth authorize said administrator to deposit in the Pittsylvania Savings Bank said sums of money, with interest thereon; that he take a certificate of deposit thereof in the name of each ward, and file the same in the clerk's office with the clerk of this court.

The motion, of which notice was duly served on Glenn, came on to be heard at the January term of the court, when it was overruled, with costs. The plaintiffs thereupon applied to the judge of the Circuit court of Pittsylvania for a supersedeas to the judgment; which was allowed.

In the Circuit court it was agreed by the parties, that the report of commissioner Banks, and the order directing it to be recorded, made at the December term of the court, should be considered a part of the record; and the cause came on to be heard on the 6th day of June 1867, when the court held that the judgment of the County court was erroneous, because the order of the County court of the ——— October 1863, authorizing the defendant in error to deposit the money therein mentioned in the Pittsylvania Savings Bank, to the credit of the plaintiffs in error, (if such an order could be made at any time,) was premature, and made before the court had any jurisdiction to make any order in respect to said accounts, the same not having been returned to the clerk or the clerk's office at that time. Therefore, the judgment was reversed, with costs, and the order aforesaid of the County court, made at the October term 1863, was rescinded and annulled. To this 378 judgment Whitehead's adm'r, applied to this court for a supersedeas, which was allowed.

Although the statements made by the commissioner bring down the accounts to August 1862, they show that all the moneys with which he is charged, except the interest, were in the guardian's hands in May 1859. The first item in each account is a charge of \$1,517.17 of principal, balance due ward per account settled and recorded, as of the 20th of April 1859; and under date of May 1st of the same year, there is the additional charge of \$264.83, proceeds of the sale of slaves in which the wards had an interest. All the other items of the accounts, after that date, are charges of interest on the previous items on one side, and payments for wards on the other.

The report of the commissioner accompanying the statement of the accounts, bears date at its commencement, October

17th, 1863. It states that Glenn had on the 4th of September 1863, exhibited before the commissioner a statement of all money which A. J. Whitehead, as guardian, or he as his executor, had received and disbursed, or become chargeable with, together with his vouchers, from the time of said Whitehead's last settlement up to the 17th of October 1863. That this guardian was included in the list of fiduciaries, &c., which list was posted at the front door of the court house of the county, on the first day of October court 1863; and on the date of this report, (ten days having elapsed since the said account was mentioned in said list,) made up and completed the foregoing accounts of A. J. Whitehead, as guardian as aforesaid; and on the 18th of August 1862 found a balance of —, stating the amounts in the account. All of which amounts, together with the interest which has accrued thereon since the 18th of August, was deposited in the Pittsylvania Savings Bank, by *an order of Pittsylvania County court, made at its October term 1863, after deducting tax accounts and commissioner's tickets.

This report was endorsed by the clerk as filed on the 9th of November 1863; and at the December term of the County court, an order was made, reciting that the account having been returned to the clerk's office one month, and no exceptions filed to the same, it was examined by the court and confirmed.

It is very obvious that all of this report was not written, and that it was not signed by the commissioner, when the order of court was made. The statement of the accounts was made out on the 17th of October; the Court met on the 19th, when this statement (not the report) was presented to the court; and the order for the deposit of the money was made on the 22d. Such is the statement of R. Carter, the clerk of the commissioner, whose affidavit is filed in the case, though it does not appear to have been made a part of the record. Certainly the term of the court commenced on the 19th.

Dabney, Barksdale, Ould & Carrington, for the appellant.

Grattan, for the appellees.

STAPLES, J., delivered the opinion of the court.

The court is of opinion that the 16th section of chap. 132, Code of 1860, requires a commissioner in chancery, on the first day of any County court, to post at the front door of the court-house a list of those fiduciaries whose accounts are before him for settlement; stating the names of such fiduciaries, the nature of their accounts, whether as personal representative, guardian, curator, committee or trustee; and the names of their decedents, or of the persons for whom they are guardians, curators
380 *or committees, or under whose deed or other instrument of trust they are acting.

These provisions are manifestly intended for the protection of persons interested in the subject matter of such accounts; and they apply to the report, regular or special, mentioned in the 24th section of the same chapter; and consequently, under the last named section a County court is not authorized to make any order for investing or loaning out the money or funds therein referred to, unless the commissioner has previously conformed to the provisions of the 16th section, by posting the notice as therein required.

The settlement and report of commissioner Banks constitute a part of the record in this case, by agreement of the parties in the Circuit court. They purport to have been made out and completed before the commencement of the October term of the court; but it is very manifest that this was not the fact. It is possible the settlement had progressed far enough to ascertain what was due the wards respectively. The accounts were, no doubt, taken in this incomplete state to the court-house, at the instance of the administrator; and upon some verbal representation of the sums probably due the wards, the order for the deposit was obtained. This being done the papers were returned to the commissioner; the settlement then completed, and filed in the clerk's office nearly a month afterwards. There was neither a regular nor a special report, such as is contemplated by the statute.

It is very obvious the notice was not posted until the very day the order was obtained; nor was any information given to the wards, or to any one for them, that an application would be made for such order. The failure to post the notice until the October term, notwithstanding the accounts were before the commissioner
381 long anterior *to the September court; and the hot haste in obtaining the order the same day the notice was posted, plainly evince a purpose to keep the wards and their friends ignorant of the whole proceeding. The report did not show any money in the hands of the administrator of the guardian, belonging to the wards. It did show a balance of principal due each of them, amounting to fifteen hundred and seventeen dollars and 17 cts. by account settled and recorded as early as April 1859; and in addition thereto the interest that had accrued since the date of the settlement. This principal had been appropriated and never accounted for by the guardian. This liability continued until September 1863, when the administrator of the guardian is seized with a desire to have a settlement of his accounts. At that period Confederate Treasury notes constituted the sole circulating medium of the country. And it is impossible not to see, that the whole object of this action was to relieve the estate of the guardian, or the administrator himself, of a debt, every dollar of which was justly due in coin or its equivalent, by a deposit in a depreciated currency, under the supposed sanction of the County court. A proceeding of this sort, affecting the rights of

infants, does not commend itself to the favorable consideration of this court. An order thus irregularly made cannot be regarded as an adjudication of the rights of the infants. As they were not parties to the proceeding in any form, they can of course take no appeal therefrom. Their only remedy is a motion to set aside such order as improperly made. In *Hollins v. Patterson*, 6 Leigh 457, the County court, without any of the proceedings required by the statute concerning roads, made an order summarily on motion, for an alteration of a public road. It was held, that the court, at a subsequent term, at the instance of a party aggrieved, and on hearing of 382 the party on whose motion the alteration was made, might set aside the order for the alteration, and re-establish the road. The same principles justify the rescission of the order in this case. What effect such rescission may have upon the rights of the parties, this court is not now called on to decide. The defendants in error are entitled to have it removed out of their way, with a view to the prosecution of such claim as they may have against the estate of their former guardian.

The judgment of the Circuit court must, therefore, be affirmed.

Judgment affirmed.

COMMISSIONERS IN CHANCERY.

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VIII. In General.

I. ORDER OF REFERENCE.

A. Authority to Make Order.—A special commissioner appointed to make sale of lands by a decree, who makes the sale and takes bonds payable to himself as commissioner, has no authority to collect or sue on said bonds unless specially appointed, or directed, by the court to do so. And when he is so authorized and brings a suit to enforce the payment of such bonds he must aver in his bill that he has been so appointed and authorized to sue and collect said bonds. If he fails to make such averment and show such right to sue, his bill will be dismissed. *Blair v. Core*, 30 W. Va. 765; *Clarke v. Shanklin*, 24 W. Va. 32.

Commissioners appointed by a court of equity to sell lands, make the sale and take bonds for the purchase money, made payable to themselves; and before the money is paid the commissioners are removed and others are appointed. The last commissioners are entitled to sue at law on the bonds, in the names of the first to whom the bonds were made payable. *Clarksons v. Doddridge*, 14 Gratt. 42; *Lewis v. Glenn*, 84 Va. 977, 6 S. E. Rep. 866; *Triplett v. Goff*, 83 Va. 785, 3 S. E. Rep. 525; *Sangston v. Gordon*, 23 Gratt. 764.

The unauthorized act of a commissioner, in passing upon a matter not referred to him, cannot preclude one, injured by his so doing, from asserting his rights, even though the court, at the succeeding term, confirm the report of the commissioner. *Ware v. Starkey*, 80 Va. 197; *White v. Drew*, 9 W. Va. 605.

Order in Vacation.—When there is no complaint of want of notice nor any averment that any objection was made to the order of reference, and the judge has the bill and exhibits before him which make out a *prima facie* case for inquiry, the judge has, under the statute, Acts 1883-84, p. 150, and Acts 1884-85, p. 57, authority to order an account by a commissioner. *Moore v. Bruce*, 85 Va. 143, 7 S. E. Rep. 195.

Cessar of Authority.—The powers of commissioners appointed to execute a decree of a court of chancery, cease when the court by which they are appointed, is abolished, or ceases to exist. *M'Laughlin v. Janney*, 6 Gratt. 609.

Time for Execution of Order.—When an order is made for an account, to be taken before a commissioner of the court, or before auditors to be agreed upon by the parties, it must be taken with all convenient speed; and unless a report be made thereupon within twelve months from the date of the order, the benefit thereof will be lost to the party who obtained it, unless for good cause to be shown to the court. *Anonymous*, 4 H. & M. 410; *Dangerfield v. Claiborne*, 4 H. & M. 390.

The repeal of a law authorizing a reference to a commissioner for the settlement of an account revokes the authority of the commissioner to make such account; and in such case the court has no authority to act upon and sustain exceptions to the commissioner's report. *State v. Brookover*, 23 W. Va. 214.

Non-Resident Commissioners.—The court cannot appoint commissioners to make up an account out of the state, except by consent of parties. *Anderson v. Gest*, 2 H. & M. 26.

B. When Order of Reference Improper.

Interest.—When the record does not show that a party has any interest in the suit or the subject-matter thereof, it is irregular and error, for a court, upon his motion, to order a commissioner to ascertain and report whether the consideration of a deed

was confederate money or good money; or whether the consideration of a deed was legal or illegal. *Henderson v. Alderson*, 7 W. Va. 217; *Sturm v. Fleming*, 26 W. Va. 58; *Reid v. Stuart*, 13 W. Va. 338-354; *Handy v. Scott*, 26 W. Va. 710; *Hurt v. West*, 87 Va. 78, 12 S. E. Rep. 141; *Feamster v. Withrow*, 9 W. Va. 296.

Time of Order of Reference.—When defendant's demurrer to the plaintiff's bill has been overruled, and leave is given to defendant to file an answer in thirty days, no order of reference can be properly made until the expiration of that time. *Neely v. Jones*, 16 W. Va. 626; *Pecks v. Chambers*, 8 W. Va. 210-215; *Moreland v. Metz*, 24 W. Va. 180.

Purpose of Order—Evidence.—An order of reference should not be made solely to enable the parties to take depositions. The cause should be so far developed by the pleadings and the proofs as to show the propriety of an order of account, and the extent to which it should go. *First Nat. Bank v. Parsons*, 42 W. Va. 137, 24 S. E. Rep. 555; *Sadler v. Whitehurst*, 83 Va. 50, 1 S. E. Rep. 410; *Neely v. Jones*, 16 W. Va. 626; *Lee v. Fulkerson*, 21 Gratt. 182; *Allen v. Smith*, 1 Leigh 252; *Neal v. Buffington*, 43 W. Va. 331, 26 S. E. Rep. 179; *Poage v. Willson*, 2 Leigh 490; *Watkins v. Young*, 31 Gratt. 84; *Balt., etc., Co. v. Williams*, 94 Va. 422, 26 S. E. Rep. 841; *Lively v. Winton*, 30 W. Va. 554, 4 S. E. Rep. 451; *Neely v. Jones*, 16 W. Va. 626; *Arbuckle v. McClanahan*, 6 W. Va. 108.

Unless by the prayer of the bill for an account and discovery of assets, or some petition or special application to the court by the plaintiff, or defense by a defendant, showing that such account is required by the parties, or some of them, no such account ought to be decreed; but when the cause is, in other respects, ready, the court should proceed, at once, to a decree *de bonis*, etc. *Cocke v. Harrison*, 3 Rand. 500.

Question of Title—Question of Law.—Bill in county court, by vendor against vendee, for specific execution of agreement for sale and purchase of land; vendor insisting he has a good title to convey, and vendee that title is defective, and both parties by the pleadings referring the question (which is a question of law on the construction of a will) to the court; and the cause is brought to hearing by consent, neither party asking a reference of the title to a commissioner. *Held*, in such case, the court ought not to refer the title to a commissioner, nor, if title be defective, to give vendor time to perfect it, but should proceed to decide the question. *Jackson v. Ligon*, 3 Leigh 174 [161]; *Goddin v. Vaughn*, 14 Gratt. 128.

C. When Order of Reference Discretionary.—When in a particular case the court has not enough before it to determine from the pleadings and proofs, or from the pleadings alone, whether the transaction be tainted with usury or not, it may do so by reference to a commissioner. The court is not bound to direct an issue for a jury; in its sound discretion and for convenience it may do so, but if it considers an issue unnecessary, and deems it proper that the case should go to a commissioner instead of a jury, it may so direct. *Rohrer v. Travers*, 11 W. Va. 154; *Grigsby v. Weaver*, 5 Leigh 197; *Samuel v. Marshall*, 3 Leigh 567; *Stannard v. Graves*, 2 Call 310 [309]; *Beverley v. Walden*, 20 Gratt. 147. See monographic note on "Usury" appended to *Coffman v. Miller*, 26 Gratt. 608. The circuit court may state an account in a chancery cause without an order of reference to a commissioner, if there is sufficient data and evidence in the cause to enable it to properly do so. *Darby v.*

Gilligan, 48 W. Va. 755, 28 S. E. Rep. 787; *Dorr v. Dewing*, 36 W. Va. 466, 15 S. E. Rep. 93.

Amount of Interest Due.—When the liability of a trustee is fixed, and the only question for consideration is the amount of interest with which he ought to be charged, the court may proceed to determine that question without reference to commissioner. *Cogbill v. Boyd*, 79 Va. 3.

Nature of Contract—Confederate Money.—The court may refer a case to a commissioner, to enquire whether the contract was made with reference to confederate money as a standard of value, or whether the notes were to be paid in currency of the time when they fell due. *Kraker v. Shields*, 20 Gratt. 377; *Palro p. Bethell*, 75 Va. 825; *Puryear v. Cabell*, 24 Gratt. 208; *Dyerle v. Stair*, 28 Gratt. 802; *Jackson v. Jones*, 9 W. Va. 1.

Taxes—Improvements.—In a bill for specific performance the chancellor may order an account to ascertain, for the benefit of defendants, the amount of taxes they have paid, and the value of their improvements, as well as rents and profits. *Allen v. Smith*, 1 Leigh 277 [253]; *Stuart v. White*, 25 Gratt. 300.

Legacy—Assets—Sufficiency of.—When, in a suit for a legacy, the answer of defendant executor admits a sufficiency of assets in his possession to pay all debts and legacies, the court may require the payment of the legacy without ordering an account. *McRae v. Brooks*, 6 Munf. 157; *Sharpe v. Rockwood*, 78 Va. 38.

It is error to decree that an administrator *de bonis non* shall pay a debt of his testator out of the assets in his hands, upon an admission in his answer that there are debts due the estate *uncollected* more than sufficient to pay all the debts. *Kent v. Cloyd*, 30 Gratt. 555.

Liens Fixed by Decree.—When a decree of the court ascertains the liens and fixes their priority, it is not necessary to refer the cause to commissioners for that purpose. *Bock v. Bock*, 24 W. Va. 590; *Anderson v. Nagle*, 12 W. Va. 98; *Smith v. Patton*, 12 W. Va. 541.

D. When Order of Reference Necessary.

Title—Question of Fact.—Where a doubt arises as to the title, or where the defendant asks for a reference of the question of title to a commissioner to be reported on, it is proper to so refer the cause, and upon such application, should the court refuse to refer the question to a commissioner, it would be error. *Middleton v. Selby*, 19 W. Va. 174.

Where a bill in equity is exhibited by the vendor of land, against the purchaser for specific performance, if the purchaser object to the title, and it appear doubtful whether the plaintiff can make such a title as would authorize a decree for specific performance, or other relief, on giving bond, to guard against remote or improbable contingencies, the title ought, of course, to be referred to a commissioner, to be examined and reported upon. *Beverley v. Lawson*, 3 Munf. 317; *Goddin v. Vaughn*, 14 Gratt. 128; *Thomas v. Davidson*, 76 Va. 343.

Mutual Accounts.—A court of chancery ought not to decide upon accounts mutually existing and controverted between the parties, without referring such accounts to a commissioner or commissioners to report thereupon. *Bland v. Wyatt*, 1 H. & M. 543.

Priority of Liens.—Decree to sell lands to enforce liens, without first by account taken, ascertaining amounts and priorities of all encumbrances thereon is premature and erroneous. *Hoge v. Junkin*, 79 Va. 230; *Muller v. Stone*, 84 Va. 834, 6 S. E. Rep. 223; *Alexander v. Howe*, 85 Va. 198, 7 S. E. Rep. 248; *Dil-*

lard v. Krise, 86 Va. 410, 10 S. E. Rep. 430; Fidelity Loan, etc., Co. v. Dennis, 93 Va. 507, 25 S. E. Rep. 546; Horton v. Bond, 28 Gratt. 815; Cole v. McRae, 6 Rand. 644; Hartman v. Evans, 38 W. Va. 679, 18 S. E. Rep. 810; Schultz v. Hansbrough, 33 Gratt. 567; White v. Mech. Bldg. Ass'n, 22 Gratt. 233, and *note*; Smith v. Flint, 6 Gratt. 40; Lipscombe v. Rogers, 20 Gratt. 638; Moran v. Brent, 25 Gratt. 104; Simmons v. Lyles, 27 Gratt. 923; Smoot v. Newberry, 8 W. Va. 400; Marling v. Robrecht, 13 W. Va. 440; White v. Drew, 9 W. Va. 695; Walker v. Summers, 9 W. Va. 533; Neely v. Jones, 16 W. Va. 636; Strayer v. Long, 33 Va. 715, 8 S. E. Rep. 372; Anderson v. Nagle, 13 W. Va. 98; Rohrer v. Travers, 11 W. Va. 146.

Creditor's Bill.—An order of reference on the filing of a creditor's bill operates a suspension of all other pending suits, and this order may be made in the first cause ready for hearing, although it is not the first suit brought; and if a creditor with knowledge that there has been a decree for an account in another creditor's suit, brings a separate suit for his own claim he will be compelled to pay the costs. Laidley v. Kline, 23 W. Va. 571; Kent v. Cloyd, 30 Gratt. 555; Stephenson v. Taverners, 9 Gratt. 398.

Gambling Transactions.—Though the pleadings do not show that the transactions sought to be settled and adjusted, arose out of a partnership for gambling, yet if this appears from the evidence taken before the commissioner who was directed to settle the accounts, it is proper for the court to recommit the accounts, and direct an enquiry into the consideration on which the claims of the parties are founded. Watson v. Fletcher, 7 Gratt. 1. See monographic *note* on "Gaming" appended to Neal v. Commonwealth, 22 Gratt. 917.

Decree against Executor.—In a suit in equity against executors, it is not regular to enter a decree to be levied of the goods of the testator, without any account. M'Rae v. Bates, 4 H. & M. 490.

Ascertain Damages—Equity.—When a court of equity once properly acquires jurisdiction in a cause it is competent for the court to do complete justice between the parties; and as ancillary to that purpose, it may ascertain damages sustained by the defendant, either by an enquiry made by a master or by jury upon an issue *quantum damnisfactus* to be tried at its own bar. Nagle v. Newton, 22 Gratt. 825; Stearns v. Beckham, 31 Gratt. 431.

In an order of reference to the commissioner to take an account between the parties, all accounts between them ought to be settled. Harris v. Magee, 8 Call 433 [502].

E. Objects of Order of Reference.—The value and profits of land being in the nature of damages, ought to be ascertained by a jury, and not by commissioners. Eustace v. Gaskins, 1 Wash. 289 [188] (1798); Cooke v. Wise, 3 H. & M. 495 (1809).

It is not error in a court of equity to direct commissioners instead of a jury, to state and report an account of the profits of land. Roberts v. Stanton, 2 Munf. 129 (1811); Kennedy v. Baylor, 1 Wash. [163] 205 (1798); Newman v. Chapman, 2 Rand. 93 (1823); Kraker v. Shields, 20 Gratt. 394 (1871); Tabb v. Boyd, 4 Call 450 (1800).

It being proper to direct an account to ascertain what is due to the purchaser for moneys paid by him in part of the purchase money, it is proper also to direct an account of rents and profits of the land while in his possession; and if on such account it appear that there is a balance due to the defend-

ant, it is proper to decree such balance to him. Payne v. Graves, 5 Leigh 609.

A valuation, by commissioners legally appointed, of property decreed to be sold, ought not to be set aside for the purpose of producing a sale, unless it appear that they clearly acted under a mistake, or were influenced by some misconduct of the party interested to prevent such sale. Spencer v. Carter, 4 H. & M. 403.

F. Orders Ancillary to Order of Reference.—In referring the case to a commissioner for a resettlement of the accounts, it was competent for the court, and was in accordance with the established practice, to instruct the commissioner as to the principles upon which the account should be made up. Cogbill v. Boyd, 79 Va. 3.

Commissioner's Bond.—A decree directing a sale of land by a commissioner should require such commissioner, before he collects any money, to give bond and security. Blair v. Core, 20 W. Va. 369; Lytle v. Cozad, 21 W. Va. 184; Donahue v. Packler, 21 W. Va. 124; M'Allister v. Bodkin, 76 Va. 815; Hess v. Rader, 36 Gratt. 746; Thompson v. Brooke, 76 Va. 160; Cooper v. Dougherty, 85 Va. 343, 7 S. E. Rep. 287; Finney v. Edwards, 75 Va. 44; Tyler v. Toms, 75 Va. 116; Eggleton v. Dinsmore, 84 Va. 858, 6 S. E. Rep. 146.

But this requirement is for the benefit of those entitled to the proceeds, and they may waive their right to demand such bond. Lee v. Swepson, 76 Va. 173; Southwest Va., etc., Co. v. Chase, 95 Va. 50, 37 S. E. Rep. 336; See also, Ayers v. Hite, 97 Va. 466, 34 S. E. Rep. 44.

Examination on Oath.—A court of chancery may direct the reference of a case to a master, with authority to examine the defendants on oath; and such examination will have the effect of an answer. Templeman v. Fauntleroy, 3 Rand. 434.

Partnership Accounts.—When partnership accounts are referred to a commissioner, the court will rule the parties to produce before him any books and papers which may relate to the partnership, but will direct the commissioner to disregard such parts as relate to the private affairs of either party. Calloway v. Tate, 1 Hen. & Munf. 9.

Shorthand Reporters.—Neither the circuit courts nor the judges thereof are authorized, under the statute providing for the employment of shorthand reporters in said courts, to employ or authorize the employment of said reporters before commissioners in executing the orders or decrees of reference of such courts. Weigand v. Alliance Supply Co., 44 W. Va. 133, 28 S. E. Rep. 803.

II. WHO MAY BE A COMMISSIONER.

An attorney employed in a cause is not a competent commissioner to take an account ordered in the cause. Bowers v. Bowers, 29 Gratt. 697; Dillard v. Krise, 86 Va. 410, 10 S. E. Rep. 430; Davis v. Beazley, 76 Va. 491; Smith v. Mayo, 83 Va. 910, 5 S. E. Rep. 376; Findley v. Smith, 43 W. Va. 299, 36 S. E. Rep. 370; Shipman v. Fletcher, 91 Va. 481, 23 S. E. Rep. 468; Fayette Land Co. v. L. & N. R. Co. 93 Va. 274, 24 S. E. Rep. 1016.

One who is creditor and party in a suit is incompetent to be a commissioner in the cause. Dillard v. Krise, 86 Va. 414, 10 S. E. Rep. 430; Etter v. Scott, 90 Va. 763, 19 S. E. Rep. 775.

III. PROCEEDINGS BEFORE COMMISSIONER.

Depositions.—In taking an account the commissioner may take the depositions of witnesses to enable him to act upon the subject, under his gen-

eral notice, and a special notice is not necessary. *Miller v. Cox*, 38 W. Va. 747, 18 S. E. Rep. 960; *McCandlish v. Edloe*, 3 Gratt. 330; *Coffman v. Sangston*, 31 Gratt. 263; *Carter v. Cutting*, 5 Munf. 223; *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. Rep. 591. See monographic note on "Depositions" appended to *Field v. Brown*, 24 Gratt. 74.

Report—Additional Evidence.—Though the master has adjourned the taking of deposition *sine die*, and has even made up his report, if he has not returned it, he may, for reasons satisfactory to him, proceed to take further testimony. *Atwood v. Shen*, Val. R. Co., 85 Va. 968, 9 S. E. Rep. 748.

According to the settled doctrine of this court, when an account of the transactions of a fiduciary has been ordered upon a proper bill, if additional objections to the settled *ex parte* accounts are discovered in the progress of the cause, in order to save the expense and delay of an amended bill, the plaintiff is permitted to present the matter before the commissioner, with proper specifications, in writing, and the defendant is allowed to meet it by affidavit, which has the same weight as would be given to an answer in chancery. *Davis v. Morriss*, 76 Va. 84; *Chapman v. Shepherd*, 24 Gratt. 877.

In *Anderson v. Anderson*, 4 H. & M. 475, it was held that under the particular circumstances of that case a creditor should be allowed to prove his debt before the commissioner, upon filing his bill for that purpose, before the cause, as to him, was set for hearing in the regular course of the court.

Continuances.—A commissioner properly has much latitude of discretion in granting continuances of proceedings before him; and the court whose order he is executing will not overrule his action in that respect, unless it be plainly erroneous. Still less will an appellate court reverse a decree for that cause. *Fant v. Miller*, 17 Gratt. 187. See monographic note on "Continuances" appended to *Harman v. Howe*, 27 Gratt. 676.

Sale by Only One Commissioner.—When two commissioners are appointed by a decree of a court of equity to sell land, a sale by one only is irregular. *Gross v. Percy*, 3 Pat. & H. 483.

Credits Allowed by Commissioner.—In making up his report the master commissioner should credit a debtor with negotiable notes given as a credit upon a debt and not returned to the maker. *Gibson v. Burgess*, 82 Va. 650.

Fees of Commissioner.—In the case of *Cabell v. Cabell*, 4 H. & M. 436, the commissioners appointed to divide lands under decree of court were allowed five dollars per day for their services.

IV. RETURNS BY COMMISSIONER.

A. Return of Report.—When a cause is referred to a commissioner merely as a convenient mode of bringing before the court the necessary evidence upon which a decree of sale is to be based, the report is not of the kind required by the statute to be returned ten days before hearing. The court in such case acts upon the evidence and not upon the findings of the commissioner. *Lancaster v. Barton*, 92 Va. 620, 24 S. E. Rep. 251; Va. Code 1887, § 3325.

It is important that the master commissioner to whom causes are referred should furnish the court with a finding of facts qualifying it with such doubts as he may feel; but, nevertheless, giving the court his inclination one way or the other. *Crim v. Post*, 41 W. Va. 397, 23 S. E. Rep. 613.

When Return Made.—Report of commissioner need not lie over until next term after that to which it is

returned, when it is admitted that neither party means to except to it. *Chew v. Beverly*, 4 H. & M. 409.

Under the act of March 9th, 1836, which required that a commissioner's report should be returned thirty days *preceding* the term at which the cause was to be heard, it was held error to pronounce a final decree upon a report not so returned. *Gray v. Dickenson*, 4 Gratt. 87.

At the revival of 1869 the time was changed to ten days and that revival dispensed with the necessity of returning the report before the commencement of the term. *Hughes v. Harvey*, 75 Va. 305; *Strange v. Strange*, 76 Va. 242.

B. Return of Evidence.—The evidence taken before a commissioner in chancery, and upon which he bases his report, does not become a part of such report unless exceptions are taken during the period when the report lies in his office, and he has sent up the evidence upon which the exceptions are based; or he may, of his own motion, where he has a doubt as to the weight of testimony upon a particular point, send up the evidence upon that point; but, in either event, the commissioner himself must certify that he has sent up the evidence in such manner as to make it manifest by the report itself that the evidence has been sent up. But any party may except to such report at the first term of the court to which it is returned, or, by leave of court, after said term; and there can be no doubt that the court may, on its own advice, or on motion of a party, direct the evidence to be sent up; but this is a matter within its own discretion, and the appellate court will not interfere with its exercise of such discretion unless it plainly appear that manifest injustice and injury have resulted. *Arnold v. Slaughter*, 36 W. Va. 569, 15 S. E. Rep. 250; *Thompson v. Catlett*, 24 W. Va. 524; *Lynch v. Henry*, 25 W. Va. 416; *Chapman v. McMillan*, 27 W. Va. 220; *Anderson v. Caraway*, 27 W. Va. 385; *Holt v. Taylor*, 43 W. Va. 153, 27 S. E. Rep. 320; *Williams v. Clark*, 93 Va. 690, 25 S. E. Rep. 1013; *Ward v. Ward*, 40 W. Va. 611, 31 S. E. Rep. 746.

When a question of fact is referred to a commissioner, and no exception is taken to his report while it remains in his hands, he need not return the evidence upon which it is based, in the absence of any direction or request, by a party interested, so to do. *Bowden v. Parrish*, 36 Va. 67, 9 S. E. Rep. 616; *Bowers v. Bowers*, 29 Gratt. 701; *Harper v. McVeigh*, 82 Va. 751, 1 S. E. Rep. 193; *Saunders v. Prunty*, 89 Va. 923, 17 S. E. Rep. 231; *Robinson v. Allen*, 85 Va. 721, 8 S. E. Rep. 335; *Maddock v. Skinker*, 93 Va. 479, 25 S. E. Rep. 536; *Williams v. Clark*, 93 Va. 690, 25 S. E. Rep. 1013; *Lynch v. Henry*, 25 W. Va. 418; *Sims v. Tyrer*, 96 Va. 5, 26 S. E. Rep. 508; *Thompson v. Catlett*, 24 W. Va. 524.

If such report be excepted to within the 10 days after completion during which it lies in the commissioner's office for examination, the commissioner must return the exceptions, with such remarks thereon as he thinks proper, and the evidence relating to the exceptions, and such evidence will be considered on the hearing of such exceptions; but, if no exceptions be filed within those 10 days, the evidence on which the commissioner acted is not required to be returned by him, and forms no part of the report, and will not be considered on the hearing of any exceptions that may be afterwards taken to the report, unless made a part of the report by the report itself, or unless it be brought up by order of the court. *Kester v. Lyon*, 40 W. Va. 161, 20 S. E. Rep. 934.

Where exception is taken to a commissioner's report before the commissioner, within 10 days after its completion, it is his duty to certify the exceptions and evidence before him relating to the exceptions, with such remarks as he may see proper to make, in order that the exceptions may be heard by the court upon such evidence. He should so certify the evidence as to show it to be the evidence sent up. *Ward v. Ward*, 40 W. Va. 611, 21 S. E. Rep. 747.

Where a cause is referred to a commissioner, and exceptions are filed to the commissioner's report, in pursuance of section 7 of chapter 8 of the Acts of 1886, the commissioner shall, with his report, return the evidence filed in the case, including all the evidence taken upon the execution of the reference; and it will be presumed such commissioner performed his duty in this regard. *Central City Brick Co. v. Norfolk & W. R. Co.*, 44 W. Va. 286, 28 S. E. Rep. 926.

C. Return of Decrees and Orders.—It is the duty of the commissioner to return the decrees, orders, and notices under which he acted, in order that the court may see that they have been properly executed. *Holt v. Holt*, 37 W. Va. 305, 16 S. E. Rep. 675.

D. Certificate of Fees.—Where a report of a commissioner, under an order or decree of reference is returned, it is the duty of the court, when called to its attention, to see that the certificate under oath, of the fees and time employed of the commissioner, as required by section 5, ch. 187, is annexed thereto, and that no fees be allowed or paid thereon until such certificate is made. *Weigand v. Alliance Supply Co.*, 44 W. Va. 183, 28 S. E. Rep. 803.

V. EXCEPTIONS TO REPORT.

A. When No Exception Necessary.—A commissioner's report, if erroneous upon its face, may be objected to at the hearing of the cause though no exception be previously filed; and also in the appellate court, though no exception appear to have been taken in the court below; but, without such exception, it cannot be impeached on grounds, and in relation to subjects, which may be affected by extraneous testimony. *White v. Johnson*, 2 Munf. 285; *Kanawha Val. Bank v. Wilson*, 25 W. Va. 244; *Nutt v. Summers*, 78 Va. 164; *Cookus v. Peyton*, 1 Gratt. 431-432; *French v. Townes*, 10 Gratt. 513; *Ward v. Ward*, 40 W. Va. 611, 21 S. E. Rep. 747; *McCleary v. Grantham*, 29 W. Va. 301, 11 S. E. Rep. 949; *Hyman v. Smith*, 10 W. Va. 298; *Ogle v. Adams*, 12 W. Va. 215; *B. & O. R. Co. v. Vanderwerker*, 44 W. Va. 229, 28 S. E. Rep. 829; *Chapman v. Shepherd*, 24 Gratt. 877; *McDonald v. Hurst*, 86 Va. 885, 11 S. E. Rep. 536; *Smith v. Proffitt*, 82 Va. 832, 1 S. E. Rep. 67; *Halcomb v. Innis*, 4 Call 364; *Cralle v. Cralle*, 84 Va. 198, 6 S. E. Rep. 12; *Neely v. Jones*, 16 W. Va. 625; *Reitz v. Bennett*, 6 W. Va. 417; *Boggs v. Johnson*, 9 W. Va. 484; *Jameson v. Myles*, 7 W. Va. 311; *Laidley v. Kline*, 8 W. Va. 218; *Saunders v. Griggs*, 81 Va. 506; *McCarty v. Chalfant*, 14 W. Va. 531; *McClaskey v. O'Brien*, 16 W. Va. 791; *Maddock v. Skinker*, 93 Va. 479, 25 S. E. Rep. 535; *Livesay v. Feamster*, 21 W. Va. 99; *Griffin v. Macaulay*, 7 Gratt. 504; *Campbell v. White*, 14 W. Va. 122; *Kester v. Lyon*, 40 W. Va. 161, 20 S. E. Rep. 933; *Woodyard v. Polsley*, 14 W. Va. 212; *Morrison v. Householder*, 79 Va. 627; *Hildreth v. Turner*, 89 Va. 858, 17 S. E. Rep. 471; *Sandy v. Randall*, 20 W. Va. 244; *Hutton v. Lockridge*, 22 W. Va. 178; *Evans v. Shroyer*, 22 W. Va. 563; *Thompson v. Catlett*, 24 W. Va. 524-541; *Shen. Val. Bank v. Shirley*, 26 W. Va. 563; *Chapman v. McMillan*, 27 W. Va. 220; *Kyle v.*

Conrad, 25 W. Va. 780; *Cullop v. Leonard*, 97 Va. 356, 33 S. E. Rep. 611.

The *ex parte* settlements of an executor are sufficiently impeached by the allegations of the bill, when the errors complained of are apparent on the face of the accounts. *McCormick v. Wright*, 79 Va. 524.

A settlement of an executor's administration account, certified by commissioners on a day subsequent to his death, and not appearing to have been made in his lifetime with notice to himself, nor, after his death, with notice to his executor, is erroneous, and ought not to be received as the ground of a decree against his estate. *Boyd v. Kaufmans*, 6 Munf. 45.

Where the court hears the cause, as well as the report of the commissioner, as upon the depositions taken in the cause long after his report was filed, and sustains an exception to the report, as to which he could not decide without looking into the deposition taken in the cause after the report had been filed, and, as to such matter, decrees against the report, when the same depositions show that, on another issue as to the amounts due on the demand set up in the cross-bill, the plaintiff in the original bill should have large credits, which the court refuses, because it would be against the finding of the commissioner, when it appears it was improper to have referred the cause to a commissioner, and no exception was made by the plaintiff to the report, and it appears the court has not considered the depositions as to both issues, but only one, this is error, for which the decree will be reversed. *Liver v. Winton*, 30 W. Va. 554, 4 S. E. Rep. 451.

Usury.—Though it appears from the face of the commissioner's report that usurious interest was allowed, yet if no exception was taken, the appellate court will not, for that cause alone, reverse the decision. *Hansucker v. Walker*, 76 Va. 753. See monographic note on "Usury" appended to *Coffman v. Miller*, 26 Gratt. 698.

Error Apparent on Record—How Shown.—To show such error on the face of a report, in the absence of such exceptions as bring before the court the evidence before the commissioner, recourse may be had to the pleadings and exhibits therewith, provided it be impossible that the alleged error could not have been affected by extrinsic evidence. *Kester v. Lyon*, 40 W. Va. 161, 20 S. E. Rep. 934.

A commissioner's report is based upon the evidence of papers filed in the cause; and there is no exception to the report. The papers not being competent evidence of the facts recited in them, the court may disregard the report, and decide the case upon the competent testimony, and against the report. *James River, etc., Co. v. Littlejohn*, 18 Gratt. 54.

B. When Exception Necessary.—Reports not excepted to in the lower court, cannot be impeached before the appellate court in relation to matters which may be affected by extraneous testimony. *Liberty Sav. Bank v. Campbell*, 75 Va. 534; *Brewis v. Lawson*, 76 Va. 36; *Wimblish v. Rawlins*, 76 Va. 48; *Universal L. Ins. Co. v. Binford*, 76 Va. 108; *Morrison v. Householder*, 79 Va. 627; *Ashby v. Bell*, 80 Va. 311; *Nickels v. Kane*, 82 Va. 309; *McComb v. Donald*, 82 Va. 903; *Cralle v. Cralle*, 84 Va. 198, 6 S. E. Rep. 12; *Robinson v. Allen*, 85 Va. 721, 8 S. E. Rep. 835; *White v. Johnson*, 2 Munf. 285; *Evans v. Shroyer*, 22 W. Va. 564; *Estill v. McClintic*, 11 W. Va. 399; *Sandy v. Randall*, 20 W. Va. 244; *Simmons v. Simmons*, 23 Gratt. 451; *Cole v. Cole*, 28 Gratt. 365; *Peters v. Neville*, 35

Though no exception has been taken to a commissioner's report, it is well settled that whether an

interlocutory decree confirming such report shall be modified or wholly set aside or not, is generally a matter resting in the sound discretion of the chancellor, to be exercised according to the particular circumstances of each case. *Newberry v. Stuart*, 86 Va. 965, 11 S. E. Rep. 880; *Armstrong v. Pitts*, 13 Gratt. 235; *Wooding v. Bradley*, 76 Va. 614; *Nelson v. Kownslar*, 79 Va. 468.

2. **Form of Exception.**—An exception to a commissioner's report should point out clearly the errors for which the exception is taken. Otherwise the appellate court will presume the report to have been correctly made. *Coffman v. Sangston*, 21 Gratt. 263; *Moore v. Bruce*, 85 Va. 189, 7 S. E. Rep. 195; *Douglas v. Spoor*, 89 Va. 279, 15 S. E. Rep. 550; *Fairfax v. Muse*, 4 Munf. 124; *Nickels v. Kane*, 83 Va. 309; *Crislip v. Cain*, 19 W. Va. 438; *Chapman v. McMillan*, 27 W. Va. 220; *Anderson v. Caraway*, 27 W. Va. 385; *Kester v. Lyon*, 40 W. Va. 161, 20 S. E. Rep. 933; *Hartley v. Roffe*, 12 W. Va. 401; *Green v. Thompson*, 84 Va. 376, 5 S. E. Rep. 507.

3. **Nature of Exception.**—Generally, exceptions to the report of master commissioners partake of the nature of special demurrers, and, if the report is erroneous, the party complaining of the report or excepting thereto must point out the errors in his exceptions with reasonable certainty, so as to direct the mind of the court to them. When he does so, the parts not excepted to are admitted to be correct, not only as regards the principles, but also as relates to the evidence, on which they are founded. *Stewart v. Stewart*, 40 W. Va. 65, 20 S. E. Rep. 862; *Kester v. Lyon*, 40 W. Va. 161, 20 S. E. Rep. 933; *Crislip v. Cain*, 19 W. Va. 438; *McCarty v. Chalfant*, 14 W. Va. 581; *Chapman v. P. & S. R. Co.*, 18 W. Va. 184; *Chapman v. McMillan*, 27 W. Va. 220; *Robinet v. Robinett* (Va.), 19 S. E. Rep. 845.

A report of a commissioner, unless excepted to in time, will be presumed to be correct, not only as to the principles of the account, but as to the evidence also. *Keck v. Allender*, 87 W. Va. 201, 16 S. E. Rep. 520; *Stewart v. Stewart*, 40 W. Va. 65, 20 S. E. Rep. 862; *Kester v. Lyon*, 40 W. Va. 161, 20 S. E. Rep. 933; *Ward v. Ward*, 40 W. Va. 611, 21 S. E. Rep. 747; *B. & O. R. Co. v. Vanderwerker*, 44 W. Va. 229, 28 S. E. Rep. 829.

4. **Waiver of Exception.**—Where a party files exceptions to a commissioner's report within the 10 days which the same is required by statute to be held by the commissioners before filing, and asks leave to file other exceptions during the term before the submission of the cause, and does so file such other exceptions, he must be held to have waived his right to except because the report was not held full 10 days before filing. *Smith v. Brown*, 44 W. Va. 342, 30 S. E. Rep. 160; *Mann v. Peck*, 45 W. Va. 18, 30 S. E. Rep. 206.

One defendant, F., files an exception to the commissioner's report; which is relied on by R., another defendant; but at the hearing in the court below, this exception is waived. The exception having been waived, R. cannot rely upon it in the appellate court. *Robertson v. Trigg*, 32 Gratt. 76.

An administrator having waived his exceptions to the commissioner's report, under the erroneous impression that the report would be sustained, and the case then finally disposed of, may withdraw his waiver, and renew his exceptions. *Hannah v. Boyd*, 25 Gratt. 692.

5. **Exception—Immaterial Error.**—The failure of the lower court to pass upon exceptions to the report of a commissioner when such exceptions are obvi-

ously not well taken is not an error for which the appellate court will reverse the decree. *Bristol Iron, etc., Co. v. Thomas*, 93 Va. 396, 25 S. E. Rep. 110; *Harman v. Stearns*, 95 Va. 58, 27 S. E. Rep. 601; Va., etc., Co. v. Fields, 94 Va. 103, 26 S. E. Rep. 423; *Moore v. Bruce*, 85 Va. 189, 7 S. E. Rep. 195.

The commissioner for settling the accounts of the parties, says in his report,—"The complainants will hereafter render an account of a remnant of the business still left in their hands." There are exceptions by both parties to the accounts as stated; but the court overrules them all, confirms the report, and makes a final decree in favor of the defendant. It being not probable that the further account referred to by the commissioner, will lessen the amount due the defendant, if there be no other error, the appellate court may amend the decree by providing for the further account, and affirm it. *Graham v. Pierce*, 19 Gratt. 28.

VI. WEIGHT OF REPORT.

A. **Ex Parte Accounts.**—The idea that the *ex parte* accounts can, in any case, have anything to do with the operation of the statute of limitations is founded upon a total misapprehension. These settlements have no sort of analogy to stated accounts between individuals. Whatever efficacy they may have as evidence rests solely upon the long established practice and usage of the country and upon the supposed integrity of the tribunal appointed by law for the adjustment of such matters; whereas a stated account is founded upon a supposed adjustment between the parties themselves. *Leake v. Leake*, 75 Va. 808.

The rule, that administration accounts, audited *ex parte* by commissioners appointed by the proper court, returned to the court, and recorded, are to be taken as *prima facie* correct, liable to be surcharged and falsified, upon proof adduced, by any party interested, rests not on the ground that such audited accounts stand on the same footing as *stated* accounts between parties, but, mainly, on the long established practice of the country, and on the supposed integrity of the tribunal provided by law for the adjustment thereof. *Newton v. Poole*, 12 Leigh 112; *Carter v. Edmonds*, 80 Va. 58; *Leake v. Leake*, 75 Va. 792; *Green v. Thompson*, 84 Va. 393, 5 S. E. Rep. 507; *Radford v. Fowlkes*, 85 Va. 641, 8 S. E. Rep. 817; *Peale v. Hickie*, 9 Gratt. 445; *Chapman v. Shepherd*, 24 Gratt. 389; *Wyllie v. Venable*, 4 Munf. 370; *Shipman v. Fletcher*, 91 Va. 478, 23 S. E. Rep. 458; *Leach v. Buckner*, 19 W. Va. 45; *Shugart v. Thompson*, 10 Leigh 434; *Anderson v. Fox*, 2 H. & M. 280; *Preston v. Gressom*, 4 Munf. 110; *Wimbish v. Rawlins*, 76 Va. 48; *Holt v. Taylor*, 48 W. Va. 153, 27 S. E. Rep. 331; *Hurt v. West*, 87 Va. 78, 12 S. E. Rep. 141; *Blackwell v. Bragg*, 78 Va. 529; *Atwell v. Milton*, 4 H. & M. 253; *Corbin v. Mills*, 16 Gratt. 433, and *foot-note*.

The settlement of an administration account under an *ex parte* order of the court which granted administration, is *prima facie* evidence in favor of the administrator against creditors of decedent. *Shearman v. Christian*, 9 Leigh 571.

Where, in an *ex parte* settlement by commissioners, of an executor's accounts, the commissioners improperly omit to state an interest account, and charge the executor with interest, that is cause for surcharging and falsifying the account. *Burwell v. Anderson*, 8 Leigh 376 [348]; *Anderson v. Burwell*, 6 Gratt. 405.

B. Question of Fact—Weight of Report.

1. **Old Rule.**—When a question of fact is referred

to a commissioner, depending upon the testimony of witnesses, conflicting in their statements and differing in their recollection, the court must of necessity adopt his report, unless in a case of palpable error or mistake. *Bowers v. Bowers*, 29 Gratt. 697; *Porter v. Young*, 85 Va. 49, 6 S. E. Rep. 618; *Stimpson v. Bishop*, 82 Va. 190; *Magarity v. Shipman*, 82 Va. 784; *Robinson v. Allen*, 85 Va. 721, 8 S. E. Rep. 835; *Magarity v. Succop*, 90 Va. 563, 19 S. E. Rep. 260; *Jones v. Degge*, 84 Va. 690, 5 S. E. Rep. 799; *Moore v. Butler*, 90 Va. 685, 19 S. E. Rep. 850; *Armentrout v. Shafer*, 89 Va. 560, 16 S. E. Rep. 726; *Clinch River Min. Co. v. Harrison*, 91 Va. 132, 21 S. E. Rep. 600; *Porter v. Christian*, 88 Va. 730, 14 S. E. Rep. 183; *Bowden v. Parrish*, 86 Va. 67, 9 S. E. Rep. 616; *Gay v. Lockridge*, 43 W. Va. 267, 27 S. E. Rep. 306; *Stuart v. Hendricks*, 80 Va. 601; *Douglas v. Spoor*, 89 Va. 279, 15 S. E. Rep. 550; *Boyd v. Gunnison*, 14 W. Va. 1; *Graham v. Graham*, 21 W. Va. 702; *Handy v. Scott*, 26 W. Va. 710; *Reger v. O'Neal*, 33 W. Va. 159, 10 S. E. Rep. 375.

Where questions purely of fact are referred to a commissioner to be reported on, his findings will be given great weight, and should be sustained unless it plainly appears that they are not warranted by any reasonable view of the evidence; and this rule operates with peculiar force in the appellate court, when the findings of the commissioner have been approved and sustained by the decree of the inferior court. *Fry v. Feamster*, 36 W. Va. 454, 15 S. E. Rep. 253; *Reger v. O'Neal*, 33 W. Va. 159, 10 S. E. Rep. 375; *Broderick v. Broderick*, 28 W. Va. 378; *Moore v. Ligon*, 30 W. Va. 146, 3 S. E. Rep. 572; *Handy v. Scott*, 26 W. Va. 710.

Where questions purely of fact are referred to a commissioner, his finding will be given great weight, though not as conclusive as the verdict of a jury, and should be sustained, unless it is contrary to law, or not warranted by any reasonable view of the evidence. This rule operates with peculiar force in an appellate court, when the findings of a commissioner have been approved by the court below. *Hall v. Hall*, 30 W. Va. 779, 5 S. E. Rep. 260; *Hulings v. Hulings*, 38 W. Va. 351, 18 S. E. Rep. 627.

2. *Modification of Rule in West Virginia.*—It is a settled rule of law that when questions of fact are submitted to a commissioner, his findings upon such facts should be sustained unless the court is satisfied from the evidence that such findings are erroneous. *Graham v. Graham*, 21 W. Va. 702; *Boyd & Co. v. Gunnison & Co.*, 14 W. Va. 1; *McGuire v. Wright*, 18 W. Va. 507.

Every presumption is in favor of the correctness of the decision of a master, and it is not usual, to reject his findings, unless, upon examination, such findings are found to be unsupported or defective in some essential particular. *Hartman v. Evans*, 38 W. Va. 669, 18 S. E. Rep. 813.

When questions purely of fact are referred to a commissioner to be reported upon, the findings of the commissioner, while not as conclusive as the verdict of a jury, will be given great weight, and should be sustained unless it plainly appears that they are not warranted by the evidence. This rule operates with peculiar force in an appellate court, where the findings of the commissioner have been approved and sustained by the decree of the inferior court. *Stewart v. Stewart*, 40 W. Va. 65, 20 S. E. Rep. 809.

Where questions of fact are submitted to a commissioner in chancery, his findings of such facts should be sustained, unless the court is satisfied

from the evidence before the commissioner that such findings are erroneous, though such report is not entitled to as much weight as the verdict of a jury. *Holt v. Taylor*, 43 W. Va. 153, 27 S. E. Rep. 320.

A special commissioner appointed by the court with consent of the parties is not an arbitrator, but his report is subject to review by the court as in the case of a general commission. *Crislip v. Cain*, 19 W. Va. 438.

3. *Modification of Rule in Virginia.*—The court of equity cannot abdicate its authority or powers, nor confide or surrender absolutely to any one the performance of any of its judicial functions. It may rightfully avail itself of the assistance of commissioners in the proper preparation for judicial determination of the many complicated matters upon which its judgment is invoked, but in it resides the authority, and to it solely belongs the responsibility, to adjudicate them. The work of its commissioners is subject to its review and the court is in no wise precluded from making such review by the findings or conclusions of the commissioner. There is no propriety, therefore, in holding that, where the evidence is conflicting, the report of a commissioner in chancery is entitled to the same weight and should be given the same effect as the verdict of a jury; for on motion for a new trial, the verdict of a jury would not be set aside merely because the court on consideration of the evidence would have come to a different conclusion. *Shipman v. Fletcher*, 91 Va. 473, 22 S. E. Rep. 458.

When the commissioner has seen and examined the witnesses, and the testimony is conflicting, and his conclusions are clearly supported by competent and unimpeached witnesses, the court will not set aside or disturb his report, unless the weight of the testimony which is contrary to his conclusions is such, on account of the number of the witnesses and nature of the evidence, as to make it clear that the commissioner has erred; and this rule applies a *fortiori* in the appellate court when the report of the commissioner has been confirmed in the lower court. *Shipman v. Fletcher*, 91 Va. 473, 22 S. E. Rep. 458; *Douglas v. Spoor*, 89 Va. 279, 15 S. E. Rep. 550; *Smith v. Smith*, 92 Va. 700, 24 S. E. Rep. 280. The rule as laid down in these cases considerably modifies the rule stated in the case of *Bowers v. Bowers*, 29 Gratt. 697, and followed by a long line of decisions.

C. *Weight of Report in Appellate Court.*—In considering a commissioner's report the appellate court will presume it to have been correctly made and upon the proper authority unless the contrary shall appear. *Coffman v. Sangston*, 21 Gratt. 233; *Wills v. Dunn*, 5 Gratt. 384; *Simmons v. Simmons*, 23 Gratt. 451; *McCandlish v. Edloe*, 3 Gratt. 330; *Strange v. Strange*, 76 Va. 240; *Alderson v. Henderson*, 5 W. Va. 182; *Reitz v. Bennett*, 6 W. Va. 417; *Conrad v. Buck*, 21 W. Va. 396; *Stepoe v. Read*, 19 Gratt. 1; *Sims v. Tyrer*, 96 Va. 5, 26 S. E. Rep. 508; *Triplett v. Woodward*, 98 Va. 187, 35 S. E. Rep. 455.

When the testimony is voluminous, and the accounts in great confusion, and the report confirmed by the lower court, the appellate court will not interfere unless in case of palpable error. *Stuart v. Hendricks*, 80 Va. 601; *Stimpson v. Bishop*, 82 Va. 204.

VII. RECOMMITMENT.

A report made while a cause stood dismissed, and before it was reinstated, will be recommitted. *Williamson v. Childress*, 4 H. & M. 449.

A. *Unauthorized Report.*—A commissioner must

not go beyond the matter referred to him, and if he does so his report so far as refers to that matter is a nullity. It has been decided that in such a case the proper course is not to except to the master's report, but, before it is confirmed, to apply to the court that it may be referred back to the commissioner to review his report, but that, if no such application is made, and the report should be affirmed, the court will pay no attention to it, except so far as it is warranted by the decree. *Ware v. Starkey*, 80 Va. 191; *White v. Drew*, 9 W. Va. 695.

Omissions—Report Entire.—Where the evidence taken tends to show that defendant is entitled to certain credits on plaintiff's claim, and the cause is referred to a commissioner to take and state an account, he should be required to pass upon such items of credit. *Gapen v. Gapen*, 41 W. Va. 422, 23 S. E. Rep. 579.

In a suit in equity for an account, brought by one partner against the other after the termination of the partnership, both partners, defendant as well as plaintiff, are regarded as actors, and the accounts must be stated by the commissioner, and the rights of the several partners must be finally passed on by the court as if each partner were a plaintiff filing a bill against his co-partner. *Hyre v. Lambert*, 37 W. Va. 26, 16 S. E. Rep. 447.

Failure to Include All Debts—Recommitment.—The commissioner who was directed to take an account of the debts of S and their priorities, and of the lands of S and to whom and when aliened, after stating certain judgments, and debts secured by specific liens, reports that the debts secured by the deed to L were not presented before him, and he does not report them. *Held*, the report should be recommitment to the commissioner to take an account of said debts; and it is error to make a decree for the sale of the lands of S before this account was taken. *Schultz v. Hansbrough*, 33 Gratt. 567.

Omissions—Procedure.—Where a reference directs the commissioner to report upon a matter, and he does not, the court should recommit the report, without exception. *King v. Burdett*, 44 W. Va. 561, 20 S. E. Rep. 1010; *Shipman v. Fletcher*, 83 Va. 349, 2 S. E. Rep. 198; *White v. Drew*, 9 W. Va. 695; *Bank v. Wilson*, 25 W. Va. 242; *Jones v. Byrne*, 94 Va. 751, 27 S. E. Rep. 591.

If a commissioner fails entirely to make any report with reference to a matter referred to him, the court should refer this matter to him again, to be reported upon, and this should be done though no one except to such report. No one's right can be regarded as abandoned or prejudiced by his failure to except to such report because of such failure. *Childs v. Hurd*, 32 W. Va. 66, 9 S. E. Rep. 368.

C. Other Causes for Recommission.

Want of Notice.—A settlement (by commissioners appointed by the court of chancery) of an administration account, without notice to the legatees or distributees, is against the constant course of the court, and must be set aside, and the report recommitment. *Campbell v. Winston*, 2 H. & M. 10.

Intricate Accounts.—When a commissioner to whom a cause is referred to settle large and intricate matters of account, containing many contested items, returns a report showing only an aggregation of items in accordance with his conclusions, and the report is excepted to for this reason, and the circuit court overrules such exceptions and confirms the report on appeal, this court will reverse the decree of confirmation, and remand the cause, that a proper itemized statement of such accounts may be

made. *Dewing v. Hutton*, 40 W. Va. 531, 21 S. E. Rep. 780.

Defective Report—Recommission.—If, in any case, the court is not satisfied with the report of a commissioner in regard to matters not excepted to which might be affected by evidence *aliunde*, instead of remodeling the account on its own estimate of the evidence it should recommit the report, with instructions indicating its opinion, so that the respective parties might have an opportunity of meeting any objection thus suggested. *Baltimore & O. R. Co. v. Vanderwerker*, 44 W. Va. 230, 28 S. E. Rep. 831; *Ward v. Ward*, 21 W. Va. 262.

Defective Report—Recommission—New Evidence.—Where an exception to a commissioner's report is correctly sustained by the court, upon the evidence produced, yet if there is good reason to believe that other evidence might be produced, which would give the case a different result, and that such evidence has been withheld, in consequence of the commissioner's having allowed the item, the court of chancery ought not to pronounce a final decree, but to recommit the account for further evidence and enquiry. *Williams v. Donaghe*, 1 Rand. 300.

Defective Report—Appellate Court.—When, upon exception to a commissioner's report, he certifies all the evidence upon which the report is based, and his report is confirmed by the lower court and the evidence upon which it is based made a part of the record, the appellate court, if satisfied that the evidence is insufficient to sustain the findings of the commissioner, will reverse the decree confirming said report with directions to recommit the account in order that further testimony may be taken. *Holt v. Taylor*, 48 W. Va. 153, 27 S. E. Rep. 320; *Williams v. Clark*, 93 Va. 690, 25 S. E. Rep. 1012.

Want of Evidence.—In a suit by distributees against an administrator, the accounts having been referred, a report is returned before the defendant's evidence is filed. He excepts to the report, and files an affidavit showing a sufficient excuse for not sooner taking his evidence, and asks for a recommitment of the report. Under these circumstances, though the testimony may sustain the defendant as to the subject of controversy, it would not be proper to dismiss the bill. *Thomas v. Dawson*, 9 Gratt. 531.

New Reference by Consent.—During the pendency of a suit in chancery, a settlement of accounts between the parties having been made, and reported to the court, but, afterwards, by mutual consent, a new order of reference being made, the commission was not precluded from examining the accounts generally, and correcting any error therein; especially, as it appeared that the party who was benefited by such error, had torn his own signature, and that of the other party from the settlement. *Todd v. Bowyer*, 1 Munf. 447.

D. Motion to Recommit—Procedure Recommission—Second Report—Form.—If there has been a previous account, the commissioner shall not copy it into his report, but, taking it as the basis of his, correct the errors and supply the defects thereof by an additional statement. *Holt v. Holt*, 37 W. Va. 305, 16 S. E. Rep. 675; *Nelson v. Kownslar*, 79 Va. 468.

Motion to Recommit—Credits.—On a motion to recommit the report of a commissioner in chancery, if the previous neglect, or contumacy, of the party render it proper to overrule his motion, so far as it goes to open the accounts anew; he may, nevertheless, be permitted to show himself entitled to credits not considered by the commissioner, if it appear

probable, from the evidence in support of the motion, that he is entitled to such credits. *Snickers v. Dorsey*, 2 Munf. 506; *Grantham v. Lucas*, 24 W. Va. 232.

E. Motion to Recommit—Appeal.

Recommission—Appeal—Procedure.—An appeal by one party from a decree overruling some exceptions to commissioner's report, and sustaining others, and recommitting the report, brings up the whole cause; and the decree of the court of appeals affirming the decree of the court below, concludes all questions previously decided, whether in favor of the appellants or appellees. *Burton v. Brown*, 23 Gratt. 15.

Order of Recommission—Appeal.—A decree which sustains certain exceptions to a commissioner's report, and recommitts the cause to the same or another commissioner, is not an appealable decree because it does not settle all the principles of the cause. *Hill v. Als*, 27 W. Va. 215; *Laidley v. Kline*, 21 W. Va. 21; *Hooper v. Hooper*, 29 W. Va. 276, 1 S. E. Rep. 280.

VIII. IN GENERAL.

Creditor—Sale of Land—Petition.—Heirs residing out of the state, having instituted a suit for a sale of land descended to them, and the same having been sold, and the proceeds being in the hands of a commissioner directed by the court to collect them; a creditor of the ancestor seeking to subject these proceeds to the payment of his debt, should apply by petition to the court to be made a party in the cause, and to have the fund applied by proceedings in that cause to the payment of his debt. *Carrington v. Didier*, 8 Gratt. 260.

Commissioner—Notes—Taxation.—Notes in the possession of a commissioner, which were executed for the purchase price of property sold under a decree of court are not subject to taxation and should not be listed under Act of March 4, 1896 (Acts 1896-6, ch. 705, p. 778). *Fulkerson v. Treasurer of Bristol*, 95 Va. 1, 27 S. E. Rep. 815.

Commissioner's Liability—Confederate Money.—A commissioner who, under the direction of the court, collects and disburses confederate money, and, by order of the court, retains the balance, which is in controversy between disputing lien holders, until the rights of the parties are litigated, cannot be held personally liable for any loss that may be incurred in consequence of the fund perishing on his hands, by the result of the late civil war. *Davis v. Harman*, 21 Gratt. 194; *Myers v. Zetelle*, 21 Gratt. 760; *Reynolds v. Pettyjohn*, 79 Va. 331; *Williams v. Skinker*, 25 Gratt. 521; *Valden v. Stubblefield*, 28 Gratt. 153, 162; *McVeigh v. Bank*, 26 Gratt. 201; *Mead v. Jones*, 24 Gratt. 358; *Barton v. Ridgeway*, 92 Va. 171, 23 S. E. Rep. 226; *Fugate v. Honaker*, 22 Gratt. 418; *Hale v. Wall*, 22 Gratt. 435; *Cooper v. Cooper*, 77 Va. 204; *Parsley v. Martin*, 77 Va. 383; *Cogbill v. Boyd*, 77 Va. 459.

Settlement of Accounts—Presence of Legatees.—Executor's accounts are audited before commissioners of the county court, the legatees being present at such settlement thereof; these accounts are returned to the court, approved and recorded. *Held*, the presence of the legatees at the settlement, is no objection to a bill in chancery to surcharge and falsify the accounts so settled. *Garrett v. Carr*, 3 Leigh 407; *Garrett v. Carr*, 1 Rob. 196. See monographic note on "Interest" appended to *Fred v. Dixon*, 27 Gratt. 541; *Anderson v. Thompson*, 11 Leigh 456; *Strother v. Hull*, 23 Gratt. 668. See monographic note on "Estoppel" appended to *Bower v. McCormick*, 23 Gratt. 310.

Creditor's Bill—Statute of Limitations—West Virginia.—A bill filed by a single creditor to enforce the payment of his debt against the administrator and heirs of a decedent, although not in form a creditor's bill, will become such from the time the court makes an order referring the cause to a commissioner to take an account of the debts of the decedent and the statute of limitations will cease to run against any creditors of the decedent, whether he is a formal party to the suit or not, from the date of such order of reference. *Laidley v. Kline*, 23 W. Va. 570; *Woodyard v. Polsley*, 14 W. Va. 311.

Creditor's Bill—Statute of Limitations—Virginia.—It is sometimes broadly stated that the order for an account of liens suspends the running of the statute against all lien creditors. But no authority is cited, and in our investigation we have found no case which holds that the order for an account will prevent the running of the statute against the demand of a creditor who did not assert his demand in the suit. On the contrary, the authorities show that the rule only applies to such creditors as come in under the decree, or otherwise become parties to the suit, and that as to all others the statute continues to run. *Callaway v. Webster*, 7 Va. Law Reg. 40 (May, 1901).

Statute of Limitations—Equity.—Though the statute of limitations does not usually bar a suit in equity for an account, yet a great lapse of time showing laches on the part of the plaintiff may prevent a recovery at the bar of that tribunal. *Carr v. Chapman*, 5 Leigh 176 [164]; *Harrison v. Gibson*, 23 Gratt. 312, and note; *Foster v. Rison*, 17 Gratt. 231; *Caruthers v. Trustees of Lexington*, 12 Leigh 635 [618]; *Green v. Thompson*, 84 Va. 304, 5 S. E. Rep. 507; *Castleman v. Dorsey*, 78 Va. 349; *Hatcher v. Hall*, 77 Va. 578; *Morrison v. Householder*, 79 Va. 637; *Coles v. Ballard*, 78 Va. 140; *Perkins v. Lane*, 83 Va. 63; *Gibboney v. Kent*, 83 Va. 388; *Turner v. Dillard*, 83 Va. 530; *Chapman v. Persinger*, 87 Va. 586, 13 S. E. Rep. 549; *Shugart v. Thompson*, 10 Leigh 434. See Va. Code 1887, §§ 3603-3606; W. Va. Code 1890, ch. 141, pp. 941-942; *Lewis v. Rosler*, 19 W. Va. 61. See monographic note on "Depositions" appended to *Field v. Brown*, 24 Gratt. 74. See monographic note on "Issue Out of Chancery" appended to *Lavell v. Gold*, 26 Gratt. 473, and on "Bills of Exception" appended to *Stoneman v. Com.*, 26 Gratt. 887.

383 *Ould & Carrington v. Myers & als.

Myers v. Ould & Carrington & als.

March Term, 1873, Richmond.

1. **Contract for Work—Payable in Notes—Conditions.**—M. employs S. to build a house, and he is to pay for it in ten notes of \$5,000 each, payable at different periods, to be delivered by M to S when R shall say he is entitled to them. One note to be first delivered, then two at the same time, when the work has advanced to a certain stage, &c. If S should fail to carry on the work to completion, any notes not delivered should be forfeited to M. The first note is properly issued. Before S is entitled to receive the next two, M, at the request of S, delivered him one of them; S having done more work than the amount of that note; and S soon after receiving the last note, abandons the work. *HELD*:

1. **Same—Same—Accommodation Notes.**—Though the note was given by M to S for his accommo-

dation, before he was bound to deliver it, yet it is not an accommodation note in the legal sense, but is upon a valuable consideration; and M has no equity on this ground, either against S or the holder of the note for value, to have the note delivered up to him.

2. **Bill in Equity—No Damage Alleged—No Relief.**—M not having alleged in his bill damage by the failure of S to complete the work by the time prescribed, he cannot have relief on that ground.
3. **Contract—Provision of Forfeiture—Quere.**—The parties in this case having provided in the contract the forfeiture of S for the failure to complete the work, *quere* if M is entitled to any other compensation.
2. **Equity—No Decree in Favor of Plaintiff—Decree between Co-Defendants.**—M files his bill against S and his assignee of the second note delivered to S, and attaching creditors of S, who had served their attachments on M, to have the note delivered up to him, upon the ground that it was without consideration, and was procured by misrepresentation and fraudulent assurances; and the
384 court *holding that he has failed to sustain the grounds of relief he states, and that his bill should be dismissed, cannot go on to make a decree in the cause between the assignee and the attaching creditors.
3. **Same—Same—Same.**—There cannot be a decree between co-defendants, in a cause where there is no decree in favour of the plaintiff.

On the 6th of February 1866 Solomon A. Myers, of the city of Richmond, entered into a contract under seal with Samuel Strong, of Washington city, whereby Strong undertook to build for Myers, on a designated lot in Richmond, a house containing two tenements complete in all its parts, of the best materials, according to a specified plan, for the sum of fifty thousand dollars,

***Equity—No Decree in Favor of Plaintiff—Decree between Co-Defendants.**—The proposition laid down in the second and third headnotes, that there cannot be a decree between co-defendants, in a cause where there is no decree in favor of the plaintiff, seems to be a well established rule of law.

The principal case was expressly sustained as to this point in *Hansford v. Coal Co.*, 23 W. Va. 76; *Watson v. Wigginton*, 28 W. Va. 508; *Western Lunatic Asylum v. Miller*, 29 W. Va. 332, 1 S. E. Rep. 740; *Radcliff v. Corrothers*, 33 W. Va. 604, 11 S. E. Rep. 232; *Kinports v. Rawson*, 36 W. Va. 243, 15 S. E. Rep. 68.

Indeed, even when there is a decree for the plaintiff, the courts will be very chary of decreeing between co-defendants, and, as time advances, the tendency seems to increase the indisposition to make such decrees because it is not equity to delay the plaintiff his relief while the defendants litigate rights foreign to his claim and immaterial to the point in issue, and for the even stronger reason, that there is often no opportunity for one defendant to state his own case in his answer as against his co-defendant. See *Glenn v. Clark*, 21 Gratt. 39; *Hubbard v. Goodwin*, 8 Leigh 492; *Blair v. Thompson*, 11 Gratt. 445.

The general rule is that to decree between defendants "the case must be made out by evidence arising from the pleadings and proofs between plaintiffs and defendants." *Templeman v. Fauntleroy*, 3

said house to be fully completed and finished and the key to be given by said Strong to Myers, on or before the 1st of August 1866. The contract provided for an alteration of the plan at the instance of Myers, and the mode by which the consequence of such alterations should be adjusted. And it was agreed that in the payment of the said sum of \$50,000, Myers should execute ten negotiable notes of \$5,000 each, payable to Strong or his order, respectively on the 1st day of August 1867, 68, 69, 70, 71, 72, 73, 74, 75 and 1876, and each note to bear six per cent. per annum interest from the 1st of August 1866; and Myers was to deliver the said notes to Strong in the manner and at the time specified as follows: the note due at the earliest period was first to be delivered to Strong; the note due at the longest period was the second to be delivered; and so on alternately till they were all delivered, in accordance with the conditions after expressed, viz: Myers shall deliver to Strong, the first note whenever in the opinion of Richard Reins of Richmond, he has done sufficient work upon the said building to have earned it; and Reins was thereby appointed by
385 both parties to the *agreement, to give the said opinion or decision; when the walls of the first or main story are up, the iron front and joists, &c., complete thereon, ready for the walls of the second story to go up, two others of the said notes shall be delivered to the said Strong; and as each succeeding story is up, and ready for the walls of the story above to be commenced, another of said notes shall be delivered; and in like manner others of them shall be delivered until the fourth or last story is up and the roof on and completed, so that by or at that time the said Strong shall have received six of

Rand. 442. When such a case is made out, "a court of equity is entitled to make a decree between the defendants, and is bound to do so. The defendant chargeable has a right to insist that he shall not be liable to be made a defendant in another suit for the same matter which may be then decided between him and his co-defendant. And the co-defendant may insist that he shall not be obliged to institute another suit, for a matter which may be then adjusted between the defendants." *Blair v. Thompson*, 11 Gratt. 446.

But decrees between co-defendants must be distinguished from decrees in favor of the plaintiff against one defendant upon a proper case made against him. For example, "*Roberts v. Jordans*, 3 Munf. 488, was an injunction to a judgment obtained by the assignee of a bond against the obligor, upon the allegation of payments to the obligee and assignor. This court directed the injunction to be made perpetual as to such sum only as had been paid to the assignor before notice of the assignment; but gave the plaintiff a decree over against the obligee and assignor for any sums received by the latter after notice of the assignment, as soon as the plaintiff should have paid the judgment. This was not a decree between co-defendants, but in favor of the plaintiff against one of the defendants for money improperly received by him on a note he had assigned to a third person." *Blair v. Thompson*, 11 Gratt. 447.

the said notes, in value \$30,000. And the other four notes were to be delivered at such times as Richard Reins should direct, looking to the progress of the work; so that on the completion of the building by Strong, there should not be more than two of the said notes to be delivered to Strong, and they to be delivered at the time when the said house was completed.

And it was further agreed, that if Strong should unreasonably delay the construction of said house, which fact was to be decided by arbitrators chosen as specified, whenever Myers should desire it; or should Strong, from any cause, fail or refuse to carry out his part of the agreement to the full and entire completion of the said house, then, and in either event, any notes that may not have been delivered to the said Strong, shall be forfeited by him to the said Myers, &c., &c. And in conclusion it was agreed that Myers should, when requested by Strong, from time to time, convey to two trustees the said lot, with the building thereon to be erected, to secure to Strong the payments of the said notes, as they should be respectively delivered to him, and become due and payable according to the stipulations of this agreement.

386 This contract was duly admitted *to record in the Hustings court of the city of Richmond.

On the 23d of April 1866 Samuel Strong assigned and transferred to his brother Jacob Strong, of New York, all his rights and interest under the contract with Myers, and authorized him to perform all the acts, and secure all the benefits, which Samuel Strong was or might be entitled to under the same. And on the 25th of June following, Myers gave notice through the mail, to both Samuel and Jacob Strong, that the contract was not assignable; and that he would not permit Jacob Strong to do the work. He, therefore, considered the contract as abandoned by Samuel Strong.

In May 1867 Solomon Myers filed his bill in the Circuit court of the city of Richmond, in which he set out the contract between himself and Samuel Strong, the assignment by the latter to Jacob Strong, and his own notes to them; and said that the first note was delivered by him to Strong, when the same became due and payable under the contract; and a deed of trust to secure the same was executed and delivered to B. R. Wellford and Robert Ould, trustees, and was on record in the clerk's office of the Hustings court of the city of Richmond. What disposition has been made of that note by said Strong, plaintiff does not know, but from circumstances, he believes and charges that it is still held by Strong, or some fraudulent assignee from him, who, when discovered, he prays may be made a party defendant.

He refers to the provision of the contract which provides, that upon the failure or refusal of Strong to carry out his part of the agreement to the full and entire completion of the said house, any notes that may not have been delivered to Strong shall

be forfeited by him to Myers; and says, that before Strong, under his contract, was entitled to demand of him any other
387 note than the *one above referred to, he voluntarily abandoned his said contract by a formal assignment thereof to Jacob Strong, on the 23d of April 1866; which was recorded on the 16th of May following: That said assignment was made without consultation with him, and he had no knowledge thereof until sometime after it was recorded: That Jacob Strong has never, to his knowledge, assumed to act thereunder, or attempted to prosecute said work: That on or about the 28th of May 1866 all work upon the said building ceased, as plaintiff then understood and believed, in consequence of action had by the creditors of Samuel Strong against him, attaching all his property known to be accessible in the city of Richmond, and all supposed debtors of said Strong, the plaintiff among others; and plaintiff, by notice to said Strong, declared the said contract to be abandoned.

He further says, that prior to these occurrences, or plaintiff's knowledge of them, to wit: on the 11th day of April 1866, Strong applied to him to deliver to him his note for a second instalment of the money covenanted to be paid for the said buildings, to enable him, as was alleged, to raise money to assist in said work. Plaintiff was confessedly under no obligation to give such note, but believing that Strong designed in good faith to carry on the work, the plaintiff gave a note for the sum of \$8,000, being \$5,000 and ten years' interest thereon, at the rate of six per cent. per annum, payable on the 1st of August 1876; and to secure the same, executed another deed on the premises to the said Wellford and Ould, as trustees, which has been admitted to record in the Hustings court of Richmond. But this note was executed and delivered to Samuel Strong, and accepted by him, purely as a matter of accommodation, upon the promise and agreement that the work required under his contract, which was the

only consideration therefor, should be
388 thereafter *faithfully executed; as will fully appear from the recitals in the deed of trust. And he further says, that Strong has not prosecuted the work upon the said building so far as to entitle him, under his contract, to any other than the first note; and that the second note was obtained from the plaintiff by misrepresentation and upon false assurances; that plaintiff has not received any legal consideration therefor; and that he is not bound to pay the same to Strong or any other parties holding it, unless they can show that they paid for the same a valuable consideration, and had no notice of the circumstances above recited. He is informed that the second note was deposited by Strong with the First National Bank of Richmond, as collateral security for certain liabilities which have been since satisfied; and that the bank holds said note, not as proprietor thereof, but to satisfy the claims of certain

creditors of Strong, who have served their attachments upon the said bank as a debtor of Strong: these are Bartlett & Robins and Catharine Thomas, administratrix of Archibald Thomas; and a claim of Robert Ould & Isaac H. Carrington, lawyers and partners under the firm of Ould & Carrington, who, as plaintiff is informed, claim as assignees of said Samuel Strong, a right to the said note, as a security for a debt due them by Strong, and have given notice of that assignment to the bank.

The bill further states, that at the time Strong abandoned the work on the building he left on the premises certain materials he had provided for said building, a list of which is filed, the entire value of which did not exceed a few hundred dollars: That plaintiff is a defendant as surety of Strong, in a suit brought against them and one Wm. Webster, by How, Knox & Co., claiming several thousand dollars: that many of

the creditors of Strong had instituted
389 suits against him, and some had *recovered judgments; and in some of said suits the plaintiff has been charged to be liable as a debtor of Strong, and he has been summoned to appear as garnishee in the Circuit court of the city of Richmond, to disclose all his indebtedness to the said Strong. And, in consequence of the premises, he is subject to harassment and expense, and subjected to hazard of great pecuniary loss, unless protected by the peculiar powers of a court of equity. He claims to be entitled to retain in his possession the property before mentioned, until his liability as surety for Strong in the pending suit of How, Knox & Co. shall be determined; and he also claims, that if the first note herein referred to, be now held by Strong, it shall be retained in the power of the court, and not pass into the hands of any other party until the said liability shall be determined. And making Samuel Strong, the First National Bank of Richmond, Ould & Carrington, and the creditors of Strong who had attached the second note in the bank, and those who had summoned the plaintiff as garnishee, and Wellford & Ould, the trustees in the deed to secure it, parties defendants, he prayed that the bank should be restrained from delivering the note then in their custody to any other party; that Strong should be required to produce the first note, or disclose to the court in whose possession it is, and whether it is held for his benefit in any particular; and if so, that it be retained to await the determination of the suit of How, Knox & Co. in the Hustings court against the plaintiff and others; that the trustees, Wellford & Ould, be ordered to execute a release of the deed of trust aforesaid; and that the other defendants be restrained and enjoined from prosecuting any claim against the plaintiff as an alleged debtor of said Strong; and for general relief.

Ould answered the bill. He says
390 that he and his *partners, Isaac H. Carrington, are the holders and proprietors of the note for \$8,000, in the bill

mentioned, subject to the rights of the First National Bank of Richmond, which holds, or did hold, it as a pledge for the payment of a certain debt; and that Ould & Carrington are bona fide holders of the said note for value; that they obtained the said note from Samuel Strong on the 8th of June 1866; that said Strong was at the time the holder of the note, subject to the rights of the bank; that Ould & Carrington accepted said note in payment and satisfaction of a debt of \$2,300 due from Strong to them; that at the time they received the note from Strong it was endorsed in blank; and the defendant, and he believes the said Carrington, was wholly ignorant of any failure of consideration or any other defence or equity, as between the plaintiff and Strong, which would have invalidated the note or any part thereof, in the hands of Strong, or even that the said note was given to Strong by way of accommodation or anticipation. He denies that he, or as he believes Carrington, had any reason to believe that Strong had not done all that was necessary to entitle him to the note; denies all knowledge of the contents of the deed of trust given to secure it, and that in fact it had never been delivered to or seen by him, at the time the said note was transferred by the said Strong.

The defendant further says, that as to the matter of inadequacy or failure of consideration for the said note, he has been informed by Richard Reins, to whose decision Myers and Strong submitted themselves by the contract, that Strong has expended both labor and materials upon the said building, in addition to such as were to be expended before he should demand the first of said notes, to the value of the note of which Ould & Carrington are the holders;
and that he has expended further
391 *work, labour and materials sufficient to entitle him to demand the third note which the plaintiff covenanted to deliver; all which defendant believes to be the facts.

The defendant further says, that on the 8th of June 1866 he gave notice to the bank, of the transfer of the note to himself and his partner, and delivered to the said bank the written order of Strong to deliver the note to the defendant. And he was informed by the president of the bank that the market value of the note was about \$2,000; and the defendant for himself and the said Carrington proffers to relinquish all his interest in the said note, and to surrender the same for the said sum of \$2,300.

And he further says, that although he was aware that suits had been instituted and attachments sued out against Strong, at the time he became one of the holders of the note, yet that he had no actual knowledge at that time, that any attachment had been laid in the hands of the plaintiff, the maker of said note, or that any attachment had been served on the said bank for the purpose of affecting said note; and the note being negotiable and current at the time he became a holder thereof,

actual notice of said attachments, if any had at that time been served upon the plaintiff and said bank, would not have invalidated the title of the defendant.

He says Carrington does not join with him in his answer, because he is in a distant part of the State. In February 1867 Carrington filed his answer; which agrees substantially with that of Mr. Ould.

Bartlett & Robins and Thomas' adm'x answered the bill. Bartlett and Robins say, that on the 26th of May 1866 they sued out an attachment on their claim against Strong, and on the 31st it was served on Myers, and he was summoned as garnishee; and they afterwards obtained a judgment against Strong in said suit for \$3,200,

392 *with interest and costs. They insist that at the time of the service of their attachment, Myers was indebted to Strong to the amount of the note in the bill mentioned. And they say that Ould and Carrington were counsel and law agents of Strong, and well knew the claim, and of the proceedings of these respondents, and examined the papers on which these proceedings were taken before the time of the alleged assignment to them of the said note of Myers; and they cannot claim to be assignees without notice. On the 13th of June they served their attachment on the First National Bank of Richmond. And they insist that said note and the debt by it represented were then subject to their liens.

Thomas' adm'x says, that on the 31st of May 1866 she sued out of the clerk's office of the Hustings court of the City of Richmond, a *capias ad respondendum* against Strong for a debt of \$1,575, upon which she had since obtained a judgment; and all of it is still due except \$575; that Strong was arrested under said *capias* on the same day, and was discharged from custody by surrendering to this respondent, all his estate of every sort and description; among other things the note of \$8,000 mentioned in the bill, although not expressly named in the schedule; and not named as she believes, because he had, whilst in custody as aforesaid, executed to his counsel, Ould & Carrington, an assignment of the said note; which assignment she is advised is void in law: That on the 13th of June she sued out an attachment in her suit, and had it served on the First National Bank of Richmond, on that day; and she was then informed by H. G. Fant, the president of the bank, that he held the said note of \$8,000 as the property of Strong; and that he knew of no lien upon it of any sort, or of no assignment of the same, except a small claim of about \$400, which must be paid the bank

393 before the note *could be surrendered. She insists the note still was the property of Strong, and was so at the date of her *capias* and attachment, and that under these she had a lien upon it from the date of their service.

The bank answered by its president, H. G. Fant. He said the note for \$8,000 was endorsed in blank by Strong to the bank

as a security for \$4,000 advanced to him by the bank. That on the 8th of June 1866, Messrs. Ould & Carrington presented to the bank an order from Strong, directing the delivery of the note to them; that about the time of the receipt of this order divers attachments were served upon the bank, at the instance of creditors of Strong; and respondent, not knowing his legal duty in the premises, with the advice and consent of Messrs. Ould & Carrington, retained, and still retains possession of said note; though, unless otherwise ordered by the court, he will deliver the note to them. Respondent admits the debt for which the note was pledged is now extinguished. He denies all notice of the equities set up by the plaintiff in his bill, and avers he was a bona fide holder thereof for value.

There were answers of other attaching creditors, showing the dates of the service of their attachments.

Strong, in his answer, insists that by the terms and intent of the contract, he could be held only to forfeit compensation for the labour and material expended on said building, for which Myers had not executed his negotiable notes. He admits that the second note was delivered to him a short time before he could have demanded the same under the letter of said contract; but he denies, as utterly false, the allegation that the said note was executed by Myers or accepted by respondent purely as a matter of accommodation, or that it was obtained by misrepresentation or false assurances on his part. He avers that Myers re-

394 ceived the fullest consideration *for both the notes he had executed and delivered under the contract, and that respondent had expended labour and material on said building at least sufficient to entitle him to demand, under the strict letter of the contract, a third note from complainant. He admits he pledged the note to the bank as security for \$4,000 he then borrowed from the bank. He denies that Ould & Carrington took the note as collateral security for their demand against him for professional services; and avers that the same was given and received by them in absolute payment of the debt due them, amounting to \$2,300. Respondent does not know who is the holder of the first note delivered to him by Myers; nor, as he is advised, is it material for him to know, as plaintiff, in his bill, admits that your respondent was entitled to said note under their contract.

The answers of Ould, Carrington, Bartlett & Robins, and Thomas' adm'x were filed before the judge acted on the motion for an injunction; and it was granted on the 11th of May 1867.

In the progress of the cause, though it does not appear when, Myers filed an amended and supplemental bill. In it, after purporting to set out the averments of the original bill, he says, that at the time of filing it, he was not aware of the exact nature and extent of the claim set up by Ould & Carrington to the note for \$8,000, but supposed they claimed it as collateral

security for their account against Strong; but he is now informed that they claim to be the owners of the note. In their answer to the plaintiff's original bill, they claim that the said note was transferred to and accepted by them as satisfaction of a professional account against Strong for services rendered as counsel, amounting to not more than \$2,500. And he charges that their claim, as set forth by themselves in their said answer, grows out of a

395 *contract between themselves and Strong, which was palpably usurious, and therefore null and void. In legal effect it was a loan or forbearance by Ould & Carrington, of not more than \$2,500, for less than ten years, in consideration of a certain return of the principal and \$5,500 of interest. For the forbearance of their claim of \$2,500 they obtained plaintiff's note, with Strong as endorser, for \$8,000, a discount of twenty-two per cent. per annum.

Plaintiff further charges, that Ould & Carrington, at the time they accepted an assignment of the note from Strong, had full knowledge of facts set forth in this and the original bill, which had intercepted Strong's control of the note; and also of attachments which had been sued out against the estate of Strong, and duly served upon the plaintiff.

Ould & Carrington are the only parties made to the amended bill; and they are called upon to answer, except as to the charge of usury, which plaintiff proposes to prove independent of an answer from them. And the prayer of the bill is for the relief prayed in the original bill, and for general relief.

Ould & Carrington answered the amended bill. They deny that the transfer by Strong to them, of the note for \$8,000, was usurious, or that Strong's endorsement on the note was intended to make him liable to them. It was put there when deposited with the bank, with the sole purpose, it is believed, of conveying the legal title to whosoever might become the bearer thereof. They deny, as wilfully false, the allegation that they had full information, or any information whatever, that would induce them to believe that Strong had no legal right to transfer to them the said negotiable note of the complainant, or that they had any notice of any equitable defences that said Myers pretends to have against

396 said *note. At the time they accepted the transfer of the note they believed said Myers had received full consideration therefor, and they are now satisfied that such is the fact. They say they knew that the creditors of Strong were seeking to obtain satisfaction of their demands by attachment; but they deny as false the charge that they had knowledge at the time, or before the transfer to them of said note, that attachments had been served upon the complainant or any particular debtor of Strong, except of one which Strong informed them had been served upon the firm of Betz, Youngling & Co., of this city, the validity of which he requested them to

litigate. But they submit that if the facts as to notice of the attachment were as plaintiff falsely charges it to be, no benefit or advantage would thereby accrue to him, nor would their position as bona fide holders for value of said note, be in any respect impaired or weakened.

Richard Reins was examined as a witness. He says that when the second note was given Strong had finished about \$11,000 worth of work upon the building; and that the probable value of all the work done upon it by him, was about \$13,500. The second note was delivered at the request of Strong, and for his accommodation, before Strong was entitled to it under the contract. He was also examined to show that Myers had sustained large loss in rents by the failure to complete the house in August 1866.

There were some facts agreed, intended to bear on the question of usury, but it is unnecessary to state them.

The cause came on to be heard on the 17th of November, 1868, when the court referred it to a commissioner, with directions to enquire and report:

1st. Whether the negotiable note of complainant described in his bill was an accommodation note, or procured by fraud and misrepresentation of the defend-

397 ant, *Samuel Strong, or given for a good and valuable consideration.

2d. Whether the defendants, Ould & Carrington, are bona fide holders of said note; and if so, at what time they acquired title thereto.

3d. Whether the contract between the defendants, Ould & Carrington, and their co-defendant, Samuel Strong, under which they claim title to said note, is usurious.

4th. Whether any attachments have been levied upon said note, or upon the debt of which it is evidence, by the creditors of Samuel Strong, defendants in this suit; if any, their respective dates and times of taking effect as levies, and amounts, and whether the said attachments are now pending and unsatisfied; and which of said attachments, if any, are prior in law to the claim of Ould & Carrington to said note or the debt of which it is evidence.

On the 30th of November 1868 commissioner Evans returned his report. Upon the questions referred to him he reports:

1st. That the negotiable note was not an accommodation note, and was not procured by the fraud or misrepresentation of Samuel Strong; and was given for a good and valuable consideration.

2d. That Ould & Carrington are bona fide holders of the said note; and that they acquired title thereto on the 8th of June 1866.

3d. That the contract between Ould & Carrington and Strong, under which they claim title to said note, is not usurious.

4th. Upon the fourth question the commissioner gives a list of attachments issued at the instance of the creditors of Strong, with the amounts, the dates of their service, and upon whom served. Some

398 of these attachments *were served on the First National Bank of Richmond,

and some on Solomon Myers, and some on both; and some of them were served before the 8th of June 1866, and they are still pending. The commissioner says: I do not think that any of these attachments are prior in lien to the claims of Ould & Carrington to said note, or to the debt of which it is evidence.

Bartlett & Robins and How, Knox & Co., two of the attaching creditors, whose attachments had been served on Myers on the 31st of May, excepted to the report upon the fourth question; and Myers excepted to the report upon the first three questions.

On the 13th of March 1869 the cause came on again to be heard upon the papers formerly read, and the report of commissioner Evans, with the exceptions thereto, when the court approved and confirmed so much of said report as ascertains that the negotiable note of Myers for \$8,000 was given for a good and valuable consideration, and that the contract of assignment of said note from Samuel Strong to Ould & Carrington was not usurious. But the court being of opinion that such creditors of Samuel Strong as levied attachments on his estate by service of copies on Myers and on the First National Bank of Richmond, as garnishees prior to the 8th day of June 1866, at which date the assignment by Strong to Ould & Carrington was made, acquired liens on the debt represented by the said note from the time of such service; but not deciding whether the levy of the attachment on Myers alone was sufficient, sustained the exceptions to so much of the report as expresses the opinion of the commissioner that none of the attachments are prior in lien to the claim of Ould & Carrington. And the First National Bank of Richmond was directed to deliver the note to the clerk of the court, &c., and the court reversed the distribution of the fund represented by the note for further decree herein. From this decree Ould & Carrington and Myers applied for, and obtained separate appeals to this court.

Page & Maury, for Ould & Carrington.

I. yons, A. A. Smith, and J. Alfred Jones, for Myers.

E. Y. Cannon, Spilman and Scott, for the attaching creditors.

BOULDIN, J. Without repeating the facts of this case, I propose to consider, in the first place, whether the appellee, Myers, on the pleadings and proofs in the cause, has made a case, as between himself and Strong, for the interposition in his behalf of a court of equity.

In his original bill, he claimed relief against the second note mentioned therein—the note for \$8,000—upon the ground, first: That it was purely an accommodation note without consideration, and that nothing was due thereon to Strong. Secondly: That it was obtained by misrepresentation and false assurances, and was therefore fraudulent and void. And, on these grounds

alone, he claimed that this note should be restored to him, to be cancelled. Both allegations are flatly denied by Strong in his answer; and neither is sustained by the proofs in the cause.

The note, it is true, was executed and delivered to Strong in advance of the period when, by the terms of the contract between himself and Myers, he was entitled to demand it; and in that aspect the delivery of the note to Strong may be regarded a favor or matter of accommodation, to the same extent precisely that the anticipation of the payment of any other debt payable at a future day might be considered a favor or matter of accommodation to the creditor. But, it is not true that it was, in any sense of the word, an accommodation

400 *note, as understood by the law merchant, or without consideration. On the contrary, when that note was executed Strong had expended on the building in progress of construction for Myers, one thousand dollars more in labor and material than the principal of the two notes delivered to Strong; and this work and material constituted the consideration of the note in question; a consideration valid and sufficient in law to support the note even inter partes. The anticipation of the time merely, when the delivery of the note could be demanded, cannot make the note itself accommodation paper, when at the time of delivery the work already done by Strong was, as we have seen, more than the value of the note.

My opinion, then, is, that the note was not accommodation paper, nor without consideration, but was strictly business paper in the hands of Strong, executed on valid and sufficient consideration. Nor is there any evidence in the record to establish the charge of fraud and misrepresentation. It is flatly denied by Strong, and wholly unsupported by proof.

These are the only grounds on which Myers, in his original bill, based his claim to equitable relief against the note for \$8,000. He did not claim that an enquiry should be made into the amount of damages sustained by him in consequence of Strong's failure to complete the building, and that he should be allowed such damages as a set-off against the note in the hands of Strong and his assignees. Without alleging the existence even of any such damage, or asking for such inquiry, he merely claimed that the note itself was not business paper, was without consideration, was obtained by misrepresentation and false assurances, and should therefore be delivered to him, to be cancelled; allegations denied by the answer of Strong, as we have seen, and not sustained by the evidence.

So far, then, as the note for \$8,000 is concerned, my opinion is, that Myers has made by his original bill, and the proofs thereon, no case for the interposition in his behalf of a court of equity. He has made no case which would entitle him to relief,

even were his claim against Strong alone, and the note still in the hands of the latter.

But an amended bill appears to have been filed, at what date the record does not show. And I will now enquire, whether any claim for damages, by reason of the abandonment of the work, or any other equity against Strong, not alleged in the original bill, is properly made in that bill. It was evidently intended to introduce, as against Ould & Carrington, a new equity—the charge of usury, between them and Strong; and to state rather more minutely the character of their claim to the note; but not to make a new issue with Strong: and this is the more manifest when we see that Ould & Carrington are the only persons made defendants to the amended bill; and no others are required to answer it. It is true that the following recital of what is charged to appear in the original bill is made, viz: "And your orator showed unto your honor, that by reason of the said Strong's violation of his contract aforesaid, your orator had been subjected to great and serious detriment and pecuniary injury; which injury, it is now more apparent than it was at the time of his filing said bill, will vastly exceed the amount of both the said notes given as aforesaid by your orator to said Strong." But, in fact, the original bill showed nothing of the kind; no such charge or allegation is made in that bill; nor any damage or pecuniary loss even alluded to, except the harassment and expense which he charged *would grow out of the attachments, &c., &c., of Strong's creditors. Myers, when he filed that bill, was evidently content to rest upon the excess of \$4,000 work and material over and above the two notes, which was forfeited to him by the terms of the contract, and was amply sufficient to cover all apparent damage. He asked no account of damages for breach of contract, in his original bill, and no such account in his amended bill. The special relief prayed for in the amended bill was not against Strong, by reason of any equities between Strong and Myers, but was against Ould & Carrington alone, on a state of facts applicable to them only; and as we have seen, they alone were made defendants to, and required to answer, this bill; and the general prayer was only for "the relief prayed for in his original bill," and for general relief. It will thus be seen, that neither in the original nor amended bill was the claim for damages, so earnestly argued at the bar, presented as a ground of equity or set-off against the notes which had been delivered to Strong. No inquiry into that matter was asked, either in the bills or before the commissioner. The appellee, Myers, seemed content with the forfeiture he had already realized, and has not attempted to show by evidence in the cause, that it was not ample to cover any real or even speculative loss arising from the breach of the contract. The fact in relation to that matter has not been put in issue in the pleadings; but so far as the record shows, the forfeiture is ample indemnity to cover all losses.

Under such a state of pleadings and proof, I am of opinion that the appellee, Myers, has made no case of equity against the note for \$8,000, even against Strong himself, were he still the holder thereof. Were it necessary to decide the question, however,

I would be prepared to hold that the 403 question of damages was not left *open by the contract of the parties; but that the amount thereof was limited to the value of work and material, for which no notes had been issued at the time the work was abandoned. This was the measure of damages agreed on by the parties themselves; and we think, in a case of this character, in which the damages must be of necessity to a great extent conjectural, the measure agreed on by the parties should govern the court. I agree with Best, C. J., when in the case of *Crisdee v. Bolton*, 3 Car. & Payne 240, he said: "The law relative to liquidated damages has always been in a state of great uncertainty. This has been occasioned by judges endeavoring to make better contracts for parties than they have made for themselves. I think that the parties to contracts, from knowing exactly their own situations and objects, can better appreciate the consequences of their failing to obtain those objects than either judges or juries. Whether a contract be under seal or not, if it clearly states what shall be paid by the party who breaks it to the party to whose prejudice it is broken, the verdict in an action for the breach of it, should be for the stipulated sum. A court of justice has no more authority to put a different construction on the part of an instrument, ascertaining the amount of damages, than it has to decide contrary to any other of its clauses. Our office is to ascertain the intent of the parties, and if it be not contrary to law, to carry their intent into execution. In the present case, no evidence has been adduced of the amount of damage sustained by the plaintiff," &c., &c. I should be inclined to apply these words of the learned Ch. Justice to this case, were it necessary to decide the question; but I have shown, I think, that not being presented in the pleadings, it is not before us. Having made, then, no case even against Strong, were he the only defendant, it would seem to be a necessary consequence *that there can be no case against Strong's assignees, as it is clearly not a case of interpleader.

The charge of usury between Strong and Ould & Carrington, made for the first time in the amended bill, even if sustained by the evidence, on which we do not propose to intimate an opinion, would constitute no equity in favor of Myers; for he does not pretend that usury exists in the note. He would not be relieved from one dollar of the debt by establishing usury between endorser and endorsee; but would still be compelled to pay it all. In this case, then, in which he has come to be relieved from the payment of the entire note, and has shown no equity to be relieved from any part of it, my opinion is, that he had no right to raise questions between other parties not affect-

ing his own liability. Such questions might well be raised on a bill of interpleader, but not in this case.

I think the bill, so far as it sought to establish an equity as to the \$8,000 note against Strong and his assignees, and attaching creditors, should have been dismissed; leaving those parties to litigate among themselves as to their respective rights in the tribunal already selected by them.

The appellee, Myers, not having shown himself entitled to a decree against Strong, or any other party in the cause, so far as the note for \$8,000 is concerned, but it being proper that his bill should be dismissed as to all parties claiming that note, my opinion is, that there is no foundation for any decree between the defendants, in relation to that matter. In the latest case in this court on the subject, *Glenn v. Clark*, 21 Gratt. 35, Judge Staples delivering the opinion of the court, said: "The practice of decreeing between co-defendants is not much favored by the courts. There is an

increasing indisposition to extend 405 that practice further *than it has already been carried." Ibid. p. 39. In *Hubbard v. Goodwin*, 3 Leigh, 492, 522-3, Judge Tucker, speaking of decreeing between co-defendants, said: "I think it has been done in no case where the plaintiff was not entitled to a decree against both or either. The practice should not be extended further. "A defendant who answers the plaintiff's bill, does not always go on to state his own case as between him and his co-defendant. There is no issue made up, nor any provision for taking their testimony in reference to the peculiar matters in difference between them; and hence in many cases the contest between them cannot come fairly before the court." This language of Judge Tucker was quoted with approval by Judge Allen, delivering the opinion of the court, in *Blair v. Thompson*, &c., 11 Gratt. 441, 452; and it applies with peculiar force to this case. The contest here, on the pleadings, has been almost exclusively with Myers. The gist of the controversy was his right to the note for \$8,000; and being of opinion that his bill should be dismissed, it would be carrying the doctrine of decrees between co-defendants beyond any reported case which has come to my knowledge, to go on under such circumstances, and enter a decree between the co-defendants. I believe, with J. Tucker, that no case can be found in which there was a decree between co-defendants, when there was none for the plaintiff. I have, with a good deal of diligence, looked over the reported cases on the subject in England and America, and have found not one in which there was a decree between co-defendants, in the absence of a decree for the plaintiffs. Indeed, in almost all the cases, the decree between the co-defendants was a necessary result of the decree for the plaintiff. The rule laid down in the leading English case, *Chamley v. Lord Dunsany*, 2 Sch. & Lef. R. 690, as ap-

406 plied in the *more recent case of *Cottingham v. Earl of Shrewsbury*, 3 Hare's R. 627, is thus stated by Vice Chancellor Wigram: "If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the court will try and decide that case, and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound by any proceeding which may be necessary only to the decree the plaintiff obtains." Ibid. p. 637. A fortiori, then would it be improper to bind co-defendants by a decree inter sese, when no decree at all is entered for the plaintiff. Such, as we have seen, seems to be the opinions of the judges of this court; and such was the direct decision of the High court of Errors and Appeals for the State of Mississippi, in the case of *Arnold v. Miller ex'or & als.*, 26 Miss. R. 152. The court held that "those equities arising from the relief decreed, in the first instance, to the complainant, are proper to be adjusted between all the parties to the suit whose interests are involved in the subject matter of it, upon the principle of preventing multiplicity of suits." Citing 1 Paige C. R. 268; 2 McCord Ch. R. 470. They go on to say: "The reason of this is manifest. But where the claim of one co-defendant against another does not result from the recovery of the demand of the complainant against one or both of them, we cannot see on what principle the right of one co-defendant to a decree against his co-defendant, in that suit can be justified. Here the complainant's bill was in effect dismissed; and the answer did not assume the character of a cross bill: It was a simple denial of the complainant's equity," &c., &c. Ibid. p. 155-6. And a decree between co-defendants in that case, which in some of its aspects will be found to be very similar to the present, was reversed. My 407 opinion is, that *in this case there should have been no decree between the defendants in relation to the note for \$8,000.

There is more difficulty as to the equity claimed by Myers against the note for \$5,000 first issued to Strong, and his right to a lien on the lumber of Strong which came to his possession, growing out of his contingent liability as surety for Strong to How, Knox & Co. Myers, in his bills, has prayed indemnity for this liability out of the lumber aforesaid and the note of \$5,000 alone; and he calls on Strong to state where that note now is. Strong's answer, as to this note, is evasive. He does not say that he had endorsed the note to another, and is no longer the holder thereof; but merely says that he does not know where the note is. This may be true, and he may still be the owner of the note; or he may have transferred it after maturity, subject, of course, to the equities of Myers. On these subjects we are wholly in the dark; and we are equally uninformed as to the existence or amount of any fixed liability

of Myers for Strong. These matters, we think, should have been subjects of enquiry before a commissioner in the Chancery court, if desired by the counsel of the parties. Something has been said, however, at the bar, about an adjudication in another forum of the questions in relation to the note of \$5,000. Such adjudication, if already made, may render any further litigation on that subject unnecessary; but nothing of the sort appears in this record; and we can only deal with what is before us. My opinion is, that the decree of the Chancery court should be reversed, with costs to the appellants, so far as it undertakes to adjust the rights of the appellants and the attaching creditors, as between themselves; and that so much of the bill as seeks to have the \$8,000 note of Myers to Strong surrendered to Myers, to be cancelled, should be dismissed, with costs to the defendants, in the Chancery court; 408 and, in relation *to the other matters in controversy, that a further decree should be entered in accordance with the principles above declared.

The other judges concurred in the opinion of Bouldin, J.

Decree reversed.

409 *Underwood v. McVeigh.

March Term, 1873, Richmond.

1. **Confiscation—Sale of Property—Ejectment—Case at Bar.**—In 1863 proceedings were instituted in the District court of the U. S. at Alexandria, under an act

Judgments—No Opportunity for Defence—Void.—"It lies at the very foundation of justice, that every person who is to be affected by an adjudication should have the opportunity of being heard in defence, both in repelling the allegations of fact, and upon the matter of law; and no sentence of any court is entitled to the least respect in any other court, or elsewhere, when it has been pronounced *ex parte* and without opportunity of defence. An examination of both sides of the question, and deliberation between the claims and allegations of the contending parties, have been deemed essentially necessary to the proper administration of justice by all nations, and in every stage of social existence."

The above proposition laid down in the principal case has been quoted and sustained by many courts in their subsequent decisions. See *Hess v. Gale*, 93 Va. 470, 25 S. E. Rep. 533; *Moorman v. Arthur*, 90 Va. 472, 18 S. E. Rep. 809; *Dorr v. Rohr*, 82 Va. 362; *Bowler v. Huston*, 30 Gratt. 276; *Staunton, etc., Co. v. Haden*, 92 Va. 207, 23 S. E. Rep. 286; *Ferguson v. Teel*, 82 Va. 696; *Grigg v. Dalsheimer*, 88 Va. 511, 18 S. E. Rep. 993; *Lavell v. McCurdy*, 77 Va. 771; *Buford v. North Roanoke Land, etc., Co.*, 90 Va. 423, 18 S. E. Rep. 914; *B. & O. R. Co. v. P. W. & Ky. R. Co.*, 17 W. Va. 836; *Renick v. Ludington*, 20 W. Va. 536; *Dower v. Church*, 21 W. Va. 49; *Haymond v. Camden*, 22 W. Va. 199; *McCoy v. McCoy*, 29 W. Va. 809, 2 S. E. Rep. 817; *Fowler v. Lewis*, 36 W. Va. 126, 14 S. E. Rep. 451; *Hukill v. Guffey*, 37 W. Va. 474, 16 S. E. Rep. 560. See especially, *foot-note* to *Fairfax v. City of Alexandria*, 28 Gratt. 16, for collection of cases.

of Congress, to confiscate the real estate of M. Before the condemnation, M appeared by counsel and filed his answer, which afterwards, on the motion of the attorney for the U. S., was struck out; and the court, not allowing M to appear in the cause, decreed that the property should be sold at auction by the marshal. This was done, and the property was conveyed by the marshal to the purchaser. Upon appeal by M to the Supreme court of the U. S., the decree was reversed. And when the case came back to the District court it was dismissed. In ejectment by M against the purchaser, to recover the property, **HOLD:** The decree having been made in the absence of M, was a nullity, and the deed of the marshal passed no title to the purchaser.

2. **Attachment Proceedings—Judgment—Sale.**—In proceedings by attachment against M, judgment is rendered against him, and there is an order for a sale, and a sale and conveyance to the purchasers, of the real estate attached. **HOLD:**

1. **Same—Same—Same—Legal Title—Fraud.**—The judgment and conveyance made under the judgment and order, by the sheriff, divested M of his legal title to the property; unless the said sale was fraudulently made, and the confirmation thereof was procured by fraud; and that the purchaser was privy to such fraud, or had notice of the same, or of such circumstances as would put a prudent *bona fide* purchaser upon enquiry in respect thereto.

2. **Same—Same—Same—Same—Same—Combination among Purchasers.**—But if the purchaser combined with others to purchase the property at the attachment sale, at a sacrifice; and if, in pursuance of such combination, they so acted as to prevent competition at said sale, or to prevent the said property realizing a fair value, then such combination and action was fraudulent; and the deed of the sheriff passes no title to the purchaser.

410 *3. **Evidence—Relevant Matter Admitted—Effect for Jury.**—If evidence offered to be introduced on the trial of a cause is relevant to the issue, it should be admitted. It is for the jury to determine what effect it shall have.

The case is fully stated by Judge Christian, in his opinion.

Beach, for the appellant.

John Howard and Jones, for the appellees.

CHRISTIAN, J., delivered the opinion of the court.

This case is before us upon a writ of error and supersedeas to a judgment of the Corporation court of the city of Alexandria.

The action was ejectment, brought by the defendant in error to recover of the plaintiff in error a house and lot in the said city of Alexandria; and also for damages and mesne profits for its occupation. There was a verdict for the defendant in error for the premises claimed; and the damages for mesne profits and damages for occupation were assessed at the sum of three thousand and eighty-one dollars; and a judgment was entered in accordance with the verdict. There was no motion for a new trial; and the facts proved are not certified. The legal

questions submitted to this court are raised by certain instructions propounded by both plaintiff and defendant; and the bills of exception taken to rulings of the court, in granting or refusing these instructions, embody the evidence which was before the jury.

The evidence establishes the following facts:

McVeigh was the owner in fee of the premises in controversy, and was in the actual possession of the same until the day of —, 1861, when he removed to the city of Richmond, where he remained during the war.

411 *On the 18th day of July, in the year 1863, certain proceedings were commenced by the district attorney of the United States for the Eastern District of Virginia, for the seizure of said property, for confiscation, under the act of Congress entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." After a libel of information was filed, and notice thereof published, and before sentence of condemnation was entered by the said District court, McVeigh appeared by counsel, interposed a claim to the property, and filed his answer.

On the 10th March 1864, the attorney of the United States submitted a motion, that the appearance, answer and claim of McVeigh be stricken from the files, for the reason that the respondent "was a resident of the city of Richmond within the Confederate lines, and a rebel." And on the same day, the following order was entered: "And now came on to be heard, the motion of L. H. Chandler, attorney for the United States, libellants herein, to strike from the files the answer, claim and appearance interposed by Messrs. Beach and Bradley for and in behalf of respondent William N. McVeigh; and on motion of L. H. Chandler, the application of libellants is granted, and it is ordered that the answer and claim interposed in this suit by said Messrs. Beach and Bradley have been irregularly and improperly admitted on file in this cause; and that the same be stricken therefrom."

On the same day, to wit: on the 10th of March 1864, after the order was entered as above, striking from the files the appearance, answer and claim of the respondent, the court entered its sentence and decree of condemnation of the property libelled; and it was on that same day adjudged and ordered, "that the real and personal

412 *property mentioned and described in the libel in this cause, be and the same accordingly is confiscated and condemned as forfeited to the United States." And it was on the same day, ordered that a decree of venditioni exponas be issued by the clerk of the court, to the marshal of the district, directing him to sell the property upon twenty days notice, and make return on the 16th April following.

On the last mentioned day (April 16th, 1864,) which was the return day of the said

venditioni exponas, issued under the above order, John Underwood, U. S. Marshal, returned a deed between himself and Maria G. Underwood, who is the wife of John C. Underwood, Judge of the District court of the United States for the Eastern District of Virginia, who as Judge of said court entered all the orders above referred to; which deed, after reciting all the proceedings of confiscation above referred to, further recites: "And whereas, after due publication according to law, and the decree of said court, of the time, terms and place of sale, the said property, on the 11th day of April 1864 was sold to the said Mrs. Maria G. Underwood, the party of the second part, she being the highest bidder therefor, for the sum of twenty-eight hundred and fifty dollars: Now, therefore, the said John Underwood, as Marshal as aforesaid, the party of the first part, in consideration of the premises and of the full payment of the said purchase money, the receipt whereof is hereby acknowledged, doth grant, bargain, sell and convey unto the said Mrs. Maria G. Underwood, the party of the second part, her heirs, executors, administrators and assigns, the following property, to wit." And then follows a particular description of the property conveyed by said deed, which is the same property which is the subject of controversy in the case now before this court.

413 *The case was taken up on a writ of error from the District court to the Circuit court, where the decree was affirmed, and then carried up to the Supreme court of the United States. The Supreme court pronounced its judgment at the December term 1870, when that court reversed the decree of the said District court, and remanded the cause to be proceeded in, in conformity to law. Mr. Justice Swayne, delivering the unanimous opinion of the Supreme court, said: "In our judgment the District court committed a serious error, in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order, in effect, denied the respondent a hearing. It is alleged that he was in the position of an alien enemy; and hence could have no locus standi in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice." 11 Wall. U. S. R. 267.

It was accordingly ordered and adjudged by the Supreme court of the United States, "that the judgment of the said Circuit court in this cause be, and the same is hereby, reversed and annulled;" and the cause was remanded to the said Circuit court of the United States, for further proceedings to be had therein, in conformity with the opinion of the Supreme court. The mandate of the Supreme court was issued on

the 6th of March 1871, and on the 5th of April 1871 the cause came on to be heard in the said Circuit court, and the said libel was dismissed. Thus ended the proceedings in the case of libel for confiscation in United States courts.

Pending these proceedings in confiscation, sundry creditors of McVeigh, (who was a member of a mercantile
414 *firm of the name and style of C. A. Baldwin & Co. among them Francis Dane & Co., instituted suit against him, in the County court of Alexandria county, and attached all his interest in the same property which was the subject of the confiscation proceedings above referred to. Judgment was rendered against McVeigh in this suit, and an order was made to sell the attached property for the satisfaction of the judgment. On the 10th of May 1864 it was accordingly sold by the sheriff of Alexandria county; and the house and lot now in controversy was conveyed by the sheriff to Maria G. Underwood, wife of John C. Underwood, who was the purchaser of the same property at the confiscation sale, (the property at the attachment sale having been cried off to one John B. Alley, who assigned his purchase and directed the conveyance to be made to her).

The sale thus made by the sheriff of Alexandria, in the said attachment suit, was confirmed by the County court on the 6th of July 1864; and the said sheriff was ordered to execute and deliver to the purchaser deeds for the property sold.

On the 6th day of October 1865 the defendants in the attachment suit, McVeigh and Baldwin, appeared, and were permitted to file their petition. Whereupon, it was ordered, "that the same be reopened and docketed, and that they be permitted to make such defence to the judgment and order herein rendered as they might have done before said judgment and order were rendered, on giving security for costs." And then, by consent of parties, the case was removed to the Circuit court of Alexandria. Upon a case agreed, in lieu of a special verdict, the following order and proceedings were entered and had in that court: "It appearing to the court that the petitioners, C. A. Baldwin & Co., have not
415 been served with process or a copy of the judgment aforesaid, *it is ordered and adjudged by the court that the judgments complained of be set aside and annulled. But as the purchasers are not before the court, the court declines making any order affecting their rights; reserving, however, to the petitioners, C. A. Baldwin & Co., the right to institute such other and further proceedings as they may be advised necessary to impeach or annul the titles claimed by such purchasers." The plaintiffs excepted to said order, "that the judgments complained of be set aside;" and it being admitted by the defendants that the claims for which the plaintiffs respectively recovered judgment against them, at the January term 1864 of the County court of Alexandria county, were justly due by said

defendants to the plaintiffs respectively. The plaintiffs, thereupon, moved the court to confirm said judgments of the County court for the amounts of said claims thereby respectively adjudged to the plaintiffs. But the court denied the motion; and to the ruling of the court, denying the motion, the plaintiffs excepted.

To this judgment of the Circuit court of Alexandria a writ of supersedeas was obtained, which brought the case before the District court of appeals for the fourth Judicial district, held at Fredericksburg. That court, on the 7th day of January 1869, pronounced the following judgment: "This day came the parties, by their counsel; and the court having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel, is of opinion, that the defendant, William N. McVeigh, had an attachable interest in the estate on which the attachment in this case was levied; and that said attachment was not issued on false suggestions, or without sufficient cause. The court is therefore of opinion, that the said Circuit court erred in overruling the motion of
416 the plaintiffs to confirm the judgment of the County court of Alexandria county, recovered by the plaintiffs against the defendants, on the 5th day of January 1864, and in setting aside and annulling said judgment. But the court is further of opinion, that as the evidence introduced by the said McVeigh, and mentioned in the opinion of the said Circuit court, referred to in the judgment of said court, strongly tends to prove that the purchasers of the property sold under said attachment were not bona fide purchasers, the defendants are entitled to impeach the title of the said purchasers to the said property, either by a new suit to be instituted for that purpose, or by further proceedings in this cause, at their election. If they elect the former, (a new suit,) then the judgment in this cause should be without prejudice to their right to relief in any new suit they may be advised to institute. And the cause is remanded to the said Circuit court, for further proceedings to be had therein, according to the principles above declared."

The Circuit court, upon receiving the mandate of the District court of appeals, entered a judgment, confirming the judgment of the County court in favor of the claim of the attaching creditors. And thus ended the proceedings in the attachment suits.

Acting under the judgment of the District court, authorizing the defendants to impeach the title of the purchasers of the property sold under the attachment, in a new suit to be instituted for that purpose, McVeigh brought his action of ejectment against John C. Underwood, for the house and lot purchased by Mrs. Maria G. Underwood, his wife, and of which they were and still are in possession.

It seems that Underwood and wife executed a deed, conveying this property to one Force, to be held by him in trust for

the sole and separate use of the said
417 Maria *G. Underwood; and, upon his motion, he was made a party defendant to the action of ejectment. As before stated, there was a verdict and judgment in favor of McVeigh for the premises in controversy, and for a certain amount as damages and mesne profits; and a writ of error to that judgment brings up the case to this court.

In the petition for a writ of error, there are four assignments of error, which will now be considered seriatim, in the order in which they are propounded:

I. The refusal of the court to grant the defendant's (plaintiffs in error) first instruction.

II. The refusal of the court to grant the defendant's (plaintiffs in error) second instruction.

III. The granting of the 1st instruction of the plaintiff, (defendant in error).

IV. The granting of the second instruction of the plaintiff, (defendant in error).

V. The admission of the depositions read in evidence by the plaintiff, (defendant in error).

The first instruction asked for by the plaintiff in error, was in these words: "That the said sentence and decree of condemnation, and the said sale and conveyance of the marshal, divested the plaintiff of his right, title and interest in and to the premises in the declaration mentioned, for and during the natural life of the said plaintiff; and that as to said estate, for and during the natural life of the plaintiff in said premises, the jury must find for the defendants." This instruction the court refused to give; and the question is, whether this refusal was error. This instruction directly propounded the question to the court, as to how far a party can be held bound by a sentence of condemnation in proceedings in which he was not permitted to appear *and in which he had no opportunity to be heard. The

418 court was asked to give this instruction, in the face of the record introduced by Underwood himself, as a muniment of his title, showing that he, as Judge of the District court of the United States, had ordered "the appearance, answer and claim" of McVeigh to be stricken from the files of his court; and then, after refusing him a hearing, on the same day enters an order of condemnation and sale; and, at the sale, becomes the purchaser, (through his wife, upon whom he settles the property,) at a grossly inadequate price. It is upon this record, offered by himself as a muniment of title, showing these pregnant facts, that he asks the court to charge the jury, that by the decree of condemnation and sale which he had entered, without a hearing, and refusing an appearance, McVeigh had been "divested of all his right, title and interest in the premises, during his natural life; and that they must, therefore, find for the defendants." The court did not err in refusing the instruction. It would, on the contrary, have been gross error to have

given it. The sentence of condemnation and sale was a nullity—void in toto. It was rendered absolutely void by the act of the court in refusing to permit McVeigh to appear and be heard. The authorities on this point are overwhelming, and the decisions of all the tribunals of every country where an enlightened jurisprudence prevails, are all one way. It lies at the very foundation of justice, that every person who is to be affected by an adjudication should have the opportunity of being heard in defence, both in repelling the allegations of fact, and upon the matter of law; and no sentence of any court is entitled to the least respect in any other court, or elsewhere, when it has been pronounced *ex parte* and without opportunity of defence. An

419 examination of both sides of the question, and deliberation *between the claims and allegations of the contending parties, have been deemed essentially necessary to the proper administration of justice by all nations, and in every stage of social existence. A tribunal which decides without hearing the defendant, or giving him an opportunity to be heard, cannot claim for its decrees the weight of a judicial sentence. See Smith's Leading Cases, Vol. 1, part 2, ed. 1872, p. 1118-19-20, and the numerous cases there cited; and to these might be added, cases almost without number. The principles which form the very foundation of the Common Law have been announced by the ablest and most distinguished jurists as maxims of natural justice and universal application; by Lord Brougham, when he said, in *Earl of Bandon v. Becker*, 3 Clarke, & Fin. R. 479, 510, "You may at all times, in a court of competent jurisdiction, competent as to the subject matter of the suit itself—where you appear as an actor—object to a decree made in another court, upon which decree your adversary relies; and you may, either as actor or defender, object to the validity of that decree; provided it was pronounced through fraud, contrivance or covin of any description, or not in a real suit; or if in a real and substantial suit, between parties who were really not in contest with each other:" by Parke B., in *Chapel v. Child*, 2 Cr. & Jer. R. 558, when he declared that, "no judicial proceeding could deprive a man of any part of his property without giving him an opportunity of being heard:" by Judge Bronson, in *Bloom v. Burdick*, 1 Hill, N. Y. R. 130-140, when he said, "It is a cardinal principle in the administration of justice, that no man can be condemned or divested of his right until he has had the opportunity of being heard; and if judgment is rendered against him before that is done the proceeding will be as utterly void as though the court had 420 undertaken to act *where the subject matter was not within its cognizance:" by Mr. Justice Story, when he declared in his admirable work, "Conflict of Laws," that the common justice of all nations requires that no condemnation should be pronounced before the party had

an opportunity to be heard:" by Chief Justice Marshall, when, in *The Mary*, 9 Cranch U. S. R. 126, 144, he announced the same principle, as "a maxim of natural justice and universal application:" and by Mr. Justice Swayne, when he said, in the very case we are now considering, that to deny the respondent a hearing, would be "a blot upon our jurisprudence and civilization, and would be contrary to the first principles of the social compact and of the right administration of justice."

And yet this plaintiff in error, holding a high judicial station under the Government of the United States, in violation of these great principles, known every where as maxims of natural justice, not only denied the respondent a hearing in his court, but, on the very day on which he committed that judicial act, which the Supreme court of the United States characterized in the strong language of Mr. Justice Swayne, as "a blot upon our jurisprudence and civilization," he entered the order of condemnation and sale upon twenty days' notice, and himself became the purchaser at a price so grossly inadequate as to shock the moral sense of every honest man. And now, when the owner, who has been thus deprived of his estate under the forms of law, by a judicial fraud, comes into a court of justice to assert his rights, in an action of ejectment against the man, who, acting as judge, denied him a hearing in his court, and entered a decree of condemnation and sale of his property, he is met by that very decree of condemnation and sale, entered by his adversary, in violation of every principle of law and natural justice; and

421 the court is gravely asked to instruct the jury, that the decree of condemnation and sale, thus obtained, "has divested the plaintiff in ejectment of his legal title to the property in controversy, and that they must find for the defendant."

In other words, the court was asked to instruct the jury, that although the very record upon which the defendant, Underwood, relied as a muniment of his title conclusively showed, as it did show, that McVeigh had been denied a hearing in his court, by ordering that his "appearance, answer and claim be stricken from the files," of his court; which judicial act was declared by the Supreme court of the United States, "to be contrary to the first principle of the social compact and the right administration of justice," yet that the title of McVeigh was divested by this judicial fraud, and that he could not assert his rights in an action of ejectment.

The court properly refused this instruction. The decree of condemnation and sale entered under such circumstances, was not valid for any purpose. It was the merest nullity. In the language of Judge Bronson, in *Bloom v. Burdick*, above cited, "the proceedings were as utterly void as though the court had undertaken to act when the subject matter was not within its cognizance." The general principle is not at all affected by the allegation in the order

denying a hearing, that McVeigh was "a rebel living in the rebel lines."

The Supreme court of the United States, by its unanimous opinion (11 Wall. 267, above cited) has put that question forever at rest, when it says: "It is alleged that he (McVeigh) was in the position of an alien enemy, and hence could have no locus standi in that forum. If assailed there he could defend there. The liability and the right are inseparable. A different result would be a blot on our civilization and jurisprudence. We cannot hesitate or doubt on the subject. It would be contrary

422 *to the first principles of the social compact and of the right administration of justice."

We are, therefore, of opinion, that the said Corporation court of Alexandria did not err in refusing the said first instruction asked for by the plaintiff in error.

We are now to consider the second assignment of error, which is, that the court refused to give the second instruction asked for by the plaintiff in error; which instruction is in these words: "That the said judgment and order in the said attachment suit, and the said sale and conveyance of the premises in the declaration mentioned, made by the sheriff, divested the plaintiff of the legal title to said premises; and that the jury must, therefore, find the issue joined for the defendants."

The court refused to give this instruction, but gave the following: "That the judgments and orders in the said attachment suits, and the sale and conveyance of the premises in the declaration mentioned, made under authority thereof, by the sheriff, divested the plaintiff of his legal title to said premises; and that the jury must, therefore, find for the defendants; unless they find that the said sale was fraudulently made, and the confirmation thereof was procured by fraud; and that the defendants or either of them were privy to such frauds, or had notice of the same, or of such circumstances as would put a prudent bona fide purchaser upon the enquiry in respect thereto."

"If the jury believe from the evidence, that the defendants, or either of them, combined with John B. Alley and others to purchase the property claimed in this suit, at the attachment sale, at a sacrifice; and if they shall further believe, that the said defendants, or either of them, in pursuance of such combination, so acted as to prevent competition at said sale, or to prevent the said property from realizing a fair

423 value, then such combination *and action was fraudulent; and the jury must find for the plaintiff."

The granting of these two last instructions, and the refusal to grant the second instruction of defendant, in lieu of which these last were given, constitute the second, third and fourth assignments of error, which will be considered together, as they raise the same legal questions, involving the consideration of principles common to all.

It is undeniably true, as contended by the able counsel for the plaintiff in error; as a general proposition, that a sheriff's deed conveying property which has been duly levied upon and fairly sold under a valid judgment rendered by a court of competent jurisdiction, passed the legal title to the purchaser. But it is equally true, that if the sale made by the sheriff was fraudulently made, and the order of confirmation of said sale was procured by fraud, and the purchaser was a party to that fraud, the deed of the sheriff shall avail nothing for or against the parties affected by it.

These two propositions are undeniably true; they are independent of each other, and stand well together.

The proposition that a sheriff's deed for property sold under a valid judgment of a court of competent jurisdiction, passes the legal title, is, as a matter of course, subject to the qualification that all the proceedings are regular and bona fide, and free from the taint of fraud. If fraud be shown, either in the proceedings or sale, or in the judgment confirming the sale, the whole proceedings are vitiated. The proceedings of a court of justice establishing rights, or fixing liabilities, must always be founded upon the fact that they are carried out bona fide, and without the taint of fraud. If fraud be shown the very fountain is poisoned, and all the proceedings are null and void. Courts of law and courts of

424 equity have "concurrent jurisdiction to suppress and relieve against fraud.

If a case of fraud be established, the courts will set aside all transactions founded upon it, by whatever machinery they have been effected, and notwithstanding any contrivance by which it may have been attempted to protect them. It is immaterial whether such machinery and contrivance consisted in a decree in equity and a purchase under it, or of a judgment at law, or of other transactions between the actors in the fraud. Kerr on Fraud & Mistake, 44; 1 John's Ch. 401; 5 How. R. (Miss.) 365; 1 New Hamp. R. 535; 1 P. Wms. R. 736; 12 Ves. R. 324; 7 Com. Bench N. S. 321; 32 Law Jour. Exch. 241.

A judgment or decree obtained by fraud upon a court does not bind such court or any other; and its nullity on this ground, though it has not been reversed or set aside, may be alleged in a collateral proceeding. Kerr on Fraud & Mistake, 293; 11 How. 437; 5 Calif. R. 406; 63 Penn. R. 408; 62 Penn. R. 481; and other cases cited by Mr. Kerr. In *Rex v. Duchess of Kingston*, 20 How. St. T. 355, 544, (2 Smith's L. C. 687,) De Grey, C. J., said: "Fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts, ecclesiastical and temporal. In applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior court, or by the highest court of judicature; but in all cases alike it is competent for every court, whether superior or inferior, to treat as a nullity any judgment

which can be clearly shown to have been obtained by manifest fraud. Kerr on Fraud & Mistake, 294.

In the language of Lord Brougham, in *Earl of Bandon v. Becher*, before referred to (supra): "It is not an irregularity, it is not an error, which is here complained of, but it is that the whole proceeding (after the judgment) is collusive and fraudulent; that it cannot therefore be treated as a judicial proceeding, but may be passed by as availing nothing to the party who sets it up."

"We are, therefore, of opinion that there was no error in the court below in refusing the instruction in the form in which it was presented, and in saying to the jury that the defendant in error, McVeigh, was divested of the legal title in the premises by the sale and deed of the sheriff; unless they should find 'that the said sale was fraudulently made, and the confirmation thereof was procured by fraud, and that the defendants, or either of them, were privy to such fraud,' &c.

The case of *Lessee of Cooper v. Galbraith*, 3 Wash. C. C. R. 546, is one exactly in point on this question. It was an action of ejectment, (as is the case before us,) and on the merits of the case it was contended that the lessee of the plaintiff was the presiding judge of the court in which the judgment was rendered; and it appeared in evidence that he purchased an interest in that judgment, and was concerned with the nominal purchase of the land in controversy, under the execution; that this conduct amounted to a breach of official duty; and, in short, that the whole transaction was tainted by such marks of fraud, imposition, and misconduct as ought to invalidate the purchase.

The whole question of judicial misconduct and fraud, in acquiring title to the property, on which the action was founded, was submitted by Mr. Justice Washington to the jury.

So, also, in the case of *Martin v. Raulett*, 5 Rich. Law R. 541, which was an action of trespass to try the title to real estate, in which one party claimed under a sheriff's

426 deed; the jury was instructed, among other things, "that all sales at auction should be open to full and free competition," and that "the purchaser must do no act the effect of which was to destroy fair competition." Judge Withers, delivering the opinion of the court, said: "The jury, applying the standard presented to them, have affirmed that Gary's conduct did contravene such rule of law and vitiate the sale by the sheriff to himself. In this they have differed from the presiding judge. * * * Without undertaking to form any opinion ourselves, in the present case, we must allow that when such a question does arise in a cause, there is no other arbitrament to which it can be submitted but that of the jury." So we say in the case before us, that the question whether "the sale was fraudulently made, and the confirmation thereof was procured by fraud," was prop-

erly submitted by the court to the arbitration of the jury, who in an action at law are the sole judges of the facts which constitute fraud. They have decided that question in the affirmative, and we cannot trench so far upon the province of the legal triers of fact as to reverse their decision, especially in a case where no motion is made for a new trial upon the ground that the verdict is contrary to the evidence.

The principles herein announced are not at all in contravention of the decisions of this court in *Taylor v. King* and *Harris v. Harris*, 6 Munf. 358, 367, so much relied on by the learned counsel for the plaintiff in error. Those cases simply affirm, "that a party or privy to a deed cannot avoid it, in a court of law, by parol evidence, on the ground of want of consideration, for he is estopped from averring such matter against a specialty." *Taylor v. King* was a case in which both parties claimed under the same grantor, Charles Lewis, who conveyed the property in controversy to Edmundson, trustee, to secure certain creditors who assigned their debt to Taylor. After the

427 *execution of the trust deed to Edmundson, and of course subject to that deed, Lewis sold the land to King, and put him in possession. There was a sale under the trust deed, and Taylor became the purchaser, and the deed was made from the trustee to Taylor. This of course invested Taylor with the legal title. In an action of ejectment brought by Taylor v. King, who was in possession, this court held that King who purchased the land of Lewis after he had conveyed to Edmundson, trustee, held it subject to the deed to Edmundson; and that claiming under the same grantor, he, King, was estopped from showing in a court of law, by parol, anything to impeach the deed of the grantor under whom he, as well as Taylor, claimed title.

Now it is insisted that in the case before us, the legal title to the land in controversy, which was in McVeigh, passed by the sheriff's deed, under the sale in the attachment proceedings, just as the legal title in the case of *Taylor v. King* was passed by the deed of the trustee, and that McVeigh cannot, in a court of law, impeach that deed. It is true, as before observed, that a sheriff's deed for property sold under a valid judgment, passes the legal title; but this proposition must always be subject to the qualification, that the proceedings are free from the taint of fraud. If the sale be fraudulent, or the judgment be obtained by fraud, then the deed of the sheriff conveys nothing, and is a mere nullity.

The distinction is plain between this case and that of a deed of trust. In the one case the grantor voluntarily parts with the legal title, when he conveys to a trustee. It is gone from him forever, and no party or privy to that deed can assail it; but is estopped in law from impeaching the legal title thus vested in the trustee. But when the legal title is transferred by judicial proceedings, those proceedings must be

428 regular, and free *from fraud. If fraudulent they have no operation, and a deed under them, fraudulently made, or for property made at a fraudulent sale, conveys nothing, and will be treated in every court where this can be shown, as a nullity.

This is the plain result of all the authorities referred to.

We are therefore of opinion that there was no error in the instruction of the court below, which charged the jury that the sheriff's deed under the attachment proceedings "divested McVeigh of the legal title, and that they must therefore find for the defendant; unless they should find that the said sale was fraudulently made, and the confirmation thereof was procured by fraud, &c."

Nor did the court err in instructing the jury that "if the defendants combined with others to purchase the property at a sacrifice, and in pursuance of such combination so acted as to prevent competition at said sale, and to prevent the said property from realizing its fair value, then such combination was fraudulent; and the jury must find for the plaintiff."

Whatever conflict of authority there may be as to how far a bona fide purchaser at a judicial sale will be protected against error in the proceedings, it is well settled, that when the purchaser combines with others to prevent competition, and thus gets the property at a sacrifice, he is not a bona fide purchaser, and he cannot hold the property obtained by his own fraud. *Kerr on Fraud* 224, and cases there cited. In *Cocks v. Izard*, 7 Wall. U. S. R. 559, it is said: "The law does not tolerate any influence likely to prevent competition at judicial sales, and it accords to every debtor the chance for a fair sale and full price."

429 *In *Slater v. Maxwell*, 6 Wall. U. S. R. 268, the Supreme court of the United States says: "It is essential to the validity of judicial sales, not merely that they should be conducted in conformity to the requirement of law, but that they should be conducted with entire fairness. Perfect freedom from all influence likely to prevent competition in the sale should be strictly exacted."

It has been held in numerous cases, that a purchaser who used unfair means to prevent competition, cannot hold the property. *Newman v. Meek*, 1 Freeman's Ch. R. 441; *Johnston v. La Motte*, 6 Rich. Eq. R. 347; *Plaster v. Burger*, 5 Ind. R. 232. See also *Martin v. Raulett*, 5 Rich. Law R. 541, and *Dutcher v. Leake*, 44 Illinois R. 398. In the last named case it was held, "that when a purchaser at a judicial sale combines and confederates with the officer and others to conduct the sale as secretly as possible to prevent competition, and represents to the party interested in such sale, that it had been postponed, with intention to deceive such party, to the end that he shall not be present to compete for the purchase of such property at such sale, such party is not a bona fide purchaser, and will

not be protected against errors in the proceedings.

And although mere inadequacy of consideration standing by itself, is not a sufficient reason for setting aside a judicial sale; yet if it exists in connection with other circumstances tending to impeach the fairness of the transaction and the good faith of the purchaser, it is entitled to great weight in determining the bona fide character of the purchaser, and to his protection as such."

We are now to consider the last assignment of error, to wit: that the court erred in admitting the depositions offered by the defendant in error, McVeigh, the plaintiff in the court below. The bill of exceptions

430 reserving this point states that "the plaintiff further to maintain *the issue, and in order to prove that said attachment and confiscation sales and the confirmation thereof were procured by fraud, and that the defendant Underwood was a party to and had notice of said fraud, offered to read respectively the depositions of John C. Balderston, Francis Dane and John P. Robinson; to the reading of each of which the defendants objected, but which the court, overruling the defendants' objections, allowed to be read; it having been stipulated between the parties, that no objection should be made to the reading of same on matters of form or notice; all matters of substance, however, being open to objection, the same as if made at the time of taking said depositions and as if they had been taken in this case."

These depositions had been taken in a proceeding against Oakes Ames, John P. Alley, and Samuel Hooper, who had purchased McVeigh's property at the attachment sale, (Alley having transferred his purchase of the house and lot to Mrs. Underwood,) upon a rule awarded in the attachment suit of Francis Dane & Co., and other plaintiffs, v. C. A. Baldwin & Co., defendants, of whom McVeigh was one. After the action of ejectment was brought, in order, no doubt, to save the trouble and expense of retaking the same depositions, it was agreed to waive all objections as to matters of form and notice, and in effect regard the depositions as having been taken in the action of ejectment, upon due notice, but reserving the right to object to the reading of the depositions upon all matters of substance. And, accordingly, the only objection urged here against the reading of the depositions, is, that the evidence is irrelevant and immaterial, it being insisted that the legal effect of the sentence of condemnation, and the sale and conveyance by

431 the sheriff, in the attachment suit, was to divest McVeigh of the legal *title; and even though the sentence of condemnation was a fraud upon McVeigh in denying him a hearing, and the sale was fraudulent, the legal title was transferred to the purchaser, and McVeigh could not maintain his action in ejectment.

The motion to exclude the depositions, therefore, raises, and was intended to raise, precisely the same legal questions which

have been already disposed of in noticing the 2d, 3d and 4th assignments of error. It is not necessary, therefore, to repeat the views and citations of authorities already referred to, which show that when McVeigh was met in his action of ejectment by the production of the records in the confiscation and attachment suits, and the defendants relied upon the deeds of the marshal and the sheriff, it was competent for McVeigh to show by evidence, as well as by the face of the proceedings, that they were fraudulent and void, and that deeds made under them conferred no title.

For this purpose, the evidence which the plaintiff in error in his petition insists was immaterial and irrelevant, was most material and very relevant. It certainly strongly tended to show, and did, in the opinion of the jury, as their verdict proves, conclusively show, that there was formed between the plaintiff in error, John B. Alley, Oakes Ames and others, (the last two named being members of Congress from the State of Massachusetts,) a corrupt and fraudulent combination to prevent competition, and to secure to themselves the whole real estate of McVeigh at the lowest possible price, and one grossly inadequate to its real value. We extract from these depositions, (which are quite voluminous and gives with much detail, a complete history of these transactions,) only enough to show the relevancy and materiality of the evidence offered. John C. Balderston, of Baltimore, testified

432 as follows: "As a member of the *firm of Balderston, Ward & Co., and as agent for Francis Dane & Co., Kimball, Robinson & Co., the last two being Boston firms, also, as agent for the Asiatic Bank of Salem, Mass., I had certain notes and claims against C. A. Baldwin & Co., of Alexandria, of which firm Mr. McVeigh was a partner. I went with these claims to Alexandria—learned that Mr. McVeigh was in Richmond, or somewhere in Virginia beyond our lines. This was at sometime in the spring or summer of 1863. I placed the matter in the hands of Mr. Beach, an attorney at law, who afterwards instituted suit upon them against Baldwin & Co. He advised us, subsequently, that he had obtained judgments thereupon, and that attachments had been issued against the property of McVeigh, or a portion of it. Nothing further was done about them, until I learned that the property had been seized by the United States marshal, under the confiscation act, and was advertised to be sold thereunder. Upon hearing that fact, I started for Washington, and endeavored to obtain a postponement of the sale. I called upon Mr. Alley in relation to it, in the months of January and February, A. D. 1872. Mr. Alley promised any assistance he could give in furthering our object."

"I then went to Alexandria, saw Mr. Beach, who advised that the confiscation act could not apply in the case; that the decree of confiscation made by Judge Underwood, was against the fee simple of the estate, and could not be sustained. After

the lapse of a few months, having learned that I could not obtain a postponement of the sale, I communicated with the parties interested, upon which Mr. Dane and Mr. Robinson came to Washington, arriving there on the morning of April 9th, 1864. The next day we had an interview with Judge Underwood, in company with Mr. Beach. The Judge refused to postpone the sale, but intimated that we might

433 *make an arrangement about our claims. He said he wanted to buy a dwelling house for his wife, and if he became the purchaser at the sale, he for one would be willing to pay fifty per cent. of his proportion of our judgments. He informed us that Mr. L. E. Chittenden, who was interested in a steamship company, would be likely to purchase the wharf property, but would not bid on the dwelling houses; and advised us to see Mr. Chittenden."

"In the afternoon of the same day, after the above named interview, we met Mr. Alley on Pennsylvania Avenue. Mr. Robinson informed him (Mr. Alley) that the sale was to take place the next day. Mr. Alley advised us to buy the property if it was not sold too high, with a view to secure our claims under the judgments and attachments. That evening Robinson and myself went to Mr. Chittenden's house—informed him that Judge Underwood had intimated that he (Mr. Chittenden) might perhaps buy the wharf property. Mr. Chittenden said he might buy it, provided that he could get it at a price which he would consider equivalent to a fair rent for a few years; that he had no confidence in the title to be derived under the confiscation sale. That it would be well for us to see Mr. Thomas Clyde, who would arrive in Washington in the morning, and was largely interested in the steamship corporation."

"It was suggested to Mr. Chittenden that there would be no time in the morning to see and talk with Mr. Clyde, as the sale was advertised to take place at 10 o'clock; upon which he said he would write Judge Underwood, asking him to postpone the sale until he could get there. He accordingly sat down and wrote a note, and gave it to Mr. Robinson, addressed to Judge Underwood."

434 **Next morning all the parties met at Alexandria courthouse, Mr. Alley and Mr. Oakes Ames being on board the boat on which I met with Mr. Clyde. Mr. Chittenden arrived there after us. Messrs. Dane and Robinson and myself had an interview with Mr. Chittenden and Mr. Clyde in the courthouse, the sale having been postponed. At this interview Mr. Clyde refused to purchase under the sale, or to buy our judgments, or, as he expressed it, to have any thing to do with it. The sale took place at 12 o'clock, (noon.) The property was in seventeen different lots. The attachments in our favor were issued only against seven or eight of them, and as these were separately offered for sale I

gave notice to the bystanders of the attachments against them held by us."

"The sale occurred on Monday the 11th day of April, 1864. The deputy marshal who conducted the sale denied the validity of our claims against the property as against proceedings under the confiscation act. A portion of the property covered by our attachments was purchased by a Mr. Eldridge. After the sale we all returned to Washington. I did not see Mr. Ames or Mr. Alley at the sale. I learned at Washington that Mr. Eldridge had purchased the property for Mr. Ames, and I was afterwards told by Mr. Alley that he was interested in the purchase with Mr. Ames. This was on the evening of the day of sale, in the lobby of the House of Representatives. The next morning, Robinson, Dane and myself had an interview with Mr. Ames and Mr. Alley at the Washington House, in Washington. Mr. Alley proposed we should go in jointly with them in the purchase, we putting in our judgment claims in the joint concern; that he, Mr. Alley, could rent the property to the government, and thereby we should be able to realize our interest."

435 **We acceded to this proposition at the suggestion of Mr. Alley and Mr. Ames, they becoming security in accordance with the laws of Virginia. The property was advertised to be sold by the sheriff under our judgments. We all then returned home."

"Early in May I went again to Washington. I was there joined by Dane, Robinson and L. B. Harrington, then President of the Asiatic Bank. We then sold our judgments to Mr. Alley for the full amounts, less seven hundred dollars—that being the estimated proportion of a prior attachment resting upon the property. On the morning of May 10th 1864, the day on which this sale under our attachments was advertised to take place, in Mr. Beach's office in Alexandria, we executed the assignments of our judgments to John B. Alley, Oakes Ames, Samuel Hooper and William A. Duncan. The sale was advertised (according to the best of my knowledge and belief) to take place at 12 o'clock, but did not in fact take place until about 2 o'clock, P. M., though I had heard of no announcement made of a postponement."

"After the necessary papers were all prepared we went from the office of Mr. Beach to the market-house, where the sale was to take place, and was made. Prior to the sale Mr. Alley insisted that we should not bid against him. I only recollect the following named persons being present at the sale, viz: Mr. Robinson, Mr. Harrington and myself, Mr. Beach, (our att'y,) Mr. Alley, Mr. Duncan, Walter Penn, (auctioneer at the previous sale,) the sheriff, and two or three others, whom I did not know. The property was mostly bid in by Mr. Alley. I made some bids at his suggestion, and he would bid over me. I think Mr. Duncan made one or two bids. Mr. Alley managed the bidding."

436 "In the settlement of our sale to Mr. Alley and others we received Mr. Ames' note for four thousand dollars, at sixty days, Mr. Alley's draft on his house in Boston for the balance of the sum due, less Mr. Duncan's payment to him of fifteen hundred and fifteen dollars, which he, Mr. Alley, paid over to us. I overheard Mr. Alley and Mr. Duncan agree to proportionately share the risk of a note to be given by Judge Underwood for his proportion of the purchase. In conversation with Mr. Alley, at which he insisted, as I have before expressed, that we should not bid against him, his language was, 'we having purchased your judgments, you are not (or will not) bid against us.' This is as nearly as I can recollect it."

In answer to the eighth question by the counsel for C. A. Baldwin & Co., "At the attachment sales who bid in the said dwelling house last mentioned, and at what price?" he said 'John B. Alley, at about thirteen hundred dollars; but I have since seen a certified copy of a deed from the sheriff of Alexandria county to Maria G. Underwood.'"

In answer to the sixteenth question by same, "You have stated, in answer to the 3d question above, that the said attachment sales were advertised to take place at 12 o'clock M., but in fact did not take place until 2 o'clock, P. M., on the day of sale, and that you heard no announcement made of a postponement; why was the postponement made?" He said, "It was made to enable Mr. Beach to prepare the papers by which we assigned our judgment claims to John B. Alley, Oakes Ames, Duncan, &c.; and after the papers were prepared we went to the market-house, and the sales were made."

In answer to the seventeenth question by same:

"Was any bell rung, or any public announcement made that the sale was
437 then to take place, so as to give *persons who might wish to make bona fide bids an opportunity to purchase the property?" He said, "There was no bell rung to attract a crowd. The auctioneer merely stated to those who accompanied him from Mr. Beach's office, that the sale would then take place. No effort was made to gather a crowd of bidders."

In answer to the eighteenth question by same:

"Was there or not in fact any thing more than a mere form of sale?" He answered. "There was hardly even a form of sale."

In answer to the twentieth question by the same, "Were or not the persons interested in the attachment sales the same persons interested in the confiscation sales?" He replied, "They were all the same ring."

In answer to the question, "What price did said house (meaning the house in controversy) bring at said attachment sale, and what was its real value?" He said, "It sold for seven hundred dollars, and I should think it was worth from ten to twelve thousand dollars."

Francis Dane, of Boston, testified as follows: "Our firm had a claim in 1861 for some forty-five hundred dollars against the firm of C. A. Baldwin & Co. of Alexandria, in Virginia, of which firm Mr. McVeigh was a partner. In 1862 we sent the claim to Mr. Balderston, at Baltimore, who had a claim against Baldwin & Co., with a request that if he concluded to institute suit against them on his own claim, to also cause the same to be done with ours. Our claim was accordingly put in suit, and judgment was obtained in our favor in January 1864, at the court in Alexandria. In the spring of 1864 we were informed by Mr. Beach, our attorney, that Judge Underwood had confiscated, by a decree in his court, and had caused to be advertised for sale under the confiscation act, the property which we had attached, and also other
property in Alexandria belonging to

438 Mr. *McVeigh. The sale was to take place at public auction, on the 11th of April 1864. Mr. Robinson, of the firm of Kimball, Robinson & Co., of Boston, proceeded to Washington with me, and we arrived there on the 9th, where we met Mr. Balderston, who was waiting for us. We proceeded to Alexandria, (Mr. Robinson, Balderston and I,) and had an interview with Mr. Beach, our attorney. He wished us to go with him to Judge Underwood, to try and get the sale of the property postponed, on which our attachment lay. The judge being absent at Washington, Mr. Beach asked us to come down the next morning and meet him together, advising us if we could not get the sale postponed, not to buy in the property, unless we could get it for a sum equivalent to the rents of same while the war should last; that is to say, for a nominal sum, as he called it; that he could not have any question that the decision of the court upon the confiscation act could not be sustained. He had the interview with the judge, all of us together, on the following day—urged the Judge to make the postponement, which he declined to do. The judge told us this was the first case in which property had been confiscated in fee simple, and that Mr. Whiting, solicitor of the War Department, had complimented him on that decision."

He further testified: "We, next day being the 10th of May, on which the property was advertised to be sold at 12 o'clock, proceeded to Alexandria; there met Mr. Alley and Mr. Ames, and transferred the judgments, with all the right, title and interest on the claim on which the judgments were founded, to John B. Alley, Oakes Ames, Samuel Hooper and William A. Duncan. Mr. Duncan informed me that a previous arrangement had been made between Mr. Alley and the parties who purchased at the confiscation sale, to pay their proportional share of the judgments in our favor,
439 and by that *means they would have a double title; so that if one should fail, they would be able to hold on to the other. In Mr. Ames' words he wanted these judgments to plaster over the property. We

attended the sale, which took place two hours later than the time advertised; there were some ten or twelve persons present, including Mr. Alley, Mr. Beach, Mr. Robinson, Mr. Balderston, the sheriff, his clerk, and myself. The property was sold, and bid off by Mr. Alley in different parcels, each house being sold separately. There were some bids made at his request, but as far as I heard the last bid on each piece of property was made by Mr. Alley, after he had requested others to bid. Previously to attending the sale, Mr. Alley insisted upon our not bidding on the property, as he had bought our claims. A copy of the assignment or transfer of the judgments above referred to is hereto annexed, marked A."

In answer to the sixth question by the counsel for C. A. Baldwin & Co., "Why then did you sell your judgments to Alley, Ames and others after the confiscation sales?" He said "because we were assured by Judge Underwood and by Alley and Ames, then members of Congress from Massachusetts, the confiscation sales were valid and binding, and that our attachments were of no value; that the confiscation would be sustained by the court; and we thought, under the circumstances, that it was necessary for us to save ourselves by accepting their offer to buy our judgments, which was a small amount in comparison to the value of the property. The parties above mentioned, said that if they failed on the confiscation title they would fall back on the attachment title, and they were willing to pay us something for our judgment and liens; and they paid us in full, except \$700.

440 *Mr. John P. Robinson of Boston testified as follows: "In 1861, and for sometime before and after, I was a member of the firm of Kimball, Robinson & Co., and in 1861 we had certain claims against C. A. Baldwin & Co., of Alexandria, of which Mr. McVeigh was a partner. These claims being unpaid at maturity, we placed them in the hands of S. Ferguson Beach, an attorney at law of Alexandria, for collection. Mr. John C. Balderston, of the firm of Balderston, Ward & Co., of Baltimore, having claims of their own against Baldwin & Co. acted for us in placing them in Mr. Beach's hands. Mr. Beach commenced a suit against Baldwin & Co., attaching certain real estate belonging to Mr. McVeigh, upon which suit he obtained a judgment at the January term in 1864, for over \$3,000. As we could not sell that property without first giving bonds of some party who held real estate in the State of Virginia, we did not take any measures to sell or effect a sale, or give any special attention to it, until we were informed that the United States government had seized the property under the confiscation act, and had advertised it for sale. We then took measures, by correspondence and otherwise, to obtain a postponement of the sale by the government, believing that as we were loyal creditors we should be entitled to the avails of the property on our judgment rather than the govern-

ment. Our claims were contracted before the war. Being unable to effect a postponement, and learning that the property would be sold under the confiscation act on the 11th day of April, 1864, I went to Washington in company with Mr. Francis Dane, of Boston, arriving there on the 9th of April, and met Mr. Balderston in Washington. We, Dane, Balderston and myself proceeded to Alexandria, had an interview with Judge Underwood, of the U. S. District court, by

whose decree the property was confiscated. 441 *We urged him to postpone the sale; which he declined to do. He said, however, if the property should be sold under the decree of confiscation, he would like to buy, or have his wife to buy, he having no money of his own to purchase with, as he said, one of the houses which our attachment covered, for his own use. He said he thought the parties buying under the confiscation act would pay us something for our judgments, to obtain a more perfect title, and make it sure if the confiscation act should be set aside. He knew the amount of our judgments, and said that in his own case, and also others who might purchase, he would advise to pay us fifty per cent. of the amount of our claims, adding, "perhaps we might get more than that out of the parties who might purchase, if the property did not sell very high." He further testified, "When we were in Alexandria we took measures to have the property advertised for sale under our judgments, which sale was advertised to take place on the 10th of May 1864. Before that time after we were informed that Mr. Alley and Mr. Ames declined to carry out the memorandum agreement referred to above. After receiving that information, Mr. Dane, Mr. L. B. Harrington, president of the Asiatic Bank, at Salem, and myself, went to Washington to be present at the sale. We arrived there a few days before the 10th of May, 1864, and found that Mr. Ames and Mr. Alley abandoned the agreement, stating that the memorandum they had given us would not stand in law; and although Mr. Alley wrote it, Mr. Ames said Mr. Alley found fault with him for having signed it. The day before the sale was to take place Mr. Dane, Harrington, Balderston and myself made a bargain with Mr. Alley, by which Mr. Alley was to purchase for himself and others all our judgments at seven hundred dollars less than their whole 442 amount. We were told "that the parties who bought the property under the confiscation sale, were ratably interested in the judgments, with Mr. Alley. On the morning of the sale we went to Alexandria, and the papers were made, assigning our interest to John B. Alley, Oakes Ames, Samuel Hooper and W. A. Duncan, according to the agreement made the previous day with Mr. Alley; thereupon Mr. Alley and Mr. Ames executed the bonds which the law required to be given, and we received in notes, checks, and money the amount agreed upon with Mr. Alley. Some two hours or more were occupied in executing

the papers, beyond the time when the sale was to take place. Mr. Ames returned to Washington before the sale. I went down to the place of sale with Mr. Dane, Balderston, Harrington, Mr. Alley and Mr. Beach, and some half a dozen others.

The property was sold by the sheriff under the direction of Mr. Alley chiefly, and I think he was the principal purchaser. Mr. Alley told us as he was to purchase our judgments we must not bid against him. There was apparently no competition among those present for the purchase of the property. As we were going from Mr. Beach's office to the place of sale, Mr. Alley told me they might wish to have some piece of the property struck off to me. When one of the parcels was struck off, in reply to the inquiry of the auctioneer, 'Who was the purchaser,' Mr. Alley gave my name. I assented to it, but made no bid, and had nothing further to do with it."

We have made these extracts from the depositions to show that the evidence was relevant and material to the issue, and that the court below did not err in refusing to exclude them from the jury. No evidence whatever was offered to contradict or explain this testimony; and upon this unimpeached and unimpeachable testimony

the jury found their verdict. There was no motion to set aside the verdict as contrary to the evidence; and if there had been, this court, upon the record before us, would have been compelled to have sustained the verdict. The whole question of fraud was properly submitted to the jury. Their verdict is conclusive in the case, especially as no effort is made by the plaintiff in error, to contradict or explain the overwhelming and unimpeached evidence; and the court was not even asked to set aside the verdict of the jury as contrary to the evidence.

Upon the whole, we are of opinion that the judgment of the Corporation court of the City of Alexandria should be affirmed.

Judgment affirmed.

444 *Vaughan v. Jones & als.*

March Term, 1873, Richmond.

Absent, CHRISTIAN, J.†

Conversion and Reconversion—Sale of Infant's Lands

—Marriage of Infant.—The real estate of R, a female infant, is sold under decrees of court, and turned over to V her guardian, upon his giving bond and security for the faithful accounting therefor. In 1862 R married B, to whom V paid over the estate upon his giving security to indemnify V; and in 1864 R died still under the age of twenty-one years, leaving a child which survived her for but a few hours; and her husband who survived the child.

Held:

*For monographic note on Conversion and Reconversion, see end of case.

†He had been counsel in the cause.

See foot-note to Rucker v. Stint, 33 Gratt. 663.

1. Same—Same—Death of Infant—Proceeds Pass as Real Estate.—The proceeds of the real estate of R descended as real estate, to her child, subject to a life estate in her husband; and upon the death of the child it passed as real estate to the heirs of the child on the part of the mother.

This was a suit in equity in the Circuit court of the city of Petersburg, brought in 1868 by Robert H. Jones, jr., and Mary Eppes his wife, against Benjamin B. Vaughan, late guardian of Rosa J. Boisseau, and others, the object of which was to have secured a large sum of money derived from the sale of the real estate of the ward, which went into the hands of said Vaughan, and was paid over by him to Stephen W. Britton, who married the said Rosa J. Boisseau. The material facts of the case are as follows:

Benjamin Boisseau, jr., died in June 1852, leaving two infant children, Mary Eppes and Rosa J. Boisseau, and Benjamin B. Vaughan qualified as their guardian. By proceedings under the statute for the sale of the lands of infants, their real estate was sold, and was delivered to their guardian under decrees of the court, upon his executing bonds for the faithful accounting for the money so received, according to law. All these sales were made before the war.

Mary Eppes married Robert H. Jones, jr., and received from the guardian her estate, including the proceeds of the real estate. She is still alive and is over twenty-one years of age. Rosa J. Boisseau married Stephen W. Britton in 1862, and the guardian delivered to Britton her estate, including the proceeds of her real estate, and took from him a bond with security, good at the time, conditioned to indemnify and save harmless the said Vaughan from all loss that might in any way result from his paying over to the said Britton the funds in his hands as guardian of the said Britton's wife. Mrs. Britton died in 1864, under the age of twenty-one years, leaving an infant child, which survived her but a few hours.

It appears that at the time the suit was brought Vaughan's pecuniary circumstances had been considerably injured by the results of the war, that his sureties in the bonds given under the decrees of the court, upon the receipt of the proceeds of the land sold, had failed or had removed out of the country, that Britton was insolvent, and but one of his sureties was good.

The bill, after setting out the facts, asked that Vaughan might be required to give security to account for the fund according to law, on the death of Britton.

Vaughan, in his answer, stated that of the sum of \$15,500 received by him as the estate of his ward and paid over to Britton, her husband, there was of the proceeds of the sale of her real estate, after allowing him a credit of five per cent. commission, and also a credit of \$743.75 for so much paid for an interest in the Washington factory purchased for his ward, the sum of \$11,419.62. And he says, in conclu-

sion, that in his present condition, he cannot ask his friends to join him in a new bond conditioned to have the proceeds of the sale of the real estate of his ward Rosa J. Britton forthcoming at the death of Stephen W. Britton, to be distributed according to law.

The cause came on to be heard on the 25th of November 1868, when the court held that it was the right of the plaintiffs to require that the defendant Vaughan should give additional security for the forthcoming at the death of Britton, of the proceeds of the sales of the real estate of the infant Rosa J. Britton, deceased, in accordance with the provisions of ch. 128 of the Code of Va. 1860, or should pay into court the said fund. And it appearing to the court from the answer of the said B. B. Vaughan that he cannot give the security, (giving him the credits he claimed in his answer,) it was decreed that he pay to George S. Bernard, who was appointed a receiver for the purpose, the sum of \$11,419.62 on or before the next term of the court. And thereupon Vaughan applied to a judge of this court for an appeal; which was allowed.

Mann & Stringfellow, and Green, for the appellants.

Pegram and Bernard, for the appellees.

ANDERSON, J., delivered the opinion of the court.

Benjamin Boisseau, jr., died seized of real estate, which descended to his infant daughters Mary and Rosa, his only heirs at law. Mary married the appellee, Ro H. Jones, jr., and is living. Rosa intermarried with Stephen W. Britton, in the summer of 1862, after she attained the age of eighteen, and died in the summer or fall of 1864, under the age of twenty-one years, intestate, leaving an only child, who survived her but a short time.

447 *Before the marriage of Rosa and her sister their lands were sold, during their minority, by their guardian Benjamin B. Vaughan, the appellant, by proceedings in chancery under chapters 124 & 128 of the Code. After the marriage of Rosa her guardian paid over to her husband, on the 13th of December 1862, fifteen thousand five hundred dollars, of which \$11,419.62 cents were of the proceeds of her real estate, and took from him bond with security, conditioned to indemnify and save harmless the said guardian from all loss and damage that might in any way result from paying to said Britton the proceeds of his ward's real estate. And the questions now to be decided, are, first: Did the proceeds of the sale of Rosa's real estate pass at her death to her infant child, who survived her, to whom the real estate would have descended if it had not been sold? Or did they pass as personal estate to her husband, under the statute of distributions? And 2d: If they passed to her infant child, did they pass as real estate to him, and at his death to his kindred on the mother's side? Or

did they lose, after that first devolution, the impress of real estate, and at the death of the child pass to his father as next of kin? We will endeavor to pursue these inquiries briefly in their order.

It is an established principle of courts of equity, says Judge Lomax, not to suffer the real estate of infants to be changed into personal, nor personal into real estate. Upon this principle the Legislature of this State has directed, in the sale of infants' real estate under the authority of courts of chancery, that if the infant dies under twenty-one years, the proceeds of the sale shall be considered as real estate, and shall pass to such person as would have been entitled if it had not been sold. 1 Lomax Dig. top p. 239, marg. 202. This is substantially the purport of section 21 of

448 chap. 108 of the "R. C. of 1819. The sale of infants' real estate by the Superior court of chancery, being authorized by previous sections of the act, what was the design of this 21st section? It seems to have been to guard against any change being made in the legal incidents and qualities attached to real estate, by the sale which had been authorized by the previous sections, both as it respects the rights and interests of the infant and of those to whom the real estate would descend in the event of his death intestate, under twenty-one years of age. And, therefore, it is provided, that the proceeds of the sale shall be considered as real estate, and at the death of the infant intestate, under twenty-one years of age, shall pass as real estate to those who would have been entitled to the land if it had not been sold. And the sale is only authorized, as appears from a previous section, provided their rights should not be violated. And, without adopting the provision aforesaid in the twenty-first section, or the equitable principle of courts of chancery, a sale could not be made within that restriction. Those to whom the proceeds would pass under this section are designated by sections 11 and 12 of the statute of descents. 1 R. C. ch. 96.

It is evident that section 21 of chap. 108 was inserted to carry out the principle declared in a previous section, that the sale could only be made within the restriction that the rights of no person should be violated thereby, and also in accordance with the established principle of equity, not to suffer the real estate of an infant to be changed into personal, &c. Although no one can be the heir of a person living, yet the statute recognizes rights in all those who would be heirs of the infant, if he were dead, and expressly requires that they shall be made defendants to the suit for the sale of an infant's real estate. And if it were any advantage to the infant that

449 his *rights of property should be governed by the law of real estate, (and the advantage in many respects is undeniable,) a statute which was enacted to authorize a sale of his real estate, only for his benefit, could hardly be intended to deprive him of that advantage.

Taking a comprehensive view of all the provisions of the statute of the revival of 1819 upon this subject, it is evident that whilst the Legislature designed to authorize courts of chancery to sell infant's real estate, without which they had no authority to sell, it was at the same time its design that such sale should be made without affecting the infant's rights incident to an ownership of real estate, and without violating the rights of those who would be entitled to the estate, if the infant were dead. It was evidently the design of the Legislature, in framing this statute, that neither the rights of the infant, as incident to his real estate, and the well established principles of equity in relation thereto, nor the rights of those who would be entitled to the estate, upon the death of the infant under twenty-one years of age, should be altered by the sale of his real estate. Indeed, it would not have been proper, if competent to the Legislature, to have authorized a court to deprive the infant of a vested beneficial right incident to his ownership of real estate, he being incapable of assenting thereto, or which would have diverted, (the statute uses stronger language,) "violated" the rights of those who were entitled to the estate at the death of the infant under disability. Therefore, the Legislature, when it had provided in a proper case, for the sale of infant's real estate, if the rights of no person will be violated thereby, inserted this 21st section, whereby a sale could be ordered within that restriction, by declaring that "if the infant after such sale shall die intestate, under the age of twenty-one years," the proceeds "shall be considered as real estate, and shall pass
450 *accordingly (that is, as real estate) to such person or persons as would have been entitled to the estate sold, if it had not been sold."

It was contended by the learned counsel for the appellant that the language, "If the infant shall die intestate under the age of twenty-one years," implies that the proceeds were considered personal estate, and might be disposed of by the infant by will, after he attained eighteen years of age; because the "if" implies that it was an estate as to which he might have died testate. And as by the law an infant under the age of twenty-one years could not make a will of real estate, it is inferred that the Legislature regarded it as personal estate, of which an infant might make a will, after he attained eighteen years of age. Now, if this reasoning passed through the minds of the legislators; if it was clear that in framing and enacting this statute, this distinction between real and personal estate, as to the testamentary power of disposition, was adverted to and was borne in mind, and that the inference from the language they employed, now insisted on, might have been drawn from it—in a word, that the Legislature intended this inference; then this mode of interpretation might justify the conclusion. But it is well known that the legislative will is not always gram-

matically expressed; and there is nothing to show that the distinction of law referred to, or the reasoning from which the conclusion is drawn, were present to the legislative mind, suggesting such conclusion or inference. When such an inference as to the intention of the Legislature, from that mode of interpretation, is in conflict with its evident purpose, as clearly manifested by other provisions of the statute, it ought to be rejected.

Should such construction be adopted, the effect would be that an infant of eight-
451 teen years of age might, by her *will, pass that for which her real estate sold, to persons who would not have been entitled to the real estate, if it had not been sold; which is contrary to the intention of the Legislature, as shown by the 19th section of this chapter, by which the court is only authorized to decree a sale, if it is of opinion that the rights of no person will be violated thereby, and who is required to be made a party defendant by the 16th section; that is, "those who would be heirs to the estate if he (the infant) were dead." It is also in conflict with what has been regarded, both from the scope and tenor of the statute, and from analogous principles of equity, as the intention of the Legislature with respect to the infant, in authorizing the sale of his real estate, not thereby to alter his rights of inheritance, which would be done by giving him the power of testamentary disposition before he attained twenty-one years of age. For these and other reasons which might be assigned, we think the inference drawn from the wording and grammatical structure of the sentence, that the Legislature considered the proceeds of the sale as personal property, and subject to testamentary disposition by the infant, after she attained eighteen years of age, is unwarranted, being in conflict with the evident intent of the Legislature, and not necessary to an intelligent reading of the sentence. The words "under twenty-one years of age," are evidently used as qualifying what goes before. The Legislature intended that the rule should only apply where the infant died intestate, (and it is not repugnant to say if he die intestate, though by the law he could not make a will,) but as he might die intestate, after he attained full age, and it was not intended that in that case the rule should apply, the words "under twenty-one years of age" were added as a limitation on the word intestate; and if the word intestate was unnecessary, because it could not be
452 otherwise *than intestate under the law, the use of the term only expressed the conclusion of law. If it was unnecessary, it may be rejected as surplusage, which we may rather do than reject express and important provisions of the statute. We are of opinion, therefore, upon a fair construction of chapter 108 of the R. C. that the 21st section was designed to preclude any change in the rights of descent and succession by the sale of an infant's real estate, in case of his death during his

minority, by giving to the proceeds of sale the impress of real estate; and that it was no purpose of the statute to alter the infant's right of property, which he derived by gift, devise or descent from his ancestor, by investing a court of chancery with power to decree its sale, so as to enable him by an act testamentary, or otherwise, to defeat the rights of those who would be entitled to the estate by the statute of descents, at his death, under disability.

Such is our construction of the statute of 1819. Has the law been changed in this respect by the revival of 1849? The important provisions prohibiting the sale, which would deprive those who would be entitled to the land, in the event of the infant's death under age, and requiring that they should be made defendants to the suit for a sale, are retained in the revised statute, chap. 128 of the Code. There is a change of phraseology by section 12, so as to make it applicable to sales made of insane persons' estates, as well as infants; and to sales made under chapter 124 for partition. And whilst there is an extended application of the rule, when the death intestate occurs after twenty-one years of age, the party continuing incapable of making a will, as in the case of a married woman, there is no alteration of the rule itself. The omission of the words "shall be considered as real estate," we do not think was intended

453 to change the law, but were omitted by the revisors as surplusage, *agreeably to their plan and the instructions given them to abbreviate and condense; for the language retained conveys the same meaning. This construction is supported by the decision of this court in *Parramore v. Taylor*, 11 Gratt. 220. That this is a sound construction may be more fully shown while we pursue the second inquiry, which is, Did the proceeds of the sale in this case pass as real estate from the infant mother to her child, and at his death to his kindred on his mother's side? Or, did it lose the impress of real estate when it devolved to her child, and at his death pass to his father as his next of kin?

The precise question seems never to have been expressly decided in Virginia; and it has been decided in different ways in other States, according as the polity of those States, and their statutory provisions on this subject, or the views of the judges, may have differed. We must then look to our own statute for its solution, with such help in its construction as we may derive from previous decisions of this court, and from the judicial construction of the statutes of our sister States, by their own courts, and from such analogies and illustrations as may be found in the principles and practice of courts of equity.

We have already shown that it passed as real estate from the mother to her infant child, by the express terms of the 21st section of chapter 108 of the R. C.; and we have assumed that in the revision of 1849, although there is some change in the phraseology of the 21st section, there was

no intention to change the law. If so, the impress of real estate is given by the Code of 1849, and by the 12th section of chap. 128 it will pass accordingly; that is, as real estate. This section declares that "it shall pass to those who would have been entitled to the land if it had not been so sold,"

454 &c. If *personal estate it would pass by the statute of descents and distributions to the husband; if real, it would pass to her child, the heir. This 12th section provides that it shall pass to the person who would have been entitled to the land, if it had not been sold—to the heir. If it does not pass as real estate; if it is not real estate in the eye of the law, but is personal estate, to require it to pass to the heir and not to the husband, is to repeal that provision of the statute of descents and distributions which gives the wife's personal estate at her death to her husband.

Was it intended to repeal this provision of the statute of descents and distributions? Or was it only designed to give the proceeds the impress of real estate, and as such to pass as directed by the statute of descents and distributions? Upon the construction, that it has the impress of real estate, and passes accordingly, the 12th section is not in conflict with the general law, but in harmony with it. We do not think that the above section was intended to repeal the statute of descents and distributions in this particular; the force and operation of which it in fact recognizes, when it provides in effect, that the proceeds shall pass to those who would be entitled under it to the land, if it had not been so sold. And it follows, therefore, that the provision in the 12th section of the chapter in the Code is in effect and substance the same that was made in the 21st section of the chapter in the Revised Code.

But it is contended that the qualifying clause, "or so much thereof as may remain," implies that it was regarded as personal estate, because it imports liability to diminution, by being appropriated to the maintenance and education of the infant; which could not be done if it was real estate. The same clause is found in section

21 of the chapter in the revised Code; 455 and yet in that *section it is expressly declared, that the proceeds, or so much as remain," shall be considered as real estate. This would seem sufficient to repel such an inference. But it may be added, that the qualification was necessary and proper, as the proceeds might have been invested in slaves, some of whom might die, or other personal property of destructible character; or if loaned, was liable to diminution by loss of security, without fault of guardian.

We conclude, therefore, that the proceeds of *Rosa Boisseau's* real estate at her death, under the law, as it then stood in effect, and as it now stands, passed as real estate to her infant child. If it passed to the child as real estate, derived by descent from his mother, at his death, which occurred a few hours afterwards, it would seem to fol-

low as a sequence, that it would pass to his kindred on the mother's side, under the 9th section of the 123d chapter of the Code. If it did not retain the impress of real estate after her infant child became invested with it, as real estate, when did it lose the impress of real estate?

We have reached this point in the case, that the proceeds of Rosa Boisseau's lands, by her death, passed as real estate, to her infant child, who lived only a short time. The question still remains, did it retain its real character, during the short period of his life, and at his death pass as real estate to his aunt, Mary Eppes Jones, his mother's sister, subject to his father's life estate? Or did it, immediately after it vested in the child, by the death of his mother, lose its impress of real estate, and pass at the death of the child as personal estate to his father, to the exclusion of his mother's kindred?

If Rosa Boisseau's land had not been sold, it would unquestionably at her death
456 have passed to her infant *child, and upon his death, to Mary Eppes Jones, her sister, subject to the life estate of her husband. She was invested with the estate, impressed with this quality. She herself, by any act of hers, during her minority, could not divest it of that quality. If it was not intended by the statute, by authorizing the sale by courts of chancery, to change, in this respect, the character of her inheritance, and to change its course of descent, the proceeds at her death would pass, as the land would have passed, to her infant child, and at the death of her infant child would pass to her sister, subject to the life estate of her husband: So that, in either case, the husband would have at least a life estate in the property. And at his death, would it be most proper that it should go to his kindred, or the kindred of his wife? If the land had not been sold, after the death of the husband it would have passed by the general law, to his wife's sister. Has that course of descent been changed by the statute, which authorized the sale for the benefit of the infant, only in a way not to impair the rights of those who would have been entitled to it in the event of her death intestate, she continuing incapable of making a will?

It is a mistake to say that there has been no judicial construction of this statute, by this court. In *Faulkner & als. v. Davis & als.*, 18 Gratt. 651, it was held, J. Moncure delivering the opinion of the court, that this statute was eminently remedial, and should receive a favorable construction, so as to advance the remedy and support the policy of the Legislature. And it was held, that the only effect of the decree which was relied on in that case, as a muniment of title, and which was made under chapter 128 of the Code of 1849, "was to convert the real estate into money, and to leave the money or property in which it might
457 be invested, in place of the *real estate sold, subject precisely to the same rights and interests, present or future vested or contingent, to which the estate was sub-

ject at the time of the sale." If this be so it would seem to be decisive of this case—for the proceeds would now be subject to the same rights and interests of Mary E. Jones, which at the time of the sale, she had contingently to the land. And this construction of the statute is agreeable to natural justice; that the proceeds of real estate derived by the wife, should, after her death, under age or other disability, be enjoyed by the husband during his life, and at his death, pass to the kindred of the wife, in preference to the kindred of the husband. Such is the effect of the statute of descents and distributions, which we think was not intended to be changed by the sale of an infant's real estate.

Indeed, if the 12th section of our statute were omitted, it might be maintained, with much reason, that the proceeds of sale should, upon equitable principles, receive the impress of real estate, and pass in succession upon the death of the infant, as real estate, to those who would have been entitled to it if it had not been sold. And so it has been held in *New York in Forman v. Marsh*, 11 New York Rep. 544; and in *Horton & al. v. McCoy*, 47 N. York R. 21; and also in *New Jersey in Oberle v. Lerch*, 346, in the Court of Chancery, and *Lerch v. Oberle*, 3, C. E. Green, 575, in the Court of Errors & Appeals. The New York statute for the sale of infant's real estate, gives to the proceeds the impress of real estate, and passes them in succession to those to whom the real estate would have descended, if it had not been sold; as our Virginia statute does in effect. But there is no provision in the New York statute, as in ours, limiting that course of succession as real estate, to the death of the infant under disability to make a will. In *Forman v. Marsh*,
458 *Edwards, J.*, held, that if *the statute had not given the character and impress of realty to the proceeds of sale, it would have been given by the application of equitable principles; and that upon those principles, "as soon as the property was received by the person who alone was interested in it, after he became of full age, and was competent to receive it," and not before, it would lose the impress of realty. In the same case, *Ruggles, J.*, said, the duration of this artificial character is not limited by any express terms of the clause which creates it. If that clause is to be literally construed, the personal fund must retain the character of real estate as long as it exists. The statute does not declare that its character may be changed by the act or election of its owner, after he arrives at full age. The question is, when shall the proceeds of the sale cease to possess the artificial character of real estate? The true answer to the question is, he says, "as soon as the purposes of the statute, in impressing upon them that character, are accomplished. And this is when the infant becomes capable of disposing of his own property." The New York statute for partition, makes no provision, giving the impress of real estate to the proceeds of the

sale of an infant's real estate, when a sale is necessary to partition. In the above case of *Horton & al. v. McCoy*, it was held, Church, C. J., delivering the opinion of the whole court, that upon equitable principles the proceeds of the sale of the infant's real estate in that case, were impressed with the character of real estate, and should pass in succession as real estate, although the statute was silent and made no such provision. And in *Oberle v. Lerch* (supra) the chancellor reviews the cases upon the subject, in a well considered opinion; and reaffirms the decision of the Court of Errors of the same State, in *Hall v. Snowhill*, 2

Green's C. R. 820. In that case the
459 *lands of an infant had been sold by virtue of a special act of the Legislature. The act authorized the sale, and directed the proceeds to be invested, and one-third of the interest to be for the mother of the infant, and two-thirds for the use of the infant; and gave no directions as to the principal. The infant died without issue, under twenty-one years of age; and it was held that the proceeds passed as real estate to the heir at law of the infant. It will be perceived that the statute authorizing the sale was altogether silent as to the impress and character of the proceeds and their course of succession. *Oberle & Lerch* was, as to the right of succession to the surplus of the proceeds, of the sale of infant's real estate for the purpose of paying debts; whether such surplus shall be considered as real estate or as personal estate, for the purposes of succession. The chancellor says that there is nothing in the statute, by which the sale is authorized, to settle the question. But he holds that the principles upon which the doctrine of equitable conversion is now well established, are applicable, and that this theoretical conversion is considered in equity to continue until the ownership vests in some person who has the right to convert it from one kind to the other, and who, when of legal capacity, accepts it, or does something to recognize it, or give it character. "Until this is done, it must retain the character of real or personal impressed upon it, by the last absolute owner, who had such power over it." Again: "An infant or lunatic cannot elect, and therefore cannot change the character impressed upon the property." But it must retain the character impressed upon it by the last absolute owner, until that character is changed by some one having like power over it. And it was held in that case, that the surplus passed to the heir, as real estate, and not to the

460 personal representative. *And this decision was affirmed by the Court of Errors and Appeal, and seems to be supported by the weight of authority. The case cited from Massachusetts, of *Emerson v. Cutler*, is contra. It was held, C. J. Shaw delivering the opinion, that the surplus of the proceeds of the land of an infant, sold by license of the court for the benefit of the infant, at her death under age, was personal estate, and passed to her adminis-

trator. The Chancellor of New Jersey, in the case (supra) reviewing this opinion, says: "This case differs somewhat from that under consideration; as in it, the land was sold for the very purpose of converting it into personalty, for the benefit of the infant. It was not a dispute as to a surplus above the purpose for which the land was sold." There seems to be ground for this distinction. But C. J. Shaw does not put it on that ground. And the ground upon which he puts the decision of the court, is directly in conflict with the Virginia statute. He says the court are of opinion that the husband is entitled to the distributive share of his deceased wife, in the estate sold by her guardian under a license of the court. We have no such statute. Our statute expressly declares that the proceeds shall pass to such persons as would have been entitled to the land if it had not been sold. He says, the real estate of the minor is alienated." "His title is effectually divested. He acquired a sum of money as an equivalent." All that is true. "The title to his money, which is personal property," he says, "is vested in him. On his death the property to be distributed is personal; and the law governing the distribution of personal property must apply to it, without regard to the source whence it was derived." It is sufficient to reply, our statute is expressly to the contrary. But C. J.

Shaw, in the case cited, denies the
461 applicability of the doctrines *of equity to cases of this kind. His opinions are always entitled to very great respect. But there are opposed to him the well considered decisions we have noticed, and, in addition, the opinions of Ruffin, of N. Carolina, and Gibson of Pennsylvania, names equally illustrious, and whose opinions would command equal respect in any enlightened tribunal of justice.

In Pennsylvania the decisions conflict. On one side is the name of C. J. Tilghman, and on the other of C. J. Gibson. But it would protract this opinion, already too prolix, to attempt any farther review of the cases cited. If we have correctly understood our statute as passing the proceeds, as real estate, to those who would have been entitled to the estate if it had not been sold, the infant child of *Rosa* derived the estate from his mother by descent. It vested in him as real estate. And upon his death under age, without issue, entitled to this property as real estate, in the eye of the law, by the 9th section of the statute of descents and distributions, it passed to his kindred on the side of the mother. This conclusion is in agreement with the views which we have long entertained, as to the effect and operation of this statute; and the only difficulty we have encountered in this investigation, in maintaining the correctness of that construction, is the very ingenious and able argument of the learned counsel for the appellant. But, upon the whole, the conclusion which we have reached, we think is sustained by the best construction we can give to the Vir-

ginia statutes, aided by the decisions of this court, and by the best approved decisions of other States, and by analogous principles of equity. We are of opinion, therefore, that the proceeds of the real estate of Rosa Boisseau, which was sold during her minority, passed at her death, as real estate, to her infant child.

462 *subject to the life estate of her husband by the curtesy; and that at the death of the infant child, the impress of real estate never having been removed from them, they passed as real estate to Mary E. Jones, wife of the appellee, and sister of the said Rosa, subject to the life estate of S. W. Britton, the husband.

But, we think there is error in the decree, requiring the appellant to pay the sum of \$11,419.62 cents, unconditionally to the receiver of the court, which he had paid to the husband of his ward, who in any view of the case is entitled to the use of it, during his life. The most that could have been done, was to require bond to be given with additional security, if the security was insufficient, conditioned for the payment of the money to Mary E. Jones, at the death of said Stephen W. Britton, reserving to the appellees the privilege at any time, if the fund should be deemed insecure, of moving for additional security; and upon the failure of the appellant to give such bond, with additional security, in a specified time, which should be reasonable, that he should pay the said sum of \$11,419.62 cents, to the receiver of the court, subject to its control, who should be authorized to sue out a writ of execution, if necessary, to enforce the decree. It is true that appellant, in his answer, objected to give additional security, declaring that he was unwilling to ask any one to go his security. But that declaration in his answer, did not preclude him from giving security, after the court determined that he should do so, or pay the money.

We are of opinion, therefore, that for this cause alone, the decree must be reversed; and in all other respects affirmed; and that the cause be remanded to the Circuit

463 *court of the city of Petersburg, for further proceedings to be had therein, in conformity with the principles herein declared.

Decree reversed.

CONVERSION AND RECONVERSION.

I. Conversion.

A. Definition and Origin.

1. Definition.

2. Origin.

B. By Act of Parties.

1. By Will.

a. In General.

b. Sufficiency of Direction.

c. Discretionary Power to Sell.

d. Discretion as to Time and Manner of Sale.

e. Sale at Future Time.

f. Option Given Beneficiary.

g. Time of Conversion.

2. By Contract.

a. Conveyance to Trustees.

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A. Definition.

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1. In General.

2. Infants.

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I. CONVERSION.

A. Definition and Origin.

1. *Definition*.—Equitable conversion is a constructive alteration in the nature of property by which, in equity, real estate is regarded as personalty or personal estate as realty. This is the universally recognized definition of conversion throughout the United States and England. See 7 Am. & Eng. Enc. Law (2d Ed.) 464.

2. *Origin*.—The doctrine of equitable conversion originated in the well known maxim that "Equity looks upon that as done which ought to be done," and has become one of the most familiar and well established principles of equity jurisprudence. *Com. v. Martin*, 5 Munf. 122; *Siter v. McClanachan*, 2 Gratt. 295; *Pratt v. Tallafarro*, 3 Leigh 438; *Davis v. Christian*, 15 Gratt. 11; *Sulphur Mines Co. v. Thompson*, 93 Va. 293, 26 S. E. Rep. 232.

In *Overton v. Maben*, 10 Leigh 615, the court said: "The whole equitable doctrine of the absolute conversion of land into money, rests upon the *ius disponendi*. *Cujus est dare, ejus est disponere*. But where there is no *ius disponendi*, there can be no equitable conversion by will."

In *Tazewell v. Smith*, 1 Rand. 320, the court said: "It is an established principle, 'that money directed to be employed in the purchase of land, and land directed to be sold, and turned into money, are to be considered as that species of property into which they are directed to be converted.' * * * The important question in such cases is, whether the character of land or money is definitively and imperatively affixed, by the will, to the property; for, the character thus impressed upon it, will remain so impressed, until some person having a right to elect, elects to take it in its original character. Land, therefore, thus impressed with the character of money, will, until election be made to take it as land, pass as money, although it has not been actually converted into money."

B. By Act of Parties.

1. By Will.

a. *In General*.—By far the most usual way in which an equitable conversion is effected is by will. In the case of *Tazewell v. Smith*, 1 Rand. 313, 10 Am. Dec. 533, a testator directed his real estate to be sold, and the money realized from such sale to be paid to particular persons. *Held*, that persons designated took the property as personalty, according to the well established doctrine of conversion. See also,

Harcum v. Hudnall, 14 Gratt. 374; *Pratt v. Talliaferro*, 3 Leigh 419; *Ropp v. Minor*, 33 Gratt. 110; *Siter v. McClanachan*, 2 Gratt. 294; *Brown v. Miller*, 45 W. Va. 211, 31 S. E. Rep. 955; *Effinger v. Hall*, 81 Va. 107; *Carr v. Branch*, 85 Va. 602, 8 S. E. Rep. 476; *Phillips v. Ferguson*, 85 Va. 509, 8 S. E. Rep. 241; *Zane v. Sawtell*, 11 W. Va. 43; *Board v. Blair*, 45 W. Va. 825, 23 S. E. Rep. 208; *Bell v. Humphrey*, 8 W. Va. 19.

b. Sufficiency of Direction.—The criterion of the principle of equitable conversion by will, is the *intention* of the testator as evidenced by the provisions of the will. *Carr v. Branch*, 85 Va. 601, 8 S. E. Rep. 476.

Such intention may be effectively manifested either by an express direction for a conversion, or by the general purport of the will. The opinion of *Lewis, P.*, in *Carr v. Branch*, 85 Va. 601, 8 S. E. Rep. 476, was as follows: "The question of conversion, according to all the authorities, depends on the intention of the testator, which need not be expressly declared, but may be derived from the general effect of the will. Hence, it has been held that where a testator authorizes his executors to sell real estate, and it is apparent from the general provisions of the will that he intended such estate to be sold, the doctrine of equitable conversion applies, although the power of sale is not in terms imperative. To the same effect is the decision of this court in *Ropp v. Minor*, 33 Gratt. 97, in which case *Judge Burns*, speaking for the court, said that the intention to convert may be implied without express words directing a sale. It is sufficient, he said, if such intention be clear."

In *Overton v. Maben*, 10 Leigh 609, a testator after directing that his property should be sold, bequeathed to his wife a specific legacy, "in addition to what the law allows her." Held, the widow is entitled to the portion which the law allowed her, of the testator's estate, real and personal, as it stood at the testator's death, not to such portion as the law would have allowed her if the whole estate had been money.

c. Discretionary Power to Sell.—A mere power of sale, leaving it discretionary with the executor or trustee whether he will do so or not, will not work a conversion, the duty to sell not being obligatory; however, where there is an actual sale under such power there will be a conversion from that time. See *Evans v. Kingsberry*, 3 Rand. 120, 14 Am. Dec. 779, where land directed to be sold on condition was held not thereby converted into personalty until a valid sale was actually made. See, to the same effect, *Woodward v. Woodward*, 28 W. Va. 200; *Carney v. Kain*, 40 W. Va. 758, 23 S. E. Rep. 650.

d. Discretion as to Time and Manner of Sale.—In *Carr v. Branch*, 85 Va. 601, 8 S. E. Rep. 476, where the will directed the executors to sell "at such time as they may deem best," it was held that a conversion took place. See also, *Ropp v. Minor*, 33 Gratt. 97; *Com. v. Martin*, 5 Munf. 117.

e. Sale at Future Time.—Even though a sale be directed to take place at a future date, a conversion is not thereby prevented. *Ropp v. Minor*, 33 Gratt. 97; *Harcum v. Hudnall*, 14 Gratt. 369.

f. Option Given Beneficiary.—Though an option is given the beneficiary to accept land at its appraised value, yet a direction for a sale of such land may work a conversion. *Pratt v. Talliaferro*, 3 Leigh 419; *Washington v. Abraham*, 6 Gratt. 67.

g. Time of Conversion.—Where the sale is obligatory upon the trustee or executor, a conversion by

will takes effect from the death of the testator. *Effinger v. Hall*, 81 Va. 107.

2. By Contract.

a. Conveyance to Trustees.—A conveyance of land to trustees, with directions to sell and hold the proceeds for the benefit of the grantor or third persons, will work a conversion. *Siter v. McClanachan*, 3 Gratt. 294; *Zane v. Sawtell*, 11 W. Va. 43.

b. Partnership Property.—In *Davis v. Christian*, 15 Gratt. 11, it was held that land owned by a partnership, is, in equity, converted into personalty for the purpose of paying partnership debts or settling equities between the partners.

According to *Jones v. Neale*, 2 Patt. & H. 330, however, land not necessary for the settlement of partnership affairs, regains its character as realty, and should be transferred as such.

This doctrine, nevertheless, was apparently not recognized in the earlier case of *Pierce v. Trigg*, 10 Leigh 494, where, after a dissolution and settlement, the surplus real estate belonging to the firm was held to pass, not to the heir of the deceased partner as land but to his personal representative as personalty. But in *Martin v. Smith*, 35 W. Va. 585, it was held that "a widow is not entitled to dower in partnership lands purchased with partnership funds for partnership purposes, until the partnership debts have been paid,"—thus very strongly intimating that after payment of such debts, she would be entitled to dower.

C. By Act of Law.

1. Order of Court.

a. Time of Conversion.—Where there is a sale of land by order of court, a conversion of the property takes place, to the extent necessary for the purposes of the sale, from the time of the order of sale. *Allan v. Hoffman*, 33 Va. 120, 2 S. E. Rep. 602.

b. Partition.—In *Findley v. Findley*, 42 W. Va. 373, 26 S. E. Rep. 433, it was held that as a general rule a judicial sale of land converts it into personalty; yet that, where for the purposes of partition, the land of an infant or insane person be sold, it does not at once become personalty, but the proceeds remain realty until the infant becomes of age, or the lunatic becomes capable of making a will, from which time only, a conversion takes place. See also, *Turner v. Dawson*, 80 Va. 841; *Vaughan v. Jones*, 23 Gratt. 444.

D. Effect of Conversion.

1. In General.—The general effect of a conversion is to give to the property that character into which it is directed to be changed.

2. Validity of Provision of Will.—As to whether the provisions of a will should be construed by using the doctrine of conversion so as to give effect to the intention of the testator, see *Com. v. Martin*, 5 Munf. 117.

E. Failure of Gift.

1. Resulting Trust.—In *Phillips v. Ferguson*, 85 Va. 509, 8 S. E. Rep. 241, money was bequeathed to be invested in land, but by reason of a breach of condition precedent the legatee could not take. Held, that the conversion fails and the money goes to the residuary legatee by the theory of resulting trusts.

II. RECONVERSION.

A. Definition.—By "reconversion" is meant that imaginary process by which a prior constructive conversion is annulled, and the converted property restored in contemplation of equity, to its original state. See *Snell's Prin. Eq.* 160; *Black's Law Dict.* title Reconversion; *Adams Eq.* (5th Ed.) 137.

B. Election.

1. In General.—As a general rule those persons who have the exclusive beneficial interest in the prop-

erty constructively converted, may elect to take it in its actual condition, if all interested are *sui juris* and agree to the arrangement. *Com. v. Martin*, 5 Munf. 122; *Harcum v. Hudnall*, 14 Gratt. 369; *Eminger v. Hall*, 81 Va. 94; *Carr v. Branch*, 85 Va. 604, 8 S. E. Rep. 476.

2. *Infants*.—In *Carr v. Branch*, 85 Va. 604, 8 S. E. Rep. 476, the court said: "An infant is incapable of making an election, nor can his guardian or trustee elect for him, though a court of equity may." See also, *Turner v. Street*, 2 Rand. 404; *Com. v. Martin*, 5 Munf. 127.

3. *Married Women*.—Before the statutory relief from incapacity a married woman could not elect, except upon privy examination. *Pratt v. Talliaferro*, 3 Leigh 419; *Siter v. McClanachan*, 2 Gratt. 280; *Shanks v. Edmondson*, 28 Gratt. 811. But these cases are no longer authority on this subject, in Virginia, under Acts 1899-1900, p. 151, giving to a *feme covert* the same rights as a *feme sole*.

4. *Complete Conversion*.—In *Com. v. Martin*, 5 Munf. 122, it was said: "Where it appears to have been the intention that a sale or purchase, as the case may be, must take place at all events, there a court of equity, whose business it is to aid the intention of the party, will not permit the character thus impressed on the property to be changed by election."

5. *Undivided Interest*.—Where the proceeds of land to be converted are to be divided among several persons, all interested in the distribution must unite in the election. *Harcum v. Hudnall*, 14 Gratt. 369; *Com. v. Martin*, 5 Munf. 117; *Brown v. Miller*, 45 W. Va. 211, 81 S. E. Rep. 956.

6. *Intention*.—In *Harcum v. Hudnall*, 14 Gratt. 369, it was held that the intention to elect must be clearly and unequivocally manifested, in order to be effective. See also, *Carr v. Branch*, 85 Va. 597, 8 S. E. Rep. 476; *Shanks v. Edmondson*, 28 Gratt. 812, and cases cited.

464 *Ould & Carrington v. The City of Richmond.

June Term, 1873, Wytheville.

[14 Am. Rep. 130.]

1. *Municipal Corporations—Taxation of Lawyers*.—The council of the City of Richmond may lay a tax upon lawyers as such.

2. *Same—Same*.—The ordinance of the council provides that lawyers and others shall be divided into six classes, and that those in each class shall pay a certain sum as his tax; and it directs that the committee of finance shall place each lawyer in the class to which they shall think he properly belongs, looking to all the circumstances of the case. And it is provided that when the committee have completed their classification, public notice shall be given, and any lawyer dissatisfied with his classification, may appear before the committee and have it corrected if erroneous. **Held:**

1. *Same—Same—Not Income Tax—Constitutional*.—The tax is not an income tax, nor are the duties imposed on the committee legislative, but ministerial; and the ordinance is not unconstitutional.

This was an action of assumpsit in the Circuit court of the City of Richmond, instituted in November 1871, by Ould &

*See monographic note on "Municipal Corporations" appended to *Danville v. Pace*, 25 Gratt. 1.

Carrington, lawyers, against the City of Richmond. The object of the suit was to test the constitutionality of the ordinance of the City Council, imposing a tax on lawyers. Issue was made up on the plea of "non assumpsit," and the whole matter of law and fact was submitted to the decision of the court.

The power of taxation vested by the charter in the council of the city is stated by Judge Anderson in his opinion, and need not be repeated. By the ordinance imposing taxes, persons following various employments in the city were classified, and a specified tax was imposed

465 *on each class. Among these were lawyers who were divided into six classes. The eleventh section of the ordinance provides—"that the committee on finance shall place each person and firm employed in the trade or business referred to in sections three, four, five, seven and eight, in the class to which the committee shall be of opinion such person or firm properly belongs, looking to all the circumstances of the case." And it was directed that when the committee had completed their classification, they should give notice of the fact by publication in two of the papers of the city, and that the committee would meet at a specified time to hear any application for a correction of the classification; and in the meantime the list was left in the auditor's office, open for the examination of all persons interested in the matter.

In 1871 the committee of finance placed the plaintiffs, as lawyers, in the first class, and classified all lawyers practising in the city in the respective classes mentioned in s. 5 of the ordinance: that being the section in reference to lawyers. In doing so the committee had no assessment of the plaintiffs' income from their profession before them; nor did the committee ascertain, or attempt to ascertain, their incomes in any way; but formed its own estimate, without evidence, of the reputation and standing of the lawyers practising law in the city of Richmond, including the plaintiffs, and their supposed capacity to make profits in that way, relatively with each other; and classified them accordingly. The committee made no report to the council of their action in the premises; nor did the council ever revise or consider it in any way; but an opportunity was offered to all the lawyers to show, each for himself, that they had been taxed too high in the manner provided in the eleventh section of the ordinance; and some of them availed

466 *themselves of that opportunity; and among them the plaintiffs, whose tax was reduced from one hundred and fifty to one hundred dollars; but in doing so the committee acted without evidence of the relative incomes of the lawyers embraced in the classification. The plaintiffs having paid the tax under protest, after the officer had levied upon their property, brought this action to recover it back.

Upon the hearing of the case there was a

judgment for the plaintiffs; and the city of Richmond having taken an exception to the opinion and judgment of the court, applied to this court for a supersedeas; which was awarded.

Meredith, for the appellant.

Wm. Green, and R. T. Daniel, for the appellees.

ANDERSON, J. The power to tax rests upon necessity, and is inherent in every sovereignty. It is included in the general grant of legislative power; and reaches, as is said by Mr. Justice Cooley, "to every trade or occupation; to every object of industry, use or enjoyment; to every species of possession." "If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent, within the State or Corporation which imposes it, which the will of such State or Corporation may prescribe." Cooley on Constitutional Limitation, chap. 14, p. 479-482. And in the language of Chief J. Marshall, the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against its abuse is the structure of the government itself. The influence of the constituents over their representative is the safeguard against its abuse. *McCulloch v. Maryland*, 4 Wheat. R. 316-428. It must always be conceded that the proper authority to determine what should, and what should not properly bear the public burden, is the legislative department of the State. This is true not only of the State at large, but it is true also in respect to each municipality, or political division of the State. But these municipal corporations have only such powers as the Legislature of the State confers on them. Cooley 488. And their powers are controlled by the constitution of the United States, and of the State. The restrictions which they impose on the legislative power of the State rest equally upon all the instruments of government created by it. *Ib.* p. 198.

The powers of public corporations are either express, implied, or incidental. And except as to such powers as are incidental, the charter itself, or the general law under which they exist, is the measure of the authority to be exercised. They have no inherent jurisdiction, like the State, to make laws, or adopt regulations of government. They are governments of enumerated powers, acting by a delegated authority; so that while the State Legislature may exercise such powers of government, within the description of legislative power, as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred, and such as are incidental, subject to such regulations and restrictions as are annexed to the grant. Cooley 192.

With these general principles in view, we will now enquire, whether the charter of the City of Richmond invests the municipality with power to impose the tax complained of. And then if such power is conferred, has it been properly exercised in this case? By section 69 of the charter, sep. acts of 1869-70 p. 138, it is provided that, "For the execution of its powers and duties the city council may raise annually, by taxes and assessments in said city, such sums of money as they shall deem necessary to defray the expenses of the same, and in such manner as they shall deem expedient, in accordance with the laws of this State and of the United States." This clause confers the general power of taxation, except only as it may be limited by the laws of the State and the United States; and includes all powers and subjects of taxation. And as to the manner of laying the tax, the council is invested with full discretion. And they are authorized to lay a tax to defray the expenses of the city to an amount which they may deem necessary. It seems to me that this language is broad enough to embrace, not only a tax on real and personal property, but every other description of tax which the council might deem necessary and proper, unless its meaning is limited and circumscribed by what follows.

The clauses of this section which follow, are evidently designed to restrict the unlimited power of taxation given by the clause which has just been recited, to a certain extent, by prohibiting certain taxation which would have been included in the power given, if not thus restricted, to wit, on city bonds, or capital invested in real estate, or in manufactures outside the limits of the city, although the persons engaged in such business or manufactures have a place of business in the city, upon the stock of a corporation and the dividends thereof at the same time, upon any capital, &c., employed in a business upon which a license or other tax is imposed.

*These are the only limitations as to the subjects of taxation; and consequently the power of taxation, on all other persons and subjects of taxation, is given. The other restrictions are, as to the mode or manner of taxation; and they are, that the tax on property shall be equal and uniform; that capital invested in business operations shall be taxed as other property; and that stocks shall be assessed according to their market value. The power to tax lawyers' licenses is unquestionably included in the general power given by the first clause of this section; and there is nothing in the clauses limiting and restricting the general power which exempts them. Is there any thing in the next section which is restrictive of this power?

This section does not employ the language of restriction. It purports to give power, not to abstract or to withhold it. It gives to the city council power to grant or refuse a license in certain cases, and to tax the license when given. After enumer-

ating several, it adds in general terms, to "all other business which cannot be reached by the ad valorem system under the preceding section," the council may grant or refuse a license, and tax the same when granted. Lawyers are not named among those to whom licenses may be granted or refused, and taxed, and I think were not intended to be included. They could not be included in a provision to authorize a tax upon an occupation or business to which the council might grant or refuse a license; for a lawyer has obtained his license from the State; and it is not within the province of a municipal council to grant it, or to take it away. Yet, whilst a lawyer's license authorizes him to practice law in any court of the commonwealth, and it is not in the power of any municipality to deprive him of that right, or to take away his

470 *license, it is a civil right and privilege, to which are attached valuable immunities and pecuniary advantages, and is a fair subject of taxation by the State, or by a municipal corporation where he resides and enjoys the privilege. It is a vested civil right; yet it is as properly a legitimate subject of taxation as property to which a man has a vested right. I cannot perceive that there would not be as much reason for saying that a man's property is not taxable, because he has a vested right to it, as for saying that a lawyer's license is not taxable, because he has a vested right to it.

I am of opinion, therefore, that the power to tax a lawyer's license is included in the general power of taxation given by the first clause of § 69; and that it is not taken away by any thing that follows. But, if I were mistaken in this view, and the power is not given by the 69th section, it is given by section 1.

By that section it is enacted that the city of Richmond, for all purposes for which towns and cities are incorporated in this commonwealth, shall continue to be one body politic, "and as such shall have, exercise and enjoy all the rights, immunities, powers and privileges, and be subject to all the duties now incumbent and appertaining to said city as a municipal incorporation." Acts of 1865-66, p. 241. By section 68 of the act passed February 7th, 1866, then in force, it is enacted that, "For the execution of its powers and duties, the council may tax real estate in the city; all personal property therein," &c.; and by section 69, "The council may tax the keepers of ordinaries, brokers, lawyers, physicians and dentists," &c. It appears, then, that the corporation was expressly invested with power to tax lawyers when, and before, the new charter of 1870 was granted; and it is expressly enacted in the 1st section thereof, that

471 the corporation *shall have, exercise and enjoy all the powers then appertaining to the city as a municipal corporation. The power of taxation was one of its most important powers, and could be exercised only through the council. This general grant of power seems designed to

supply any omissions which might be made in the provisions of the act which was to follow. So that the corporation would be invested, not only with the powers expressly granted therein, but also with all other powers with which it was then invested by previous acts of the Legislature. I am of opinion, therefore, upon both grounds, that the power to tax lawyers is clearly given by the charter. It only remains to enquire, has it been constitutionally exercised in this case?

By an ordinance of the council, the lawyers of Richmond were divided into six classes; and the individuals of each class were assessed with a certain amount of taxes; and a committee was appointed, charged with the duty of assigning them to the class to which they respectively belonged. It is contended that the council could not delegate this power to a committee.

That the power of taxation is an important and delicate trust confided to the council, and cannot be delegated by them to a committee of their own body, or to any other agency, is unquestionably true. It is a legislative power; and when granted to a municipality, it can only be executed by itself, or by such agencies or officers as the statute has pointed out. So far as its functions are legislative, it rests in the discretion and judgment of the municipal body entrusted with it; and that body cannot refer the exercise of the power to the discretion and judgment of its subordinates, or of any other authority. Cooley, p. 204, 205, and cases cited.

But, was the assignment of the lawyers to their respective classes a legislative

472 function? The enactment *that the lawyers should be divided into six classes, and that a tax of so much should be levied upon each individual of a class, was legislative, and was performed by the council itself. Was the inquiry as to which class the lawyers should be respectively assigned, and the assignment of them to their respective classes, a legislative or ministerial act? If it is a legislative function, the commissioners of the revenue, under a delegated authority from the general assembly, have been performing yearly, without question, legislative functions. It is a service which could not be well performed by the legislative body. It is the function of a commissioner, in order to the execution of a legislative act, and is ministerial; and it seems to me, that it was competent for the council to require the service to be performed by a committee of their own body, as well as by a commissioner, or the general assessor. And it was not more necessary that the action of said committee should be reported to the council, and have its confirmation, than that similar duties by a commissioner of the revenue should be reported to and confirmed by the Legislature of the State. But the tax payer should be provided with ample remedies for redress, if he has been aggrieved by the action of the committee. Whether the remedy provided in this case by the ordinance

of the council is adequate or not, there is no complaint by the appellees that any injustice has been shown to them; and it is a question, it seems to me, for the council and their constituents, and does not come within the province of the courts.

It is objected, also, that the mode of ascertaining the class to which the lawyers should be respectively assigned, was uncertain and wholly inadequate to the attainment of justice, and vitiates the whole proceeding. If it be an income tax, as is

contended it was designed to be, an
473 *assessment was necessary to ascertain what was the income of the lawyer to be taxed. And if it was not an income tax, but a license tax, that is a tax on the civil right or privilege conferred by the license, the tax ought to be proportioned, as nearly as practicable, to the value of that right and privilege. But, exact justice and equality are not attainable, and consequently not required. *Cooley on Con. Lim.*; *Slaughter's case*, 13 Gratt. 767; *Eyre v. Jacob, sheriff*, 14 Gratt. 422, 434, 435; *Gilkeson v. Frederick Justices*, 13 Gratt. 577.

I do not think it was intended to be a tax on income. The classification of the lawyers shows this. It was intended to be a tax on the civil right and privilege. And it is true that the tax ought to be proportioned, as nearly as practicable, as I have said, to the value of the privilege. Justice and equality, which are of the essence of constitutional taxation, require it. The act of council requiring the assignment of the lawyers into six classes, and the gradation of the tax upon them, according to the class to which they were respectively assigned, shows an intended approximation to equality; and if the assignment is fair and judicious, as nearly attains it as is perhaps practicable in a license tax. It is true that the principle upon which this classification is made by the 5th section of the ordinance, which is in relation to the classification of lawyers, doctors, &c., is not in terms expressed. The 3d section in relation to commission merchants, brokers, &c.; the 4th section in relation to "sellers by wholesale or retail of wine or spirituous liquors;" the 7th section in relation to "agents or sub-agents of any insurance company or office, whose principal office shall be located out of the city;" and the 8th section in relation to "express companies and telegraph companies, having a place of business in the city," all adopt the

method of classification, as in the 5th
474 section; nor in *either is the principle expressly stated upon which the classification shall be made. If the tax upon lawyers is unconstitutional and void, upon this ground it is in all the other cases; which would be disastrous to the financial condition of the city; and a question involving consequences of such moment ought to be well considered by this court, before it declares those ordinances unconstitutional and void, on this ground.

The 11th section provides, "that the committee of finance shall place each person

and firm, employed in the trade or business referred to in sections 3, 4, 5, 7, and 8, in the class to which the committee shall be of opinion such person or firm properly belongs, looking to all the circumstances of the case." Now while it is not expressed that the classification shall be made with reference to the value of the civil right or privilege conferred by the license, that, it seems to me is the obvious design and object of the classification, and would be so understood. For what other object could a classification have been made, than to attain justice and equality as nearly as practicable by levying a tax proportionate to the value of the privilege to the party taxed; and it is to this end that the committee is instructed "to look to all the circumstances of each case." It might have been better to have expressed the object and design of the classification as a guide to the committee; but it seems to me it is manifest without being so expressed. And the charter expressly invests the council with full discretion to raise the necessary revenue, by taxes and assessments, "in such manner as they shall deem expedient, in accordance with the laws of this State and the United States." I am not aware that these provisions of the ordinance are in conflict with any law of the State or the United States. That the discretion reposed in the committee may be abused is possible;

but not more likely, I think, than
475 *that the same power might be abused by a commissioner of the revenue.

The council having by their act of legislation, required the lawyers to be placed in six different classes, and declared what tax should be paid by the individuals composing each class, directed one of its most important standing committees, the committee of finance, to assign them respectively to such class as they should properly belong. It is fair to presume, that this committee is composed of intelligent, discreet, and trust-worthy gentlemen, residing in different parts of the city, who would be informed as to the relative standing of the lawyers in the city, and the extent of their business, from their own observation, and from reputation, and would not be likely to err greatly in their determination as to which class they should be respectively assigned. I should suppose that there is not an intelligent business man in the city of Richmond, such a one as should be selected as a councilman, and placed on the committee of finance, who, if not sufficiently informed as to the relative practice of every lawyer in the city, could not get sufficient reliable information by inquiry, to enable him to determine, with reasonable accuracy, to which of the six classes he should be assigned, especially after a free interchange of views with the other members of the committee.

It is true, that they might be mistaken in individual instances, which I should think, however, would rarely be the case. But, as such mistakes might occur, a remedy was provided for correcting them,

which was applied in this case. Now, whether this was the best mode for the attainment of justice in the classification of the lawyers, it is not for me or the court to say. But I cannot perceive that it is obnoxious to the objections urged against it in argument; or especially, that it furnishes ground for avoiding the tax by 476 a judgment of the *court. That the confidence reposed in the committee might be abused, is possible. But it is impossible to administer government without reposing confidence in public agents. A reasonable confidence in human agents is essential to society and to the conduct of human affairs; and a law cannot be said to be unconstitutional because it reposes a confidence in public agents which may be abused.

As before said, there is no complaint that the tax imposed upon the appellees in this case is unequal and unjust. I apprehend the case was made in order to have an important principle as to the right of taxation settled, for the benefit of all concerned, as well as the immediate parties to this proceeding. It was believed that in this assessment there was an encroachment upon the constitutional rights of citizens; and this proceeding was properly instituted to test the question. From the best consideration I have been able to give the subject, my mind has been brought to a different conclusion. I do not think that the city council have exceeded their powers in the imposition of this tax. I am, therefore, of opinion, to reverse the judgment of the court below.

MONCURE, P., and CHRISTIAN, J., concurred in the opinion of Anderson, J.
STAPLES and BOULDIN, Js., dissented.

Judgment reversed.

477 *Murphy's Adm'r & als. v. Carter & als.

Absent, CHRISTIAN and BOULDIN, Js.*

June Term, 1873, Wytheville.

Will—Administrator—Bond.—Testator dies in 1836. By his will he gives certain specific and general legacies, and then directs that certain land, and his personal property shall be sold, which with debts due shall be a fund for the payment of his debts. An administrator c. t. a. qualifies and executes a bond with sureties, the condition of which only binds them for the faithful administration of the personal estate, and that he shall "deliver all the legacies contained and specified in said will." He sells the land, and out of the general fund pays debts; but upon a settlement of his accounts is largely in arrear. **Held:**

1. **Same—Same—Same—Liability of Sureties.**†—The sureties are not liable for the due administration of the land.

*JUDGE BOULDIN had been counsel in the cause.

†**Administrator—Bond—Liability of Sureties.**—See principal case cited in *Strother v. Hull*, 23 Gratt. 668, as authority for the proposition that the sureties, on a bond for the faithful administration of the

2. **Same—Same—Same—Interpretation of "Deliver."**—Though the condition of the bond does not use the word "pay" but only "deliver," yet this last word will cover the general as well as the specific legacies.

3. **Same—Same—Mail—Administration.**—The land and personal property and debts being made one common fund by the testator, it was not mal-administration by the administrator to use the proceeds of the land in the payment of debts.

4. **Same—Realty—Personalty—Applied Pro Rata for Payment of Debts.**—The real and personal fund should be applied in payment of debts *pro rata* according to their respective values.

5. **Same—Same—Same—Same—How Ascertained.**—To ascertain the amount with which each fund is to be charged, accounts are to be stated: 1st: Of the combined fund derived from the sale of the real estate and from personalty. 2d: The total amount of legal disbursements

478 *made out of both funds. 3d: What amount of the combined fund was derived from real estate and what amount from personal estate. 4th: Then to ascertain by the rule of proportion, what part of the disbursements have been made out of the land fund; and by the same ratio, what proportion of the balance due from the administrator is chargeable to the land fund, and what proportion is to be charged to the personal fund.

6. **Wife, a Distributee—Husband, Incompetent Witness.**†—A husband, whose wife is entitled to a distributive share of a deceased legatee of the testator, is not a competent witness to prove that certain debts, paid by the administrator, were paid out of the proceeds of the land, so as to increase the amount for which the sureties are liable.

7. **Same—Husband—Administrator—Incompetent Witness.**†—The administrator, whose wife is one

personal estate, are not responsible for the administration as to the realty. To the same effect, see *Burnett v. Harwell*, 8 Leigh 89; *Hutcherson v. Pigg*, 8 Gratt. 220. See also, 11 Am. & Eng. Enc. Law (2d Ed.) 885.

‡**Witnesses—Competency—Husband and Wife.**—The proposition laid down in the principal case, that husbands and wives are not competent witnesses for or against each other has been approved in several subsequent cases. See *Statham v. Ferguson*, 26 Gratt. 37; *Warwick v. Warwick*, 31 Gratt. 77, and *fool-note*; *Perry v. Ruby*, 81 Va. 323; *Dugger v. Dugger*, 84 Va. 136, 4 S. E. Rep. 174; *DeFarges v. Ryland*, 87 Va. 406, 12 S. E. Rep. 806.

See also, on this point, *Johnston v. Slater*, 11 Gratt. 323; *William & Mary College v. Powell*, 12 Gratt. 382; *Stepoe v. Read*, 19 Gratt. 12; *Burton v. Mill*, 78 Va. 406; *Witz v. Osburn*, 83 Va. 229, 2 S. E. Rep. 33; *Keagy v. Trout*, 85 Va. 391, 7 S. E. Rep. 339.

In *Hoge v. Turner*, 96 Va. 629, 32 S. E. Rep. 291, the court, citing among others the principal case, said: "This prohibition against the competency of husband and wife to testify for or against each other is not confined to the case where the husband or wife is a party to the record. It applies equally where he or she is not a party, but yet has an interest directly involved in the suit, and would, therefore, according to the common law, be incompetent to testify."

But, though one of them is a party, if he has no interest in the matter in controversy, the other may testify. See *Thomas v. Sellman*, 87 Va. 683, 13 S. E.

of said distributees, is not equally interested on both sides, so as to render him a competent witness for this purpose.

This case was argued in Richmond at the March term of the court, and was decided at Wytheville. It was a suit in equity, in the Circuit court of Halifax, and afterwards transferred to the Circuit court of Pittsylvania, brought in 1845 by Samuel and Philemon Carter, infants, by their next friend Charles B. Taliaferro, against John C. Cabiness, adm'r with the will annexed, of Samuel Carter, deceased, and his sureties in his official bond, and John H. Carter, the brother of the plaintiffs. The bill sets out the will of their father, Samuel Carter, the provision he made for the payment of his debts, the bequest to the plaintiffs and their brother John C. Carter, the qualification of Cabiness, as adm'r c. t. a., and his bond; and prays for a settlement of the administration account of Cabiness, and the payment of their legacies; and for general relief.

The facts referred to in the bill, are stated in the opinion of Judge Anderson; and he also gives the material facts in the cause. It is only necessary to add, that after the decree made in the cause in 1851 it was several times committed to a commissioner. In the meantime Samuel Carter, jr., died, and his administrator and Philemon Carter filed an amended bill, in which they charged that a tract of land which Cabiness had conveyed to Claiborne H. Barksdale, in trust, to indemnify his sureties, had been purchased by Cabiness, and paid for in part, by moneys he had received upon the sale of the estate of his testator. They alleged that Cabiness was insolvent, and had removed to Texas. And they prayed that the land, to the amount that it had been paid for out of the proceeds of the real estate of Samuel Carter, the elder, might be subjected to pay it.

Beverly Barksdale, one of the sureties, answered the bill, and denied that the land mentioned in the amended bill was purchased with any portion of the assets of the estate of Samuel Carter, and he called for strict proof.

After the reports of the commissioners were filed, the cause came on to be finally heard on the 3d of November 1866, when the court held that certain credits which had been allowed to the sureties for payments made to Bruce and the sheriff of Halifax, were paid out of the proceeds of

the sale of real estate; and that they were not proper credits to the sureties, who were under their bond only liable for the personal estate; and having made a statement showing the amount of these credits with interest, rendered a decree against the adm'r of Cabiness, and his sureties, and in favor of the plaintiffs and John H. Carter, to each for one-third of the amount. And the court also held that \$1,000 of the purchase money of the land conveyed to Barksdale, was paid out of the real estate of Samuel Carter; and directed, unless the sureties paid that amount with interest, the land should be sold, &c. From this decree the adm'r of James Murphy and Banister Anderson, one of the sureties, *applied to this court for an appeal; which was allowed.

Dabney, Ould & Carrington, for the appellants.

Jones & Bouldin, and Marshall, for the appellees.

ANDERSON, J., delivered the opinion of the court.

This is a suit brought by legatees against an adm'r, c. t. a., and his sureties, to recover their legacies. The testator, by his will, devised certain real estate to each of his three sons, John H., Samuel and Philemon; and he directs that other real estate particularly designated, shall be sold by his executors, in such manner as they shall deem most advisable; and that, at the end of the year, all his perishable estate and crops, together with four negroes, naming them, shall be sold, and out of the money arising from the sales of all the above property and money on hand, and all that may be due him at the end of the year, he directs his debts to be paid; and should there be any surplus money, after paying his debts, he gives it to his three sons, to be equally divided between them. His remaining negroes and other personal estate, or the chief part of it, he gives to his wife and daughters.

The will was admitted to probate, at a court held for Halifax county, on the 26th of April 1836; and on the 25th of July, of the same year, John C. Cabiness qualified as adm'r c. t. a.; and executed a bond with his sureties, in the penalty of \$60,000, conditioned that he would make a true inventory of the goods, chattels and credits of the decedent, &c., and the same goods, chattels and credits would well and truly administer according to law, and make a just and true account of his actings therein, when thereunto required by said court; and further, that he would well and truly deliver all the legacies contained *and specified in the said will, as far as the said goods, chattels and credits will extend, according to the value thereof, and as the law shall charge him.

The bill was filed in 1845, by Samuel Carter and Philemon Carter, infants under the age of twenty-one years, who sue by

Rep. 146; Hayes v. Mut., etc., Ass'n, 76 Va. 225; Farley v. Tillar, 81 Va. 275.

But the common-law disability of husband and wife to testify for or against each other has been removed by statute in Virginia, save in certain specified cases. See Va. Code, § 3346, as amended by Acts of 1897-'98 (Pol. Supt. § 3346a).

In Riddell v. Johnson, 26 Gratt. 187, the court, citing the principal case, said: "The rule which excludes a party to the record as a witness in the cause applies to all cases where the party has any interest at stake in the suit, although it be only a liability for costs, and excludes a *prochein ami*, etc."

their next friend Charles B. Taliaferro, against the said John C. Cabiniss and his sureties and John H. Carter one of said legatees, who is made defendant; and the prayer is, that the court may direct a settlement of the account of the said John C. Cabiniss, as administrator with the will annexed of Samuel Carter dec'd; and that the surplus, after satisfying the debts due by the testator at his death, arising from the sale of the lands and slaves aforesaid, and from the money on hand, and debts due the testator at his death, be distributed amongst the plaintiffs, and John H. Carter, according to the provisions of the will; and for general relief.

In the progress of the cause a reference was made to a master to state the administration account, and report to the court. He reported a balance due from the adm'r on the 1st of September 1848 of \$7,322 81, principal, and \$5,901 52 interest, charging him with the proceeds of the real estate as well as personal; and \$2,441 02 interest and \$2,022 66 principal, deducting the real estate; to which he states should be added \$750 principal, and \$558 75 interest, cash alleged to have been retained out of the money left on hand by the decedent, by John H. Carter, if the court should be of opinion that he is chargeable therewith. The whole thus chargeable on the personal fund, divided into three equal parts, gave to each of the legatees \$1,924 25, of which \$999 92 was interest, and \$924 33 was principal. To

this report the plaintiffs filed various exceptions, and John H. Carter *also excepted to the item of \$750, and interest thereon.

On the 12th of April 1851, the court pronounced a decree in the cause, overruling the said exception of John H. Carter, and holding that the sureties of John C. Cabiniss as adm'r c. t. a. of Samuel Carter, are bound for the faithful administration of the personal part of the estate, decreed against the adm'r and his sureties, in favor of each of the plaintiffs, the sum of \$1,924 25, with interest on \$924 33, part thereof, from the 1st day of September 1848 till paid. It is also adjudged by the said decree, that the sureties are not bound, merely by reason of said bond, for the proceeds of the real estate sold by the administrator. And whether they are bound for so much thereof as may have been paid by the adm'r in satisfaction of the debts of his testator; and if bound, what was the amount so paid out of the proceeds of the sale of the real estate, are questions which are left open and undecided by said decree; as are also the questions arising upon the plaintiff's exceptions to the commissioner's report, which is recommitted, with directions to the commissioner to examine said exceptions, and to report thereon; who is also directed to state the account between John H. Carter and the adm'r, and to report the same.

It was earnestly contended by appellant's counsel, that if the adm'r applied proceeds of the sale of lands to the payment of debts,

the sureties are entitled to the benefit of such payments. This raises a question which was undecided by the said decree, and may be considered now.

The argument that the sureties cannot be held bound upon their bond, for any misapplication of the proceeds of the sale of lands, is undoubtedly true. But the claim

is not to hold them responsible for a misapplication of *that fund. It was

no misapplication, to apply it in payment of debts; for the sale of the land was required by the will, to raise a fund, which, together with the personal fund, should be applied to that purpose. Such application of it was no default on the part of the adm'r, and consequently could devolve no liability on his sureties therefor. Nor can they be held responsible for his failure to apply the proceeds of the land sold, to the payment of debts, as the law then stood, as they only undertook for the proper administration of the "goods, chattels and credits." But that does not seem to remove the difficulty or to meet it. The sureties undertook that the administrator should apply the personal fund to the payment of debts; and the surplus, if any, to the payment of legacies. It was argued that the bond which they executed, only requiring them in terms to "deliver" legacies, and omitting the word "pay," should be taken to bind them only to deliver the specific legacies bequeathed by the will, of which there are several, and which it was appropriate to require to be delivered; as the specific thing, not money, was bequeathed; and therefore it would have been wholly inappropriate to have required it to be paid; and the term "delivered" was used as applicable to such legacies; and the word "pay" being omitted, which only would be appropriate to the legacies sought to be recovered by this suit, it is fair to presume that the sureties intended only to be bound for the application of the fund in payment of debts, and for the delivery of the specific legacies, and not for the payment of legacies out of the fund created for the payment of debts and legacies over, if there should be a surplus. But, although the term "pay" would be more appropriate in reference to monied legacies, and would not be at all appropriate in relation to legacies which were not pecuniary, yet the word "deliver" is applicable to both *sorts of legacies. And it would be too rigid a construction to say that an obligation to deliver legacies, some of which were pecuniary, and others specific, did not bind the obligor to the payment of the pecuniary legacies. We adhere, therefore, to the assumption that the sureties undertook that the administrator should faithfully apply the personal fund to the payment of debts, and the surplus, if any, to the payment of legacies. And they are undoubtedly responsible for any default of the administrator therein.

It was claimed by the plaintiffs in the court below, that certain disbursements made by the adm'r were made out of the

proceeds of the sale of real estate, to wit: amount paid sheriff of Halifax \$720, on the 27th of March, 1838; amount paid Bruce & Thomas, 26th of January 1841, \$714.07; and amount paid James Bruce, 26th of December 1836, \$825; and that these disbursements were improperly credited to the sureties, in the account which formed the basis of the decree of 12th of April 1851; and that, therefore, they were entitled to a decree against the sureties for those sums, with interest on them severally; and in support of their pretension, they relied upon the depositions of John C. Cabaniss and Thomas D. Neal, which are excepted to by the sureties, upon the ground of incompetency, and upon other grounds. The record does not show that the court decided the question raised by the exceptions, as to the competency of these witnesses, but the final decree is for the said sums against the sureties, with interest upon them from the several dates of disbursement until payment.

It is shown by the record that the first item above mentioned, \$720, was not credited to the adm'r in the account which formed the basis of the decree of the 12th of April 1851, and that the securities did not get the benefit of a credit therefor, by said decree. It was, therefore, 485 *clearly error to decree against them for that amount. But as to the whole, if the depositions of Cabaniss and Neal are excluded, the evidence does not show that the said disbursements were made out of the proceeds of land sales. It is material, therefore, to enquire whether those witnesses were competent.

Both witnesses married daughters of Samuel Carter, the elder, deceased, and sisters of Samuel Carter, jr., who was one of the plaintiffs in this suit, and died since its institution, without issue and unmarried, both of his said sisters surviving. They were, consequently, heirs and distributees of his estate, and are entitled to a distributive share of whatever recovery his administrator may have against the sureties of John C. Cabaniss in this suit; and are, consequently, directly interested in swelling the amount of that recovery.

The general rule of the common law is, that a party to the record in a civil suit cannot be a witness, either for himself or for a co-suitor in the cause. And the rule of the Roman law was the same. 1 Greenl. Ev. § 329. The rule applies to all cases where the party has any interest at stake in the suit, although it be only a liability to costs, and excludes a *prochein ami*, a guardian, an executor, or adm'r, &c. Ibid. § 347. And, we apprehend, prevailed in courts of chancery, as well as in courts of law; though in the former parties, to the record are subject to examination as witnesses, much more freely than at law. In chancery the plaintiff may obtain an order, as of course, to examine a defendant, and a defendant a co-defendant; but it must be upon affidavit, not only that he is a material witness, but also that he is not interested on the side of the party seeking his

testimony in the matter to which it is proposed to examine him. The rule as to trustees, executors, and other fiduciaries, has been changed by statute in Virginia, which provides *that no trustee, executor, or other fiduciary, shall be incompetent as a witness in any case, by reason only of his being a party thereto, or of his being liable for costs in respect thereof; but if liable to costs he shall not be competent, unless some person undertake to pay the same. Code of 1849, p. 663, §§ 17 & 18. In this case John C. Cabaniss was liable for costs, and it does not appear that any one had undertaken to pay the same. But we do not propose to consider the question of his competency, upon the ground of his being a party to the suit, and liable for costs. It will be seen that the statute does not remove the objection to his competency upon the ground of interest, except only as to his being liable for costs. And we hold that he was incompetent if he had an interest in the recovery against the sureties, and his testimony tended to swell that recovery. That such was its tendency is unquestionable. Had he no right or interest in the distributive share of his wife?

According to the principles enunciated by this court, in *Dold's Trustee v. Geiger's Adm'r*, 2 Gratt. 98, he had an appreciable vendible interest therein, during coverture. Not an absolute title, but a legal right *jure mariti*, the possession being recovered during coverture; but charged with the equity of the wife to a settlement. Judge Stanard, who delivered the opinion, in which the other judges concurred, in that case, says: "The interest of the wife is an equity, and covers so much of the property as may be necessary to satisfy her equity, and that of the husband is legal *jure mariti* to the surplus." "Such are the respective interests of husband and wife, if the possession be recovered during coverture; and if before the recovery, or the judicial ascertainment or recognition of those rights, the coverture ceases by death, then in effect the beneficial interest devolves on the survivor; to the wife surviving, by virtue of her legal 487 right of survivorship; *to the husband, by virtue of his right of administration to his wife. Both the husband and wife had a direct interest in swelling the recovery against the sureties.

But it is contended that inasmuch as Cabaniss was liable for whatever recovery might be had against his sureties, his testimony to swell the recovery against them was against his own interest; and that whilst he had an interest in the right of his wife, he had a preponderating interest adversely, which rendered him competent. The testimony of the adm'r is not against himself. It has no tendency to swell the amount of the recovery against himself. That is not affected by his testimony, for he is responsible for the whole amount of assets which came into his hands, whether derived from the real or personal estate. The amount of the recovery against him will be the same, whether his testimony is

excluded or not. He does not, therefore, testify against his interest. His liabilities are not increased by his testimony, while his sureties are; and it tends to swell the recovery against them, in which he and his wife have both a direct interest. We do not think, therefore, that his interest was neutralized. Nor do we think that he was a competent witness against his sureties, whose interest was adverse to his, because of his fiduciary relation to the plaintiffs, who were entitled to a disclosure of his acts and doings in his fiduciary character. It seems to me, therefore, that he was incompetent, on the ground of his own interest *jure mariti*.

But his wife would have been clearly incompetent as a witness. And it is an established principle that when the husband or wife is not a party to the record, but yet has an interest directly involved in the suit, and is thereby incompetent to testify, the other is also incompetent. It is also

held, that the husband cannot be a
488 *witness for or against his wife, in a question touching even her separate estate, in which he has no interest. 1 Greenl. Ev. § 341; *Ex parte James*, 1 P. Wms. R. 611; 1 Burr. R. 424; *Davis v. Dinwoody*, 4 T. R. 678; *Snyder v. Snyder*, 6 Binn; *Langley v. Fisher*, 5 Beav. R. 443.

We are of opinion, therefore, that neither John C. Cabaniss nor Thomas D. Neal was a competent witness in this case to swell the recovery against the sureties; and that excluding their testimony, it does not appear from the record what disbursements were made out of the realty, and what were made out of the personality; and that there is error in the decree in charging the sureties with said sums, and interest thereon.

But the sureties are not entitled to be credited by the whole disbursement made out of the proceeds of land sales, and from the personal estate. They are responsible for the true and faithful administration of the personal fund. But that was mixed with the proceeds of the land sales. The testator by his will blended both into one common fund, for payment of debts and legacies over. And the sureties of the adm'r, are only bound for the true and faithful administration of so much of this common fund, as was derived from the personal estate. The administrator is clearly chargeable with the whole amount of his receipts, whether derived from land or personality. But such is not the responsibility of his sureties. They are only responsible for the personal part of the fund which came into the hands of the administrator, and should be credited by disbursements made out of the personal fund. The money with which the disbursements were made, having been derived both from land, with which the sureties are not chargeable, and from personal estate, with which they are chargeable, it would not be right to give the sureties credit for the whole amount of disbursement. But the

489 *fund derived from the realty, and personality being mixed and blended,

out of which the disbursements were made, upon what principle, or by what rule, can it be ascertained, what part of the disbursements shall be credited to the real estate, and what to the personal estate, and the extent of the sureties' responsibility?

In *Elliott v. Carter & al.*, 9 Gratt. 541, 583, Lee, J., in whose opinion the other judges concurred, says: It seems to be settled that though personal property is applicable to the payment of debts before real property, when neither species is expressly charged by the terms of the will; yet when both are equally and expressly charged they stand on the same footing, and each must contribute its rateable share to the common burden. 9 Gratt. citing *Dunk v. Fenner*, 2 Russ & Mylne 557, 13 Cond., Eng. Ch. R. 170; *Roberts v. Walker*, 1 Russ & Mylne 752, 4 Cond. Eng. Ch. R. 644; *Kidney v. Cousmaker*, 1 Ves. jr. R. 444; 3 Beavan 479 & 576. Again, when the will creates a mixed and general fund from the proceeds of real and personal estate, and directs that fund to be applied in payment of debts and legacies, they shall answer the prescribed purpose *pro rata*, according to their respective values. L. Thurlow says, when a testator combines real estate with personal, generally the burdens of the personal estate would also be placed on the estate combined with it.

This just principle, it seems to me, is applicable to this case. The legatees are entitled to subject the whole fund in the hands of the administrator, after the payment of debts, to the payment of their legacies. That fund was derived in part from the sale of real estate, and in part from the sale of personal estate, moneys in hand, and collected from debts due the testator. The latter is secured, the former is not. But both funds were so mixed and blended

that it cannot, with any certainty, be
490 ascertained *what debts were paid out of the one fund, and what were paid out of the other; nor, consequently, what part of the funds which the adm'r retains and is undisbursed was derived from the one source, which is secured, and how much from the other source, which is not secured. It would seem, therefore, to be just and equitable, both to the legatees and the sureties, that the balance of the common fund, in the hands of the administrator, shall answer the prescribed purpose, *pro rata*, according to their respective values; upon the principle that they were alike chargeable with the payment of the debts in that ratio.

We are of opinion, therefore, that this cause should go back to a commissioner, who should be instructed to ascertain—1st: What is the amount, on the 1st of September, 1848, (the period taken by the decree of the 12th of April, 1851, for distribution) of the combined fund, derived from the sale of real estate and from personality which came into the hands of the administrator. 2d: The total amount of legal disbursements made out of the combined fund. 3d: What amount of the combined fund was derived

from real estate, and what amount was derived from personal estate.

4th. He should then ascertain by the rule of proportion, what part of the disbursements which have been made, was made out of the land fund, and what part was made out of the personal fund. And by the same ratio, he should ascertain what proportion of the balance due from the adm'r on the said 1st day of September 1848, is chargeable to the land fund, and what proportion is chargeable to the personal fund. And one-third of the amount so chargeable to the personal fund, with interest on the principal sum thereof, from the 1st day of September 1848, is due from the sureties to each of the three legatees, the sons of Sam'l Carter the elder, 491 dec'd, *or his representative, subject to a credit for the amount of the decree of 12th of April 1851, in favor of either of them, and for any payments which may have been made to them respectively, by the said administrator, or his sureties, or by either of them not embraced in said decree.

The amended bill charges that John C. Cabaniss, the adm'r, applied a portion of the proceeds of the land sales to the purchase of a tract of land for himself, which he afterwards conveyed in trust to Claiborne H. Barksdale, to indemnify his sureties in his administration bond; and the bill seeks to subject that land to the payment of the balance due from the adm'r on account of the proceeds of the real estate which came into his hands. The answer of Beverly Barksdale denies the allegation that said land was paid for by Cabaniss out of the assets of the estate; and calls for strict proof.

The only evidence to support the said allegation of the amended bill, is the testimony of John C. Cabaniss and Thomas D. Neal, both of whom are interested witnesses, and incompetent to give testimony in the cause, as has been shown. The allegation that John C. Cabaniss purchased and paid for the land in question out of the trust fund, being positively denied by the answer, and being unsupported by legal testimony, it was error to subject it to sale to satisfy the balance due the legatees from the administrator from the proceeds of the sales of real estate. And the same is liable to sale for the indemnity of the sureties, according to the terms of the deed from John C. Cabaniss, in trust to Claiborne H. Barksdale. We are of opinion, therefore, to reverse the decree of the 13th of November 1866; and that the cause should be remanded to the Circuit court of Pittsylvania, for further proceedings to be had therein, in conformity with this opinion.

492 *The decree was as follows:

The court is of opinion, for reasons assigned in writing and filed with the record, that the decree of the Circuit court of Pittsylvania of the 13th of November 1866, is erroneous. It is therefore considered that the same be reversed and annulled; and that the appellees, Charles L. Powell,

sheriff of the county of Pittsylvania, and as such adm'r of Samuel Carter, dec'd, out of the assets of his intestate unadministered, and Philemon B. Carter and John H. Carter do pay to the appellants their costs expended in the prosecution of their appeal here. And the cause is remanded to the said Circuit court to direct an account, with instructions to the commissioner to ascertain and report—First: What is the amount on the 1st of September 1848, of the combined fund derived from the sale of real estate, and from personalty, which came into the hands of the administrator.

Second: The total amount of legal disbursements made out of the combined fund.

Third: What amount of the combined fund was derived from real estate, and what amount was derived from the personal estate.

Fourth: Then to ascertain by the rule of proportion, what part of the disbursements, which have been made, was made out of the land fund; and by the same ratio, what proportion of the balance due from the adm'r on the said 1st day of September 1848, is chargeable to the land fund, and what proportion is chargeable to the personal fund. And one-third of the amount so chargeable to the personal fund, with interest on the principal sum thereof, from the 1st day of September 1848, is due from the sureties to each of the three legatees, the sons of Samuel Carter, the elder, dec'd, or his representative, subject to a credit 493 for the amount of the decree *of 12th of April 1851, in favor of either of them, and for any payments which may have been made by them respectively, by the said adm'r or his sureties, or by either of them, not embraced in said decree; and for further proceedings to be had therein in conformity with the principles declared in the opinion of this court filed with the record, in order to a final decree; in which proceedings, the sureties are to be allowed the proceeds of the sale of the tract of land conveyed by John C. Cabaniss to Claiborne H. Barksdale, for their indemnity as his sureties, according to the terms of said deed of trust.

Decree reversed.

494 *Hudgins v. Lanier, Bro. & Co.

June Term, 1878, Wytheville.

Judgments—Deed of Assignment—Decree to Sell Land—Private Sales.—Judgments are recovered against H and docketed. He afterwards makes a deed in which his wife joins, conveying certain real estate to T, in trust to sell, upon the demand of a majority of his creditors, and pay his debts ratably: but if any have obtained liens, they to be first paid. He, at the same time, conveys to T, other real estate, in trust for the separate use of his wife, stated upon the express consideration of executing the first deed. The deed does not name any creditor or enumerate the debts. L, one of the judgment creditors, files a bill to enforce the payment of his debt. He says he does not mean to give up any

right he has, but is willing to proceed first against the land conveyed in the deed. He makes H, T, and the judgment creditors defendants; and the bill is taken for confessed as to all the defendants. A commissioner states the debts of the judgment creditors, and there is no exception to the report; and there is a decree appointing commissioners to sell the land conveyed in the deed, at auction; but with the consent of H there may be a private sale. H negotiates with R for a sale of a part of the property at \$4,500, which he proposes to the commissioners, and they are disposed to accept the offer; but before it is closed, M offers \$6,000; and then H protests against the sale to M, and insists it shall be sold at auction; but R declining to give more, the commissioners accept the offer of M, and H excepts to the report. H then files his answer, insisting that T shall elect whether he will proceed under his judgment lien or under the deed; and insists that under the deed, only a majority of the creditors could direct a sale. And he files a petition saying that R had offered \$5,100 for the property; and proposing to give bond and security, that if accepted, the offer will be complied with in five days after the rising of the court. **Held:**

495 *1. **Same-Same-Creditors Unnamed-Bill in Equity.**—The deed not naming the creditors, the only mode of proceeding open to them, was by bill in equity, where the necessary parties might be convened, their rights and liabilities ascertained and adjusted, and the trust enforced under the supervision of the court.

2. Same-Same-Same-Same-Want of Proper Parties.—There having been no objection for want of proper parties, the want of such parties is no objection to the proceedings.

3. Same-Same-Same-Same.—If there were other creditors beside those named in the bill, they could have asserted their claims before the commissioner.

4. Same-Same-Same-Same.—The creditors before the court made no objection to a sale under the deed; and as the bill was taken for confessed as to them, it is to be presumed they desire the sale. If they did not constitute a majority of the creditors, it was for H to show it. He alone knew their names or numbers.

5. Same-Same-Deed of Trust for Wife.—As the deed of trust makes no mention of the deed in favour of the wife, and the decree in this case does not touch the property conveyed for her benefit, the validity of the deed for her benefit is not a question in this case.

6. Same-Same-Purchase by Trustee.—T purchased one part of the land sold, at a commissioner's sale under a decree of court, and had paid all the purchase money, and was entitled to a deed; but it had not been made. This is not a cloud upon the title which will avoid the sale.

7. Same-Same-Private Sales.—H having consented to a private sale by the commissioners to R, at a certain price, and the commissioners having sold to M at a higher price, he could not withdraw his consent to a private sale, so as to set aside the sale as made, as not made in pursuance of the decree.

8. Same-Same-Few Bidders.—It is no just cause for vacating a judicial sale, that only a few bidders were present. The only enquiry for the court, is, whether the terms of the decree have been pursued, and the property sold at an adequate price.

9. Same-Same-Private Sales-Reopening Biddings.*

—The advance of \$100 upon the price paid for the property, is no such substantial and material advance upon the price obtained by the commissioners, as would justify the court in annulling the sale, and ordering a new sale.

496 *This case was argued in Richmond, and decided at the June term 1873, at Wytheville.

This was a suit in equity in the Circuit court of Matthews county, brought in August 1869, by Lanier, Brothers & Co., against Wm. H. Hudgins and others, to enforce satisfaction of the judgments which they had recovered against Hudgins, and which were docketed in May and June 1867. The bill set out the recovery and docketing of the judgments, and stated, that after the judgments were docketed Hudgins made a deed by which he conveyed to Thomas U. Hunley, certain real estate in said county, for the benefit of his creditors. That by the provisions of the deed the trustee was required to make sale of the property after the 1st of April 1869, when called on by a majority of the creditors of said Hudgins, and apply the proceeds to the payment of his debts; and if said proceeds were not sufficient to pay all, then they were to be applied ratably. But it was provided that if any prior liens had been acquired on the real estate of Hudgins, they were to be first paid. That the wife of Hudgins united in this deed; and at the same time Hudgins executed another deed, by which he conveyed to Hunley other real estate, in trust, for the separate use of his wife.

They say further, that Hudgins is insolvent; that they have liens on his real estate by virtue of their judgments; that they do not intend to waive their said liens; but they are willing to have their debts paid out of the property conveyed for the benefit of the creditors of Hudgins and have no disposition, unless it becomes necessary to prevent them from suffering loss, to interfere with the said deeds of trust. They are informed that there are other parties who have acquired liens on the real estate of Hudgins, of even or prior date to theirs. They state who these parties are. And **497** making Hudgins, *Hunley, and the lien creditors, parties defendants, they pray that the property conveyed by Hudgins, for the benefit of his creditors, may be sold, and the proceeds applied to the payment of the debts secured thereby, first paying the liens on the real estate of Hudgins. That the liens may be ascertained; and all other proper accounts taken; and for general relief.

In October 1869, the bill having been taken for confessed as to all the defendants, the court made a decree directing one of the commissioners of the court to take an account of all liens upon the real estate of

*See foot-note to Roudabush v. Miller, 33 Gratt. 454, where there is a collection of cases on Reopening Biddings. See also, Coles v. Coles, 33 Va. 528, 5 S. E. Rep. 874, where the Virginia cases on this subject are reviewed.

Hudgins, which had been acquired before the execution of the deed, in the bill mentioned, to Hunley, and the amount of such liens, and the persons entitled thereto, and their priorities.

The commissioner proceeded to state the accounts upon notice to Hudgins, Hunley, and the lien creditors, no creditor being named in the deed of trust; and from his report it appears that the debts of the creditors by judgment docketed before the execution of the deeds to Hunley, with interest to October 1st 1870, amounted to \$4,211 44, and that the plaintiff's debt amounted to \$3,072 46. To this report there was no exception.

After this report had been returned Hudgins answered the bill. After stating the execution of the deeds, and that the deed for the benefit of Mrs. Hudgins was made in pursuance of an express agreement that it was to be done in consideration of her joining in the other deed, he denies that the plaintiffs have a right to sue him; because by the terms of the deed he was to retain possession until a majority of his creditors should direct a sale: and this had not been done. He insists plaintiffs shall be put to their election, whether they will claim under said deed or under the lien of their judgments. That if they proceed

498 *upon the title to the property should be removed before a sale is directed. And he proceeds to set out the difficulties as to each parcel of land. The only parcel, however, which is involved in this case, is one of six and one-half acres, which had been sold under the decree of the county court of Matthews, and of which he had become the purchaser, and had paid the purchase money, but had not received a conveyance for it; and the commissioner had since died.

The cause came on to be heard on the 11th of October 1870, when the court, not then deciding on the liability of the property conveyed for the benefit of Mrs. Hudgins, to satisfy the plaintiff's debt, decreed that unless Wm. H. Hudgins, or some one for him, should, within four months from the rising of the court, pay to the plaintiffs the sum of \$3,072.46, with interest on \$2,016.64 cents, part thereof, from the 1st day of October 1870, then John P. Donovan and M. B. Seawell, who were appointed commissioners for the purpose, should proceed to sell the land conveyed in the deed for the benefit of creditors, at public auction, to the highest bidder. The terms of the sale were, cash for the expenses, and a credit for the balance of one, two and three years, with interest from the day of sale; taking bonds and security, and retaining the title.

And, with the consent of the defendant, Wm. H. Hudgins, the commissioners were authorized to sell the said land in lots to suit purchasers. And with like consent the commissioners were authorized to sell any of said parcels of land at private sale, and on the credit before directed to be given.

The commissioners proceeded to sell a

part of the property embraced in the deed. This was the tract called Cricket Hill, where Hudgins had carried on business as *a merchant, and the small tract of six and one-half acres lying on the opposite side of the road. This was sold as a whole, and was purchased by James W. Marchant, Wm. N. Trader and Josephus Trader; and the price to be paid for it was \$5,000.

Hudgins excepted to the report, on the ground, first: that by the decree the land was to be sold at public auction, unless, by consent of the defendant Hudgins, a private sale should be made. That Hudgins consented to a private sale to Wm. A. Richardson, who offered a price for the two lots sold, sufficient to pay the expenses of sale, and all the debts reported; and Hudgins insisted upon this offer being accepted:

2d. Because it is not reported by the commissioners that they sold the land at public auction, as directed by the decree, nor at private sale, by and with the consent of the defendant Wm. H. Hudgins. The fact is, it was sold at private sale, without his consent and against his protest.

3d. Because the commissioners have not reported whether said lands sold for three-fourths of their assessed price at the last assessment thereof, for the purposes of taxation.

It appears from the statements of the commissioners and the affidavits filed, that previous to the day of sale Hudgins had negotiated with Wm. A. Richardson, for the sale to him of the parcel of ground called Cricket Hill, on which was a storehouse, and a lot of six and one-half acres, lying across the road from the former, the same sold by the commissioners, at the price of \$4,500; and on the day of sale the proposition of Richardson was stated to the commissioners, and they expressed themselves disposed to accept it, or so much as would pay the debts, costs and expenses.

500 But whilst one of the *commissioners was making a calculation to ascertain whether this sum would pay all the debts reported and the expenses of sale, another party proposed to give for the two lots \$4,600, and wished the property put up together. Hudgins insisted they should sell to Richardson, at the price he had offered; but the commissioners explained that they could not sell for \$4,500, when \$4,600 was offered, and they were about to have the property put up at auction. Before this was done, however, upon the suggestion of Mr. Donovan, one of the commissioners, to Richardson, that he would accept any thing over \$4,600, Richardson offered \$4,650. Mr. Donovan went to Mr. Seawell, the other commissioner, and proposed to close with this offer, at once; but he declined doing so, until Marchant, who had made the other offer, was consulted, as he might be inclined to give more. They both then went to Marchant, who, when the matter was explained to him, offered \$5,000. This they communicated to Richardson, and asked him if he would give more; when he

shook his head and said, "I am out of the ring." The commissioners then informed Marchant & Trader that they could have the property at their offer; and whilst the bonds to be executed by the purchasers were in preparation by Mr. Donovan, Hudgins objected to the sale, and required and demanded that the property should be put up at public auction in separate lots; the Cricket Hill lot first, and then the other. He was told by Mr. Seawell that the property was sold. After Seawell had left the ground, some dissatisfaction was expressed by the company present to Mr. Donovan, at what had been done; when, he being unable to satisfy them, announced that if any one was willing to give more than \$5,000 for the properties, he would not confirm the sale; when Richardson offered \$5,100; and Marchant declined to give more.

501 Donovan *thereupon, declined to sign a receipt for the cash payment by Marchant.

Some days after the sale, Mr. Donovan saw Richardson, and told him that if he wished to contend for the property, he had better make a tender of the cash payment and the bonds; that he would not involve himself further in the controversy between the contending parties; and should therefore refuse to accept the tender, but would report the facts to the court; but no such tender was made. And Mr. Donovan says he saw him a second and third time, and told him in his last interview, that unless he, by a certain day named, made a tender of the bonds and cash, he, Donovan, should close the matter, so far as he was concerned, by uniting with Mr. Seawell in his receipt to Marchant and Trader; and he was understood as declining to make the tender, and saying he would have nothing more to do with it. Donovan then told him he would go and sign the receipt to Marchant; to which Richardson made no objection; and, in a few minutes afterwards, Donovan signed the receipt.

Wm. H. Hudgins presented a petition to the judge, in which, after stating that Richardson had offered \$5,100 for the property, and that the petitioner had protested against the sale to Marchant & Trader, he insists that the said sale should not be confirmed, for the reasons stated in his exceptions. And he offers and binds himself, and will execute bond, with satisfactory security, that the said offer of \$5,100, made for said land, will be complied with in five days after the rising of the court.

The cause came on to be heard on the 26th of October 1871, when the court overruled the exceptions of the defendant, Hudgins, to the report, and confirmed it. And it being suggested that Hudgins was in 502 possession of the *property sold by the commissioners, it was ordered that he, within ten days from the service upon him of a copy of this decree, should surrender and deliver possession thereof to the purchasers, Marchant & Trader.

And it was further decreed, that the sheriff of Matthews should proceed to sell

the other property conveyed in the deed of Hudgins to Hunley, for the benefit of his creditors; and that a commissioner of the court should take an account of the debts due by Hudgins and secured by said deed, showing the amount and character thereof, and to whom such debts were due. And the death of Hunley was suggested.

From this decree Hudgins obtained an appeal to this court.

Steger, for the appellant.

John Howard, for the appellees.

STAPLES, J., delivered the opinion of the court.

The first ground of error assigned by the appellant is, that before a decree was rendered for the sale of the lands in controversy, the appellees should have been required to elect whether they would claim under or against the deed of trust executed by the appellant for the benefit of his creditors. The appellees acquired a lien by judgment, upon all the real estate of the appellant, before the execution of that deed. No attempt was made to defeat or interfere with this lien. On the contrary, the deed recognized the rights of the judgment creditors, and provided for enforcing them. It mattered but little, therefore, to the appellant, whether the property was sold under the judgment or the deed of trust.

It is true, the deed provides for a sale by the trustee only upon request made by 503 a majority of the creditors. *But how were they to be ascertained? The deed does not name them; nor does it enumerate the debts. As they were only known to the appellant, it would have been always difficult for the trustee to determine whether a majority had already united in demanding a sale. Inasmuch as the trustee could not sell without the concurrence of a majority, the only recourse of the creditors was a suit in equity, where the necessary parties might be convened, their rights and liabilities ascertained and adjusted, and the trust enforced under the supervision of court. That course was pursued in this case. It is true the creditors having judgments are only named in the bill, but the appellant has made no objection for the want of proper parties. He did not claim, in his answer or otherwise, in the court below, there were other creditors necessary to be brought before the court. If, indeed, there were others besides those named in the bill, they could have asserted their claims before the commissioner to whom the accounts were referred. The appellant was notified of the time and place of taking these accounts; but he failed to attend or to file any exception to the report before or after its confirmation. The creditors, before the court, made no objection to a sale under the deed. As they permitted the bill to be taken for confessed, it is to be presumed they desired the sale. If they did not constitute a majority of the creditors, it was for the appellant to show it. He alone, was

in possession of information as to their name and number, and as he did not choose to furnish it, the court might well conclude a majority of them were represented.

The appellant claims, however, that his wife joined in the trust deed, upon condition of the creditors' consent to the settlement in her favor. And he further insists,

that they shall be required to ratify
504 the settlement, or *abandon all claims under the deed. In the first place, the trust deed imposes no such terms. It is an absolute conveyance on its face, with an unconditional relinquishment of dower. In the second place, the decree does not interfere with the property embraced by the settlement. It directs only a sale of what is conveyed by the trust deed. Whether the creditors, including the appellee, have in fact claimed under that deed, and if so, whether such claim will preclude them from contesting the validity of the settlement, are questions not arising in this case, and in respect to which we express no opinion.

Another error assigned is, in decreeing a sale before the difficulties in respect to the title were removed. It is not pretended there is any cloud upon the title to the lots actually sold by the commissioners. No objection is made by the purchaser; and the price agreed to be paid for the lots abundantly shows, that not the slightest apprehension was felt by any one, in regard to the title. With respect to the other small tract, not yet sold, according to the appellant's own showing, there is no real difficulty. The appellant became the purchaser under a decree of the County court of Matthews; has paid all the purchase money, but has received no deed. This tract contains only about six and a half acres, and probably is of but little value. The legal title can at any time be obtained, and there is no reason to suppose that any sacrifice will result from a sale of the property without it. The whole subject is under the control of the Circuit court, which will take care not to confirm a sale at a grossly inadequate price.

The next and principal ground of complaint is the error in confirming the sale made by the commissioners, because the sale did not conform to the terms of the decree under which the commissioners
505 were acting; was not *only without the consent of the appellant, but directly against his most earnest remonstrance and protest; was a surprise upon the crowd in attendance, who were allowed no opportunity to bid; was conducted secretly and confined to two bidders, one of whom was not advised that if he did not increase his bid the offer of the other would be accepted; was thus a surprise to him, and prevented his giving more, and resulted in a sacrifice of the property. These are the objections; not one of them is well founded. It is not necessary to consider in detail the evidence bearing upon this point. It is sufficient to refer to a few of the more prominent facts.

The decree provided that the commissioners, with the consent of the appellant,

might sell the lots at private sale. The appellant expressly gave such consent. He wished the property to be sold for four thousand and five hundred dollars to his friend William A. Richardson, who was willing to purchase the lots at that price at private sale. The commissioners believing this was their fair value, were willing to make the sale on those terms. It was ascertained, however, very soon, that other parties were willing to give more, and the commissioners did not feel authorized to close the contract with Richardson, upon the terms proposed by him. After some negotiations, Marchant and Trader became the purchasers at the sum of five thousand dollars. It was not until after it was clearly ascertained that they were willing to purchase the property upon more liberal terms than those offered by Richardson, that the appellant insisted upon a public sale. Having given his consent that the property might be sold privately, he had no right to retract that consent, because his individual preferences were not consulted.

As to the charge that there were only two bidders present, and that the crowd assembled was denied an opportunity
506 *of bidding for the property, it is notorious that Richardson, Marchant and Trader, were the only persons present desiring to become purchasers. The complaint comes, however, with an ill-grace from the appellant, who insisted that the sale should be made to Richardson upon the very first terms proposed by him. It is no just cause for vacating a judicial sale, that only a few bidders were present. The competition may be as active and spirited among two or three as a dozen. The only enquiry for the court, is, whether the terms of the decree have been pursued, and the property sold at an adequate price. In this case the price agreed to be paid by Marchant and Trader, is five hundred dollars in excess of the appellant's own estimate.

It is said, however, that Richardson was willing to give more than five thousand dollars; but was refused an opportunity of doing so. His affidavit was taken and filed in the record. According to his version, he was willing to give forty-six hundred and fifty dollars; he was informed that other parties had offered five thousand dollars. He then remarked you can count me out of the ring; "but put the place up to the highest bidder." This was certainly a very distinct intimation that Mr. Richardson was unwilling to pay the price offered by Marchant and Trader. It was a little presumptuous in him, to say the least, under such circumstances, to demand a public sale. He declares, however, that he afterwards expressed his willingness to pay fifty-one hundred dollars. Why then did he not make the offer? He was offered ample opportunity of doing so. A few days after the sale and before the contract with Marchant and Trader was fully consummated, he was told by one of the commissioners, that if he wished to contend for the property, he had better make a tender of the

507 cash payment and the bonds; but he declined to make any such tender.

On another occasion, he was informed by the same commissioner, that time enough had elapsed to have the matter put into a definite form, and he must say whether he then contended for the property at five thousand and one hundred dollars. But the commissioner was unable to get a definite or satisfactory answer from him. It is apparent that this witness did not entertain any serious thought of buying the property upon the terms mentioned by the commissioner; and that he has been actuated throughout simply by a desire to gratify the wishes of the appellant. He does not now, in his affidavit, express a wish to buy the property upon any terms. The record does not show that any one else is anxious to become a purchaser. It is true that the appellant, in his petition to the Circuit court, proposed to execute bond with satisfactory security, that the offer of fifty-one hundred dollars, made on the day of sale, would be complied with "within five days after the rising of the court." But it is obvious that this is no such substantial and material advance upon the price obtained by the commissioner as would justify the court in annulling the sale already made, and exposing the creditors to all the delays and hazards attending a re-sale. There is no doubt the property was sold at a very advantageous price; the sale was fairly conducted, and the terms of the decree fully complied with. The commissioners were the counsel of the parties; and their high character, personally and professionally, is an ample guaranty that no injustice was done, no fraud perpetrated or attempted. It would be a bad precedent, leading to most pernicious consequences, to vacate a sale made under such circumstances, because the owner may be able to find some one

508 willing to advance a small sum *in excess of the commissioner's sale.

Such has not been the practice in Virginia.

For these reasons, I think the decree of the Circuit court should be affirmed.

Decree affirmed.

509 *Rollo, Assignee, v. Andes Ins. Co.

June Term, 1873, Wytheville.

[14 Am. Rep. 147.]

1. **Securities of Foreign Corporation—Garnishment of State Treasurer.**—The Treasurer of the State, who holds bonds of a foreign Insurance Company, doing business in the State, under the act of February 3d, 1866, as amended by the act of March 3d 1871, is not liable to be summoned as garnishee by a foreign creditor of the Insurance Company.

2. **Same—In Hands of Public Officer—Liability by Attachment.**—A public officer of the State cannot be made liable by attachment at the suit of an individual, for funds in his hands clothed with a trust under the authority of a public law.

*See monographic note on "Attachment" appended to Lancaster v. Wilson, 37 Gratt. 694.

3. **Same—Foreign Attachment.**—Under the act of February 3d, 1866, when a foreign insurance company shall cease to do business in the State, and its liabilities, fixed or contingent, to citizens of the State, shall have been satisfied or terminated, the treasurer is authorized to deliver to such company the bonds and other securities deposited with him. Though the company has ceased business in the State, and its liabilities to citizens of the State have been satisfied or terminated, the bonds in the hands of the treasurer cannot be attached by a foreign creditor: but they must be delivered by the treasurer to the company.

This case was argued in Richmond, at the March term of the court, and was decided at the June term, at Wytheville.

In October 1872 Wm. E. Rollo, assignee in bankruptcy of the Merchants' Insurance Company of Chicago, in the State of Illinois, instituted an action of assumpsit in the Circuit court of the city of Richmond, against the Andes Insurance Company of Cincinnati, Ohio, laying his damages at \$20,000. At the same time, upon affidavit filed, that the defendant was not a resident of this State, an attachment against the estate of the Andes Insurance Company was issued; and upon this attachment

510 *Joseph Mayo, treasurer of the State of Virginia, was summoned as a garnishee.

On the 5th of February, 1873, the Andes Insurance Company and Joseph Mayo, jr., treasurer, moved the court to abate the attachment. The company stated four grounds on which it based its motion; and the treasurer of the State relied upon the last two of these grounds; which are all that need be stated. They are:

3d. Because the commonwealth, its officers and its agents, are not subject to attachment process.

4th. The property of the defendant in the treasury of the commonwealth, is not liable to attachment at the suit of a non-resident of Virginia, but is there held in trust for the benefit of the home creditors of the defendant corporation; and as to any residue after the satisfaction of these claims, in trust, to be returned and delivered up to said defendant.

It appeared that the Andes Insurance Company was created and located in Ohio, and having engaged in business in Virginia, the company had, in pursuance of the act of February 3d, 1866, deposited with the treasurer of the State \$50,000 of the bonds of the United States.

In November 1872 an agent of the Andes Company came to Virginia, to settle up its business. In December he satisfied Mr. Mayo, the treasurer, that all claims for unearned premiums and losses against the company, due to residents of Virginia, had been satisfied, except one claim for \$900, which the company did not consider valid, and were resisting. And thereupon, Mayo transferred to the agent all of the \$50,000, except what he considered sufficient to satisfy this and another attachment which had

been served on him, and to satisfy the said claim, if it should be sustained, and such contingent liabilities as might possibly arise before a full settlement. The amount reserved by him was two bonds of \$10,000 each, and \$600 in gold, which he had received for interest.

Upon the hearing of the motion, the court made an order abating the attachment. And thereupon, Rollo applied to this court for a writ of error; which was awarded.

Johnston, Williams & Boulware, for the appellant.

Jno. W. Daniel and Page & Maury, for the appellees.

STAPLES, J. By an act of the Legislature passed February 3d, 1866, amended by an act of March 3d, 1871, no insurance company which has not been incorporated under the laws of Virginia, can carry on its business within the State, until it shall have deposited with the treasurer of the State securities—State, corporate, or individual—of the cash value at least of ten thousand dollars.

If the securities so deposited are registered or individual bonds, the company is required, at the same time, to deliver to the treasurer a power of attorney, empowering the latter to transfer the bonds, when necessary, for the purpose of meeting any of the liabilities provided for in the act. It is also provided, that any foreign insurance company doing business in the State, may be sued in the courts of the commonwealth upon policies of insurance made to citizens or residents therein, in like manner as if such foreign insurance company had been incorporated by the General Assembly.

And by another provision of the act, it is declared that if such company shall cease to carry on business in this State, and its liabilities, fixed or contingent, to citizens of the State, shall have been satisfied or terminated, upon satisfactory evidence of this fact to the treasurer, he is authorized to deliver to such company the bonds and other securities deposited with him.

There are other provisions in the act, but it is not necessary to mention them, as they have no bearing upon the matters in controversy here.

The Andes Insurance Company, incorporated in the State of Ohio, under authority of this statute, deposited with the treasurer of this State, fifty thousand dollars of United States registered bonds, and until the occurrences hereinafter mentioned, has been carrying on the business of insurance in Virginia.

On the 29th of October 1872 the plaintiff in error, who is the assignee in bankruptcy of the Merchants' Insurance Company of Chicago, sued out of the clerk's office of the Circuit court of the city of Richmond, an attachment against the Andes Insurance Company, upon a claim of about seven thousand dollars.

This attachment was served the 30th of

October, 1872, upon Joseph Mayo, State treasurer, by delivering to him a copy, and summoning him to appear as garnishee at the next term of the Circuit court.

When the attachment came on to be heard, a motion to abate it was made on several grounds. This motion was sustained by the court; and the attachment was thereupon quashed. The case is before us upon a writ of error and supersedeas to that judgment. It is not deemed necessary to consider all of the grounds suggested for abating the attachment, as, in our view, one of them is decisive of the case.

It is important, in the first place, properly to understand the nature and effect of the process of garnishment. Garnishment is substantially a suit by the defendant in the attachment, in the name of the plaintiff against the garnishee. In this suit, as against the garnishee the plaintiff stands upon no higher ground than the defendant, and can acquire no greater right than the defendant himself possesses. In a case before the Circuit court of the United States, Daniel, J., said: "The proceeding must be regarded as a civil suit, and not as a process of execution to enforce a judgment already rendered. In this proceeding the parties have a day in court; an issue of fact may be tried by a jury; evidence adduced, judgment rendered, costs adjudged, and execution issued on the judgment." *Tunstall v. Worthington, Hempstead's R. 662. Drake on Attachment, sec. 452.*

Garnishment also operates as an attachment or levy upon the effects of the defendant in the hands of the garnishee. It renders the garnishee liable for such effects, or their value, if they are not forthcoming to meet the judgment of the court.

And it has been held in several cases, that the garnishee will be personally responsible if the goods are taken from him by a wrongdoer; and this, upon the ground that the garnishee may have his action of trespass against the latter. *Parker v. Kinsman, 8 Mass. R. 486; Despatch Line of Packets v. Bellamy Man. Co.; 12 New Hamp. R. 205.*

Now, it would seem to be very clear upon general principles, that the treasurer of the State having the control and custody of insurance funds and securities under an act of the Legislature, cannot be subject to any proceeding of this sort. If the garnishment operates in this case as in all others, to bind the effects, it is obvious that these securities may at any time be taken from the possession of the treasurer, to answer the demands of creditors. Judgment may be rendered against him for their value, if they are not forthcoming in obedience to the orders of the court; costs

adjudged; and executions and attachments issued to enforce obedience or secure payment. These results must follow, or the courts must contrive, in some way, to divest the judgment in these cases of the operation and effect attaching to all

other judgments in proceeding by garnishment.

The treasurer may conceive it to be his duty to refuse obedience to an order of the court requiring him to surrender the securities. How is the order to be enforced? Is he to be attached while in the discharge of his official duties, taken from his office, and detained in custody, for refusing to violate a trust reposed in him by the Legislature? He may decline to appear: Is the court to hear proof of the amount or value of these securities, and order their delivery to one of the officers of the court?

This would be to violate the whole purpose and intent of these statutes, and render them a delusion and a snare, instead of affording a security to citizens and residents of Virginia. By the express terms of the act, the treasurer is prohibited from surrendering these securities until the liabilities of the company to the citizens of the State shall have been satisfied, or shall have terminated. It is easy to perceive that the whole legislative scheme may be defeated, and the law violated, if these securities may be subjected to the claims of every foreign creditor who may assert a demand in our courts.

It is said, however, that none of these consequences can follow in this case, because the Andes Company have satisfied all their liabilities in the State, and the treasurer is willing to surrender these securities under the order of the court.

I think it a sufficient answer to this to say that we are not permitted to engraft exceptions upon the law to meet particular cases. The question must be decided upon general principles, and not with reference to the particular facts of this case, or the views and opinions of the treasurer. Something more is involved than the

515 *rights and obligations of the treasurer. It is a question that concerns the State. It is certainly not compatible with her sovereignty and dignity to be arraigned before her own tribunals, at the suit of individuals, in any other mode than is prescribed by her statutes. Nor is it consistent with her interests, nor the proper administration of public affairs, that her officers shall be arrested in their public duties, and required to answer before the courts for funds or securities committed to their custody for a specific purpose, under authority of a public law. The treasurer of the State is one of the most important officers of the commonwealth, with grave, arduous and difficult duties to perform. It is impossible to foresee the mischiefs and embarrassments that will ensue, if, in addition to these duties, he is to be involved in the conflicts of creditors, to answer innumerable rival attachments, employ counsel, answer interrogatories, and otherwise consume time and attention which should be devoted exclusively to the public interests. I do not deem it necessary to cite the numerous authorities bearing upon this point. They are fully considered in Drake on Attachment, sec. 492 to 516 inclusive.

While there is some conflict of opinion in regard to the liability of municipal corporations and their officers to the process of garnishment, no case of acknowledged authority can be found which holds that the officers of a State can be made liable, by this proceeding, for funds in their hands, clothed with a trust under the authority of a public law. The Supreme court of Massachusetts has announced the broad doctrine, that no person deriving his authority from the law, and obliged to execute it according to the rules of law, can be charged as garnishee in respect of any money or property held by him in virtue of that authority. *Brooks v. Cook*, 8 Mass. R. 256; *Colby v. Coates*, 6 Cush. R. 558.

516 *However broad this principle may be thus announced, there is peculiar force in its application to the present case. The treasurer is required by the statute to retain the securities in the treasury for the special objects contemplated by the act, until the liabilities of the company are settled or terminated. So long as any thing remains to be done, so long as these liabilities continue, he is expressly prohibited from disposing of or surrendering them. And when the treasurer is satisfied these securities or funds are no longer required to meet any liabilities of the company in the State, he is authorized and required to deliver them to the company. This is the extent of his authority. His power and duty are fixed by the law. Now, whether this does or does not constitute a contract on the part of the State with the insurance company, it is the law for the treasurer, fixing the measure of his authority and his responsibility. He holds the securities in trust, to be administered, first for the people of Virginia, and then for the company making the deposit. This is the distinction given them by the law, controlling not only the treasurer but the courts also; and it would seem there is no power, except that of the Legislature, to change such destination.

It was insisted, however, that in this way a foreign insurance company may effectually screen its assets from the just claims of creditors. The theory of this whole legislation is, that a foreign insurance company may come into the State, deposit its funds and securities with the treasurer, and carry on business here for an indefinite period. However long this may continue, the securities deposited cannot be surrendered or subjected to the claims of creditors. If this exemption be wrong, if the State has improperly empowered a certain class of debtors to place their assets beyond the reach of creditors, the policy of this 517 legislation is bad, and ought *to be abandoned. But this is a matter which addresses itself to the consideration of the Legislature, and not to the courts.

In returning the securities to the company depositing them, the State complies with her engagement, as expressed through her statutes. The foreign creditors have no just cause of complaint. As to them the

securities are in the same condition they occupied before the deposit was made. It is not to be presumed that an insurance company will permit its assets to remain in the treasury after it has ceased to carry on business in the State, merely to defeat the claims of creditors. If this shall be done, the State or the treasurer would scarce become a party to the fraud, and the company would no doubt be required to take possession of its property. Doubtless, upon the failure of any other remedy, the courts, ever alert to prevent and suppress fraud, would, in such case, assume jurisdiction and afford suitable relief. Nothing of the sort is pretended in this case, and no such question arises.

Upon the whole, in every view of the case, I am satisfied the judgment should be affirmed.

Judgment affirmed.

The other judges concurred.

518

*Penn & al. v. Reynolds.

June Term, 1873. Wytheville.

Absent, STAPLES, J.*

Judgment—Defended at Law—No Relief in Equity.†—

In an action of debt upon two bonds executed on the 29th of December 1862 and payable twelve months after date, the defendants appeared and defended the action; and the jury scaled the debt, reducing it from \$5,198 to \$3,000, with interest from the day the bonds fell due; and the judgment was accordingly. About a year after the judgment was rendered, the defendants in the action filed their bill for an injunction to the judgment, on the ground that the debt was scaled as of its date, instead of the day of its payment. **Held:** The defendants having defended themselves at law, cannot afterwards come into equity for relief.

This is an appeal from a decree of the Circuit court of Patrick county, dissolving an injunction which had been awarded to the judgment of the said court. The material facts of the case are as follows: In December, 1862, the appellants, Thomas H. Penn and Jackson Penn purchased of the appellee, Fleming Reynolds, commissioner for the estate of Elinder W. Reynolds, dec'd, a tract of land in said county, containing about 325 acres, at the price of \$30 25, and a slave named Mary, at the price of \$2,168; for each of which two sums of money they executed a bond bearing date on the 29th

*JUDGE STAPLES was related to some of the parties.

†**Relief at Law and in Equity.**—In both *Knott v. Seamands*, 25 W. Va. 104, and *Blasi v. Vickers*, 27 W. Va. 462, the principal case is cited along with *Sanders v. Branson*, 23 Gratt. 864, as authority for the proposition that when a statute gives a right to the defendant to defend at law or obtain relief in equity, if he avails himself of his right to make his defense at law and judgment is given against him, he cannot afterwards obtain relief upon the same grounds in equity. See also, *Jarrett v. Goodnow*, 30 W. Va. 602, 20 S. E. Rep. 575, 7 Enc. of Pl. & Pr., p. 810.

day of December 1862, and payable twelve months after date, in current money. On the 6th day of January 1864, eight days after the bonds became payable, a 519 tender of *the amount of them, including interest, in Confederate money, was made by the debtors to the creditor, who refused to receive the same, because it was Confederate money. In February 1867, he brought an action at law against them upon the said two bonds, in the said court. On the 12th day of April 1867 the defendants plead payment, on which plea issue was forthwith joined, and leave was given them to file a special plea within sixty days. No such plea was filed within sixty days; nor does it appear that any other order was made in the case, until the 17th day of April 1868, when the cause was tried. On that day the defendants filed a demurrer to the declaration, which was overruled; whereupon the defendants asked leave to file two special pleas in writing numbered 1 and 2; to the filing of which the plaintiff objected, and the court sustained the objection, and rejected the pleas. They were, in substance, as follows: Special plea No. 1, averred that the writing obligatory for the sum of \$2,168 was executed for and in consideration of the purchase of a slave, and for no other consideration whatever; and that before the said writing became due and payable, or a short time thereafter, the title of the plaintiff to said slave had entirely failed; by reason whereof the defendants had been damaged to the amount of \$2,168, which they prayed might be enquired of, and offset against the plaintiff's demand. Special plea No. 2, averred that on the 29th day of December 1863, (the day on which said bonds became due and payable,) the defendants tendered and offered to pay to the said plaintiff the said sum of money in said declaration mentioned, to receive which of said defendants, said plaintiff then and there wholly refused; that they have always from that time been, and still are, ready to pay to the said plaintiff the said sum of money in current money, as of the 29th day of December 520 1863; *and that they then, to wit: at the time of offering such plea, brought the said sum into the said court, ready to be paid to the said plaintiff if he would accept the same. The said special pleas being rejected, as aforesaid, there was thereupon a trial by jury of the issue joined on the plea of payment, when the jury found for the plaintiff the debt in the declaration mentioned; and further found, "that the same was contracted in relation to Confederate treasury notes as a standard of value, and that the true value of the same in lawful money is \$3,000." They therefore found "for the plaintiff the said sum of \$3,000, with interest from the 29th day of December 1863;" and judgment was rendered accordingly.

On the 7th day of July 1869, more than a year after the rendition of said judgment, the defendants filed a bill of injunction to the same in the said court, (having a few

days previously obtained an order from the Judge of said court in vacation awarding such injunction,) in which, after referring to and stating the facts in regard to the said contract of purchase and the execution of the said bonds, they aver "that said debts were contracted in reference to Confederate States Treasury notes as the standard of value." They then allege that on or about the 1st day of January 1864, and within 3 or 4 days next after said bonds fell due, they tendered to the plaintiff, in payment of the same, the sum of \$5,196 49 in Confederate States Treasury notes, that sum being the amount of principal and interest then due on said bonds; that said plaintiff refused to accept the amount thus tendered him, alleging as a reason therefor, and the only reason, that he did not want Confederate money; and that between the maturity of the bonds and the date of said tender, there had been no substantial, or in fact any, depreciation in said currency.

They set out, as a part of their bill, a copy of the record of the action at law upon the said bonds; after which they "represent, that had the debt been scaled to its true value as of the maturity of the bonds, as by law and the decisions of the Supreme court of Appeals of the State should have been done, the judgment should have been for \$—, and interest only, instead of the sum of \$3,000," which they say was the effect of scaling the debt "as of the date of the contract." They charge that the Stay Law will soon expire by its limitation, and that said Reynolds is threatening to sue out execution on his judgment at law; and they therefore pray, that he be enjoined from all further proceedings on said judgment, and for general relief.

On the 14th day of April 1870 the said Reynolds filed his answer, in which he demurred to the bill for want of equity; stated that the whole matter in controversy had been fairly and properly tried in the action at law, and verdict and judgment rendered therein accordingly; that the complainants had been in the possession and enjoyment of the said land ever since the purchase thereof, and of the said slave until she was emancipated in consequence of the war; that a court of equity had no right to interfere with the said judgment, on the ground of fraud, accident or mistake, or any other ground; and that the only redress to which the complainants were entitled for any error in the judgment was by an appeal from the same; but that there was in fact no error in said judgment, at least to their prejudice.

Many depositions were taken and filed in the cause by both parties, relating chiefly to the questions, whether the sale was for Confederate money or not, and what was the value in good money of the said land and slave at the time of the sale. There is much conflict in the testimony on both of these questions; the value of the land, according to the witnesses, varying between about \$800 and \$3,000. Several of the jurors who tried the action at law

were examined; one of whom said, the jury decided upon the proof of the value of the property before the war and at the time of rendering the verdict; that they valued the slave at \$1,000 and the land at \$2,000, and accordingly rendered their verdict for \$3,000, which from the evidence they believed the property to be worth. One of the witnesses proved, that on the 6th day of January 1864, a tender was made of the amount of both bonds, in Confederate money, to the creditor, who refused to take the same; saying the legatees were not willing to receive it. He did not object to taking the money because it was not the proper amount, but because it was Confederate money.

On the 15th day of April 1870, the cause came on to be heard upon a motion to dissolve the injunction, and the same was accordingly dissolved; and there was a decree against the complainants for costs and damages. From that decree they applied for and obtained this appeal to this court.

Jno. A. Campbell, for the appellants.

I. The decree of the court below declares that there is "no equity in the bill." This is manifestly erroneous. The bill was filed under § 4, ch. 71, p. 185-6, acts of 1865-66, and is strictly within the letter of the statute. Unless, therefore, the statute is unconstitutional—a proposition which it is not proposed to argue—the appellants were properly in court, as they could only avail themselves of their tender in a court of equity.

II. The contracts were for Confederate money. Vide *Walker's ex'or v. Page et als.*, 21 Gratt. 636; and the tender of Confederate money, was a good tender; and but for the act of assembly the depreciation, subsequent to the tender, would have fallen upon the appellee. Vide 9 Bac. Ab. Tender B. p. 317.

523 *III. Upon the whole case the decree is erroneous. Because the rights of the parties have not been ascertained by either of the two modes for adjusting Confederate contracts. Vide *Pharris v. Dice*, 21 Gratt. 303.

1. The sum recovered greatly exceeds the gold value of the amount contracted to be paid.

2. It is not the value of the property sold.

Lybrook, for the appellee.

MONCURE, P., delivered the opinion of the court. After stating the case, he proceeded:

If the debtors had not made their defence in the action at law against them upon their bonds, in pursuance of sections 1 and 2 of the acts passed March 3, 1866, (acts of 1865-6, p. 184,) and February 28, 1867, (acts of 1866-7, p. 694,) commonly called the adjustment acts, they might still have applied to a court of equity for relief, under the 4th section of the said act passed March 3, 1866, according to the case of *Sanders v.*

Branson, 22 Gratt. 364. But whatever may have been the measure of the relief to which they would have been entitled in a court of equity, under the said 4th section, a question which it is not necessary now to decide, they were entitled only to an election between the two remedies, and certainly had not a right to resort to both. They availed themselves of their legal remedy, by making their defence in the action at law upon the bonds. And the jury sustained their defence, by reducing the demand against them from its nominal amount of \$5,193, to the sum of \$3,000 in good money; for which latter sum, with interest from the 29th day of December 1863, they rendered a verdict; and judgment was given accordingly. If they were dissatisfied with the relief they obtained in the court of law, they 524 ought to have appealed *from the judgment of that court. Instead of doing so, they did not even except to any opinion given by the court in that action. When the stay law was about to expire, and the debtors apprehended that an execution would be issued against them upon the judgment, they applied to a court of equity for relief, under the 4th section of the act of March 3, 1866, and obtained an injunction to the judgment. In other words, having been once relieved in a court of law, they applied to be relieved again in a court of equity—that is, for double relief. We think they had no right to such relief in a court of equity. They only complain in their bill, that in the action at law, the debt was scaled to its true value, as of the date of the bonds, and not as of the time of their maturity, as, they say, should have been done, “by law and the decisions of the Supreme court of appeals of the State.” Now, it appears from the evidence in the cause, that the debt was not, in fact, scaled to its true value as of the date of the bonds; but the jury thought, that under all the circumstances, the fair value of the property sold, would be the most just measure of recovery in the action; and therefore adopted that principle as the measure of the recovery, in pursuance of the proviso contained in the first section of the said act of February 28, 1867. But whatever, and however erroneous, the principle adopted by the jury may have been, the judgment in the action at law cannot be questioned in this collateral way, but is conclusive until reversed by an appellate court.

We are of opinion that the said injunction was properly dissolved, and that there is no error in the decree of the Circuit court.

Decree affirmed.

525 *Sayers v. Cassell & als.

June Term, 1873. Wytheville.

1. **Guardians—Additional Voluntary Bond—Liability of Sureties.**—A guardian of an infant having, when he was appointed, given a bond with sureties, afterwards without a rule upon him or order of court, requiring it, comes into court and gives another

bond with other sureties. The last bond is valid and relates back to his appointment as guardian; and the sureties in the first bond are discharged; and are not necessary or proper parties to a bill by the ward against the guardian and his sureties for the settlement of his accounts.

2. **Same—No Allowance for Support and Education—Liability for Interest.**—The guardian not having been allowed anything for the board, clothing and schooling of his ward, under the circumstances of this case should not be charged with interest upon the small amount of the money of his ward in his hands.

This was a suit in equity in the Circuit court of Wythe county, brought in March 1861 by David Cassell against Leonard G. Bailey, his former guardian, and Robert Sayers, jr., and John R. and Henry W. Richardson, as the sureties of said Bailey, for a settlement of the guardian's account. It appears that Mrs. Cassell, the mother of the plaintiff, owned a small farm of about one hundred acres, and some stock, on which farm she lived with her three children, two sons and a daughter. Previous to 1852 she married Leonard G. Bailey; and in November 1852 Bailey was appointed guardian of the children. At this time the plaintiff was about thirteen years old; the other two were younger than the plaintiff.

526 *In November 1854, one of Bailey's sureties requiring counter security, Bailey executed another bond with other sureties. In February 1856, he executed another bond with other sureties; and in February 1857 he executed a fourth bond with the defendants as his sureties. This last bond seems to have been executed without a previous rule upon him, or order, requiring him to give counter security.

Sayers having answered the bill, insisting that the last bond was not valid, and that the sureties in the second bond should be parties, a commissioner was directed to settle the guardianship account; and he made his report, in which he charged the guard-

***Guardians—Allowance for Support and Education of Ward.**—In *Hauser v. King*, 76 Va. 736, the court said: “But, in the second place, it is insisted that there should have been no allowance for support, because the committee testifies that he makes no charge. This is not like the case of a father called to account as guardian of his infant child. In such a case, as a general rule, and in the absence of peculiar circumstances warranting a departure from it, no allowance for support out of the ward's estate is made to the guardian, if of ability to maintain the ward because *the law* imposes upon the father the duty to support his child. ‘The court, however,’ it is said, ‘will look with liberality to the circumstances of each particular case and to the respective estates of father and children, and will authorize the income arising from the estates of infants to be applied to their support whenever, under all the circumstances, it appears to be proper.’ *Evans v. Pearce* and others, 15 Gratt. 515, 516. See further, as to allowances to guardians, *Armstrong's Heirs v. Walkup*, 9 Gratt. 872; *Griffith* and others v. *Bird* and others, 22 Gratt. 78; *Sayers v. Cassell* and others, 23 Gratt. 525.” See monographic note on “Guardian and Ward.”

ian with the sum of \$345 18, as received the 10th of January 1855; and not allowing him any credits for expenditures or commissions, he stated the account by making annual rests, and charging compound interest upon the principal fund, up to the termination of the guardianship in December 1860, when the plaintiff attained the age of twenty-one years, the whole amounting to \$502 46, of which \$157 28 is interest. The commissioner reported that he considered the services of the ward rendered to the guardian, were a full and ample set-off against all and every charge for board, clothing and tuition; and that he did not allow the guardian commissions because he had not settled his accounts annually before a commissioner, as the law requires.

Bailey excepted to the report: 1st. Because no account is taken of the necessary expenditures made by the guardian for the boarding, clothing and schooling of the plaintiff. 2d. Because no commissions are allowed. 3d. Because the guardian is charged with compound interest, whilst he ought not to have been charged with any. 4th. For improperly charging him with any balance. 5th. In allowing the 527 labor of the *complainant as a set off to the amount expended in necessities for him.

From the evidence returned by the commissioner with his report, it appears that Bailey and his wife and her children lived on her farm in Wythe county until 1856, when the farm was sold and another was purchased in the county of Carroll, to which they removed. The plaintiff lived in the family and was treated as one of it, and he worked on the farm, when he was not at school. Bailey who was a carpenter, worked at his trade; and all the profits of the farm as also that of his labour, were expended in the support of the family, and they all including the plaintiff derived their support from it.

As to the value of the services of the plaintiff some of the witnesses thought they were worth fifty cents a day, others thought they were worth his board and clothing.

The cause came on to be heard on the 8th day of December 1861, when the court held that the bond executed by Bailey and the other defendants was valid, and that they were responsible to the plaintiff for whatever might be found due upon a settlement of his guardian accounts; and overruling the exceptions to the report, and confirming the same, decreed in favor of the plaintiff against the defendants for the sum of \$502 46, with interest thereon from the 17th of December 1860 till paid, and costs. And thereupon the defendant Robert Sayers Jr., applied to this court for an appeal; which was allowed.

Crockett, Blair and Caldwell, for the appellant.

The bond executed by L. G. Bailey, as guardian, &c., with M. B. Tate and A. S. Arnold as his sureties, on the 13th of November, 1854, is the last valid bond given

by the said guardian. The other two 528 subsequently *executed by him as guardian, &c., are void as statutory bonds.

The county court is a court of general jurisdiction; but prior to the statute authorizing it to appoint guardians and other fiduciaries, and to take bonds from them, had no power to do so. This case comes, then, within the rule "That if a special statutory authority be conferred on a court of general jurisdiction, the court, as to that authority, is a court of special jurisdiction, and the authority must be strictly pursued." *Creps v. Durden*, vol. 1, pt. 2, *Smith's Leading Cases*, p. 1073, 1095; *Ransom v. Williams*, 2 Wall. U. S. R. 313; *Hollins v. Patterson*, 6 Leigh 457. If jurisdiction is given by act of Assembly, the court cannot go beyond it. *Delany v. Goddin*, 12 Gratt. 158; *Thatcher v. Powell*, 6 Wheat. R. 119. In taking the two last bonds, under § 11 of ch. 122, Code of 1860, the court clearly exceeded its jurisdiction, and the bond of the 13th of November 1854 is the only valid and binding one in this case. The bill ought, therefore, to be dismissed.

If the above view of this case should not prevail with the court, it is respectfully referred to the following authorities to sustain the exceptions endorsed upon Commissioner Holbrook's report.

When a guardian has admitted by parol declarations, that he intended to make no charge for his ward's board, yet he ought not to be charged with interest on a sum of money received for his ward, unless such interest would exceed a reasonable compensation for board. *Hooper v. Royster*, 1 Munf. 119.

2. A guardian of infants is entitled to compensation for their support, though he may have promised their friends that he would not make any charge for it, and in fact kept no accounts against them. *Armstrong's heirs v. Walkup*, 9 Gratt. 372.

529 *3. When it cannot be shown by the guardian the amount of advances made for the support of each child the guardian should have reasonable allowance for the support of the ward. *Cunningham v. Cunningham*, 4 Gratt. 43.

4. Guardian keeps his wards in his family and treats them as his children; but they are required to work as other children might be, though the condition of his family did not require their services. The guardian is to be allowed a reasonable compensation for their board and clothing, and he is not to be charged for their services. *Armstrong's heirs v. Walkup*, 12 Gratt. 608.

5. For the grounds on which an encroachment on the principal of a ward's estate will be justified—see 2d Lead. *Cases in Eq. pt. 2d* 163-169-170; in the matter of *Boswick*, 4 Johns. ch. R. 100.

Kent, for the appellee.

The 6th section of ch. 127, Code, directs the mode in which a guardian gives his bond: the 11th sec. ch. 132 provides for the mode in which a new bond may be given; and the 12th of the same declares its effect.

It is submitted that whilst the statute points out the mode in which a guardian may be forced to renew his bond, it was never contemplated he might not voluntarily come into court and upon his own motion renew his bond.

In this case the bond sued upon is regular and in due form. No objection can be urged against it upon the ground that it does not, in form, comply with the requirements of the statute; and it is submitted, that the court in which it was taken, being a court of record, the action of the court in taking this bond was a judgment rendered upon a subject cognizable before it, and is conclusive, and cannot be questioned incidentally. Its judgment is binding till set aside or reversed, though erroneous. Acts done and bonds taken by it bind the obligors and securities as well as principals. *Gibson v. Beckham*, 16 Gratt. 321, 6, 7, and 34; and the cases there cited; *Hollins v. Patterson*, 5 Leigh 437.

Every intendment will be made in favor of the validity of the acts of a court within the scope of its powers, whether those powers are limited or general; and when jurisdiction has once attached it will not be lost by an irregularity in the mode of executing it. *Crepps v. Durden*, vol. 1, part 2, Smith's leading cases, p. (top) 1073, 1075; *Voorhees v. Bank United States*, 10th Peters R. 449.

The appellee was thirteen years of age at the time appellant qualified as his guardian. If the income from his estate in the hands of his guardian was insufficient for his support, the law required the guardian to apprentice him. It never sanctions an encroachment upon the principal of the ward's estate, except the assent of the chancellor be first obtained; and then only to a limited extent and under very peculiar circumstances. For mere maintenance, even upon petition filed, it is very doubtful. In the matter of *Boswick*, 4 Johns Ch. R. 102 (top); *Evans v. Pearce*, 15 Gratt. 513; *Myers v. Wade*, 6 Rand. 444.

It is submitted upon the proof that so far from the guardian supporting the ward, the reverse was the case; that the labor performed by the ward for his guardian during the whole of his minority, the property acquired by him from extra labor performed for others, and from the generosity of friends, was all appropriated by the guardian to his own use, and was more than equivalent for any expense incurred by him for the ward's benefit. It is further submitted, this case does not fall within the principle of *Armstrong v. Walkup*, 12 531 Gratt. 608, but rather within the spirit of *Evans v. Pearce*, 15 Gratt. 513; where the court says it will look with liberality to the circumstances of each case.

ANDERSON, J., delivered the opinion of the court.

By section 11, of chapter 132 of the Code, (Code of 1860, p. 603,) the court, under the order of which any such fiduciary derives his authority, may order a guardian,

whether he shall or shall not have before given a bond, or whether he shall have given one with or without sureties, to give before such court a new bond, in a reasonable time to be prescribed by it, &c. But no such order shall be made, unless reasonable notice appear to have been given to such fiduciary, &c. But, surely it would be competent for the fiduciary to waive his right to such notice and come into court with his sureties, and execute a new bond, which would be as binding on him and his sureties as if such notice had been given. And the statute authorizes the court to make such order, "requiring a new bond to be given, when it appears proper from the report of the clerk or a commissioner, or on evidence adduced before it by a surety, or the representative of a surety for such fiduciary, or by any other person interested." And the court can perceive no reason why the bond shall not be binding upon the guardian and his sureties executing it, if they come before the court, in anticipation of such order, and dispensing with it, and execute the new bond, without the guardian being specially ordered thereto. His act of giving the new bond is a confession that the court may properly and lawfully require him to do it, and he would be thereby estopped from afterwards denying it. The court is of opinion, therefore, that the bond executed by the defendants, Bailey, Sayers, and the two Richardsons, on 532 *the 10th of August 1857, was lawfully executed, and is binding on them.

The court is further of opinion, that by virtue of the 12th section of the aforesaid statute, the said bond relates back to the time of the qualification of the guardian, and binds the obligors for the faithful discharge of the duties of guardian by the said Leonard G. Bailey, from that time, as effectually as if it had been then executed; and that the sureties in the former bonds, and their representatives, upon the execution of the new bond, were discharged. And, consequently, it was not necessary, nor proper, that they should have been made parties to this suit.

The court is further of opinion, that although the guardian has admitted to the friends of his ward that he did not intend to charge him board, he ought not to be charged with interest on the sum of money he received for his ward during his minority; the guardian having kept him in his family and treated him as one of his children, boarding, clothing and schooling him, and he working for the family as one of the children. The court is of opinion, that under the circumstances of this case, it would be extremely harsh to disallow the guardian's account for board, clothing and schooling, and also to charge him with interest on the sum of money he received for his ward. The interest does not exceed a reasonable compensation to the guardian, taking all other matters into the account. The court is of opinion, therefore, that the commissioner erred in charging the guardian with interest, and that annually com-

pounded from 1855 to 1860; and that the court erred in overruling the defendant's exception to the commissioner's report on this ground, and in decreeing the same. The court is, therefore, of opinion that the said decree must be reversed on this 533 ground; and will now *proceed to enter such order or decree as ought to have been made by the court below.

Having maturely considered the record in this cause, for reasons assigned in writing and filed therewith, the court is of opinion that the decree of the Circuit court of Wythe county be reversed and annulled; and that the appellee pay to the appellant his costs expended in the prosecution of his appeal here. And this court, now proceeding to pronounce such decree as should have been made by the Circuit court, it is adjudged, ordered and decreed that the defendants in the court below pay to the plaintiff below the sum of three hundred and forty-five dollars and eighteen cents, with interest thereon at the rate of six per centum per annum, from the 11th day of December, 1860, till payment, and the costs of the plaintiff in the prosecution of his suit in the said Circuit court.

Decree reversed.

534 *Sexton v. Windell's Adm'x.

June Term, 1878, Wytheville.

1. **Bond—Parol Evidence Admissible to Prove Currency Intended.**—M sues the adm'r of W upon a bond dated July 18th, 1863, and payable with interest two years after date, "in current funds." The bond states on its face it was given in part of the price of land. Parol evidence is admissible to show that the parties had reference to Confederate currency.

2. **Same—Confederate Currency—Scaling.**—The court instructs the jury "that if they believe from the evidence, the parties contemplated Confederate money as the funds to be paid, the note falling due since the close of the war, when Confederate money was not current, and had no appreciable value, they should find the scaled value of the money at the time of the contract." It was error to stop with this, but he should have added, that in fixing the amount of the plaintiff's recovery they were authorized to take into their consideration the fair value of the land.

This was an action of debt in the Circuit court of Wythe county, brought in September 1865, by David Sexton, assignee of Jacob Miller, against Margaret Windell, administratrix of William Windell, deceased, to recover the amount of a bond for \$1,389, dated the 18th of July 1863, and payable two years after date, with interest from the date. The bond stated on its face that it was in part payment of a tract of land that day deeded to Windell by Miller, and that it was payable in current funds when due. The defendant appeared and pleaded payment.

Upon the trial of the cause the plaintiff

introduced in evidence the bond with the assignment to himself endorsed 535 *thereon; and then stated that he was through with his evidence in chief. And thereupon the defendant, to maintain the issue on her part, introduced a witness, and asked him what was the understanding and agreement of the parties, as to the currency in which said bond was to be paid. To this question the plaintiff objected, upon the ground that the parties on the face of the bond had agreed upon the currency in which the same was to be discharged when due. But the court overruled the objection, and permitted the witness to answer the question: and the plaintiff excepted.

After all the evidence had been introduced, and the argument had been concluded, the court instructed the jury as follows: It is a question of fact for the jury to decide, what was the understanding and agreement of the parties as to the meaning of the words "current funds," in the note sued on. If the jury believe from the evidence, that the parties meant by these words funds that might be current "when due," then they should find for the plaintiff the amount of the note. But if they should believe from the evidence, that the parties contemplated Confederate money as the funds to be paid, then the note falling due since the close of the war, when Confederate money was not current, and had no appreciable value, they should find the scaled value of the money at the time of the contract. To this instruction the plaintiff also excepted.

The jury then found a verdict for the plaintiff, for one hundred and fifty-four dollars and thirty-three cents. Whereupon the plaintiff moved the court for a new trial of the cause. But the court overruled the motion, and rendered a judgment according to the verdict: and the plaintiff again excepted: and obtained a writ of error to this court.

536 *The only question involved in this last exception is whether the facts proved showed that the purchase of the land was for Confederate money, and they are sufficiently referred to by Judge Staples in his opinion.

Kent and W. & J. P. Sheffey, for the appellant.

Terry and Pierce, for the appellee.

STAPLES, J., delivered the opinion of the court.

It is impossible to distinguish this case from that of *Hilb v. Peyton*, 22 Gratt. 530. The language of the two instruments may not be identical, but the provisions in each are so nearly alike in their legal effect, the same principles and rules of construction must govern in both cases. In *Hilb v. Peyton* a majority of this court held that parol evidence was admissible to show the real contract of the parties, notwithstanding the existence of a written obligation.

*See foot-note to *Hilb v. Peyton*, 22 Gratt. 550.

If such evidence was proper in that case, it is clearly so in this. It is only necessary, therefore, to refer to that decision as settling the law in all this class of cases, so far as the opinion of a bare majority of the court can have that effect.

The learned counsel for the plaintiff in error, conceding the authority of that case, insists that the obligation in this is plain and unequivocal in its terms, and the duty devolves on the court of construing it according to the manifest intention and meaning of the parties. This, however, does not cover the whole ground. When a written contract is to be interpreted, unaffected by extrinsic evidence, it certainly is the duty of the court to expound its provisions and ascertain its meaning. This was done in *Boulware v. Newton*, 18 Gratt. 708; which was decided upon the language of the instrument exclusively; no parol evidence having been adduced by either of the parties. And the same duty would

537 have devolved *on the court here, but for the fact that both parol and documentary evidence was offered along with the bond, explanatory of its terms and of the real understanding of the parties. By the common law, and under the statute, the case was peculiarly proper for the consideration of the jury to determine whether the contract was to be performed in Confederate treasury notes.

It is insisted, however, that the bond in controversy shows on its face a contract of hazard; and the evidence before the jury was not sufficient to overthrow this plain legal intentment. It would, perhaps, be sufficient to say, that the whole matter was submitted to the jury; that their verdict is approved by the judge presiding at the trial; and the finding is not plainly contrary to the evidence. In such case for this court to interfere would be to violate the best settled rules of law in reference to new trials. But it is unnecessary to rest our decision upon this ground. In my judgment the verdict is plainly right, and fully sustained by the evidence. I do not deem it important to enter into any elaborate argument or detailed examination of the facts to vindicate my conclusions upon this point. Such a discussion would not be profitable in any view. A brief reference to some of the more prominent facts may not be out of place. In the first place, the letter of Miller, the vendor, and his advertisement of the terms of sale, constitute very strong proof of his entire willingness to sell his land for Confederate currency; and the price agreed to be paid, as compared with the real value of the land, tends very strongly to show that the sale was in fact made with reference to that currency as the standard of value.

It is also in proof that the parties met on the 3d day of July, 1863, to close the contract. Windell refused, peremptorily, to pay any other than Confederate

538 *currency; and Miller agreed to receive it. Fifteen hundred dollars were paid on that day; and a receipt was

given by Miller, stating the number of acres in the tract, and the price per acre stipulated to be paid. Why the deed and the bonds for the deferred instalments were not then executed, does not distinctly appear. The parties no doubt preferred the papers should be prepared by some more skilful hand. Whatever may have been the reason, the contract was a complete one that day; its terms perfectly understood; the price per acre, and the kind of currency to be paid fully settled. It is not reasonable to suppose, in the absence of all evidence it is not fair to presume, that when the parties afterwards met merely to execute the deed and the bonds, the purchaser, without the slightest consideration, agreed to such an alteration of the contract as might in all probability subject him to a liability for three thousand dollars in a sound currency, in addition to the five thousand already paid in Confederate currency. The stipulation "to pay in current funds when due," does not warrant any such conclusion. It may be fairly inferred these words were inserted in the bonds to guard against any possible liability for gold and silver coin. This is the view taken by this court in *Meredith v. Salmon*, 21 Gratt. 762, in which a somewhat similar question was involved; and I beg to refer to what is there said, for a more extended consideration of this branch of the case. For these and other reasons easily suggested, I am satisfied the contract in this case, according to the real understanding of the parties, was to be fulfilled in Confederate treasury notes.

This disposes of the various errors assigned in the petition. An additional one has, however, been presented in the argument here. Complaint is made of the instruction set out in the second bill of 539 exceptions. That *part of it to which objection is made is as follows: "But if the jury should believe from the evidence that the parties contemplated Confederate money as the funds to be paid, then the note falling due since the close of the war, when Confederate money was not current and had no appreciable value, they should find the scaled value of the money at the time of the contract." I do not understand that the defendant in error makes any objection to this instruction; but the plaintiff in error insists that it is too restricted in its terms; that the court ought to have gone farther, and informed the jury that in fixing the amount of plaintiff's recovery, they were authorized to take into consideration the fair value of the land. This, I think, is correct. The statute provides that "where the cause of action grows out of a sale, or renting, or hiring of property, real or personal, if the court or jury (if it be a jury case) shall think that under all the circumstances the value of the property shall be the most just measure of recovery, it may adopt that value, instead of the express terms of the contract." In *Pharis v. Dice*, 21 Gratt. 303, this court not only affirmed the constitutionality of this statute, but

it expressed the opinion that in many cases it presented the very best and most equitable mode of adjusting Confederate liabilities in the class of cases to which it is applicable. The rule to be adopted in fixing the measure of the debtor's liability, where a portion of the purchase money has been paid, is clearly expressed in a number of cases decided by this court. See *Poague v. Greenlee's adm'r*, 22 Gratt. 724; *Meredith v. Salmon*, 21 Gratt. 762.

It is to be observed that the statute does not make it obligatory upon the jury to resort to the value of the property as the measure of recovery, but leaves it discretionary with them to determine whether, under all the circumstances, it is most just and equitable to adopt *it. The instruction given does not recognize any such discretion, but confines the jury to a verdict for the scaled value of the currency at the date of the contract. In this there is manifest error. If the court undertook at all to state the law by which the jury was to be governed, it was proper to state the whole law applicable to this branch of the case. Whether in that event the verdict would have been different it is impossible now to say; nor is it material to inquire whether, indeed, this is one of the cases in which the value of the property furnishes the most just measure of recovery. That is a question for the jury. The court ought to have embodied this provision of the statute in the instruction given, or brought it to the attention of the jury in some other equally intelligible mode. For this error the judgment must be reversed, and the cause remanded to the Circuit court, to be there proceeded with in accordance with the principles herein announced.

The judgment was as follows:

It seems to the court here, for reasons stated in writing and filed with the record, that there is error in the said judgment, in this, that the said Circuit court, in giving the instruction set out in the plaintiff's second bill of exceptions, ought to have embraced in said instruction, or to have given in connection therewith to the jury, so much of the first section of the act of February 28th, 1867, as empowers the jury, when the cause of action grows out of a sale of property, to adopt the fair value of the property sold, if they think that, under all the circumstances, such value would be the most just measure of recovery, instead of the express terms of the contract. Therefore, it is considered, that the said judgment be reversed and annulled, and that the plaintiff in error recover against the defendant in error his costs by

541 *him expended in the prosecution of his writ aforesaid here, to be levied of the goods and chattels of the said intestate in the hands of the said defendant in error to be administered. And, it is ordered, that the verdict of the jury be set aside, and the cause remanded to the said Circuit court, for a new trial to be had therein; upon which new trial the instruction of the court

to the jury shall be in conformity with the foregoing judgment.

Judgment reversed.

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*Callaway v. Harding.

June Term, 1873, Wytheville.

Absent, STAPLES, J.

1. *Appeal—Writ of Error and Supersedeas—Limitation.*—The longest period of limitation within which a petition for an appeal, writ of error and supersedeas can be presented, is two years, nine months and ten days as to final judgments, decrees and orders rendered before the passage of the act of November 8th, 1870; and as to those since rendered such period of limitation is two years.

2. *Proviso of One Section of an Act—When Applied to Another Section.*—A proviso to one section of an act cannot be applied to another section of the same act, unless it manifestly appears by reference to the whole act, that it was the intention that it should limit the operation of other sections than that to which it is appended.

In an action of debt in the Circuit court of Roanoke county, in which John B. Harding was plaintiff and Peter Saunders, sr., Walter C. Callaway and others were defendants, a judgment was rendered in favor of the plaintiff against the defendants, on the 1st of September 1866, for \$3,000, the amount of the negotiable note sued upon, with interest. On the 18th of November 1872 Callaway, one of the defendants, applied to a judge of this court for a writ of error to this judgment: and on the 27th of the same month the writ of error was awarded.

At the next term of this court Harding moved the court to dismiss the appeal, as having been improvidently awarded.

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*Early, for the appellant.

Blair and Edmondson, for the appellee.

The appellee, Harding, moves to dismiss the appeal granted in the cause, because the period in which, by law, the appellant had the right to present his petition for an appeal, had elapsed before he presented his petition. The judgment of the Circuit court of Roanoke county which it complained of, was rendered on the 3d day of September, 1866. The petition was presented in November, 1872, and the appeal was not completed until the 10th day of January, 1873, by the execution of the appeal bond on that day. So that more than six years had elapsed after the rendition of the judgment before either the petition was presented or the appeal perfected. The act of Assembly, passed June 23d, 1870—session acts 1869-70 page 224, section 17, limits the right of appeal to two years, but contains a proviso that as to any judgment or decree rendered before the passage of that act, section 26 of chapter 182 of the Code of 1860 shall re-

*See principal case cited in *Bolling v. Lerner*, 28 Gratt. 42; *Rogers v. Strother*, 27 Gratt. 421 et seq.

main in full force, which 26th section gives five years in which to take an appeal. And while for the present we may admit that the proviso applies to this case, yet the limitation in the Code of 1860 would bar the right of appeal, for more than five years had elapsed after the judgment before the appeal was taken.

But we suppose, and in fact have been informed, that the appellants' counsel relies upon the acts to stay the collection of debts, to relieve them from computation against them, of the period from the rendition of the judgment to the 1st day of January, 1869. The 1st section of the stay law, passed March 2d, 1866, session acts 1865-6, page 181, only prohibits the issuing and enforcement of process to compel the payment of money, or sale of property, for that

544 purpose. The 7th section of *same law, page 183, enacts that the period during which this act shall remain in force shall be excluded from the computation of the time within which by the operation of any statute or rule of law it may be necessary to commence any proceeding to preserve or prevent the loss of any right or remedy. This 7th section, we contend, must be read, construed and applied with the 1st section, and can only properly and legally be made to relieve against such obstructions of right and remedies as are interposed by the 1st section. The whole law must be read and construed together, and the 7th section be confined to apply to the other portion of the same chapter as analogous authority. We refer to the 19th section, chapter 149, page 594, Code 1849, as construed in *Yarborough and Wife v. Dashazo*, 7 Gratt. 377.

But if the most unrestricted effect could be given to the 7th section of the act, the prohibitions of the 1st section only extended to the 1st day of January, 1868; and from the 1st day of January, 1868, to the 10th day of January 1873, when the appellant completed his appeal by executing the appeal bond, more than five years had elapsed, and the right of appeal was barred. It is true that the prohibitions of the 1st section were continued in operation to the 1st day of January, 1869, by act of Assembly, session 1866-7, page 726-7, but no where has the 7th section been re-enacted, or the period to which it applied been extended or enlarged.

But we insist that the 7th section of the stay law, in no view, can be made to apply to the limitation on appeals. And the only one of the relief acts that were passed by the Legislature shortly after the close of the war, that applies to the computation of time as it affects appeals, is the act to preserve and extend the time for the exercise of certain civil rights and remedies—session acts 1865-6, page 191; and by that act

545 the period *from the commencement of the war to six months after the organization of a Supreme court of Appeals, under the present government, was excluded. And as the said court was certainly organized as early as the 24th April, 1866—

see 17th Grattan—the time began to run in October, 1866, and more than five years had elapsed from that time before this appeal was taken. This act was passed on the 2d March, 1866, the same day, by the same Legislature that passed the stay law, and relates to the same subject. Thus being in *pari materia*, they are to be compared and construed together. For the rule on the construction of statutes we refer to opinion of Judge Moncure, in the case of *For's adm'r's v. Commonwealth*, 16 Gratt. pages 8, 9, 10 and 11. But there was an act passed March 15th, 1867—session act 1866-7, page 789, by which it was enacted that no petition should be presented for an appeal, writ of error, or supersedeas, to any final judgment, which shall have been rendered more than two years before the petition is presented; and estimating the appellant's right of appeal from the date of the passage of that act, his right of appeal was forfeited on the 15th March, 1869; and admitting that the act as to appeal, acts 1869-70, page 424—was an implied repeal of the act of 15th March, 1867, yet the right of the appellee against having his judgment appealed from, had become such a vested right that neither the implied or express repeal of the act of 15th March, 1867, could deprive him of such vested rights. As to vested rights acquired under statute, see opinion of Judge Staples, in case of *Crawford v. Halsted & Putnam*, 20 Gratt. 211, 220.

CHRISTIAN, J., delivered the opinion of the court.

This cause is before us upon a motion to dismiss the writ of error, upon the ground that it was improvidently 546 *awarded. The judgment of the Circuit court of Roanoke county which is complained of, was rendered on the 3d day of September 1866. The petition for a writ of error was presented to one of the judges of this court on the 18th November 1872, and a writ of error awarded on the 27th of November 1872. Thus the period between the rendition of the judgment and the presentation of the petition for a writ of error was more than six years.

The third section of the act amending chap. 182, of the Code 1860, in relation to appeals, writs of error and supersedeas, approved June 23d, 1870, is in these words: § 3. "No petition shall be presented for an appeal from or writ of error or supersedeas to any final judgment, decree or order, whether the commonwealth be a party or not, which shall have been rendered more than two years before the petition is presented; nor to any judgment of a county or corporation court which is rendered on an appeal from a justice; nor to a judgment, decree or order of any other court where the controversy is for a matter less in value or amount than five hundred dollars exclusive of costs, unless there be drawn in question a freehold or franchise, or the title or bounds of land, or some matter not merely pecuniary." By the 17th section of the same act it is provided that "no process

shall issue upon any appeal, writ of error or supersedeas allowed to or from a final judgment, decree or order, if when the record is delivered to the clerk of the appellate court there shall have elapsed two years since the date of such final judgment, decree or order; but the appeal, writ of error or supersedeas, shall be dismissed whenever it appears that two years have elapsed since the said date before the record is delivered to said clerk, or before such bond is given as is required to be given before the appeal, writ of error, or supersedeas

547 *takes effect: provided, however, that section twenty-six of chapter 182, of the Code of 1860, instead of this section, shall remain in full force, and apply to cases in which the appeal, writ of error or supersedeas may be to any judgment or decree rendered before the passage of this act."

Except the proviso contained in the 17th section, the only amendment to the sections in chapter 182 of the Code on the same subject, is to change the period of limitation from five years to two years, and the amount fixing jurisdiction, from one hundred to five hundred dollars, in the third section, and in the seventeenth section changing the period of limitation from five years to two years. Under these two sections (leaving out of view for the time the proviso of the 17th section, the effect of which will be considered presently,) it is plain, that in order to bring a case into this court two things must concur: 1st, a petition for appeal, writ of error or supersedeas must be presented within two years after the rendition of the final judgment, decree or order complained of and 2d, the record must be delivered to the clerk of the appellate court, and such bond be given as is required before the appeal, writ of error or supersedeas takes effect, within two years from the date of such final judgment, decree or order.

It will be observed that there is no proviso or condition limiting the operation of the third section. That is explicit and mandatory that "no petition shall be presented" if more than two years have elapsed since the rendition of the final judgment, decree or order complained of.

There is no rule of construction by which a proviso to one section of an act can be applied to another section, unless it manifestly appears, by reference to the whole act, that it was the intention of the

548 Legislature *that such proviso should limit the operation of other sections, than that to which it is appended. In the case we are considering, the two sections (§§ 3 and 17,) relate to distinct and independent provisions; the one (sec. 3) fixing the period of limitation within which the petition must be presented, the other (sec. 17) prescribing the period of limitation, within which process must issue.

The proviso declares that section twenty-six of chap. 182, Code 1860, shall remain in full force "instead of this section," (sec. 17,) and apply to cases in which any judgment or decree was rendered before the

passage of the act. It is therefore limited in terms to the 17th section, and could have referred to no other section in the act, because section twenty-six of the Code of 1860 prescribes the time within which process shall issue, and not the time within which a petition shall be presented.

But the intention of the Legislature in limiting the operation of the proviso to the seventeenth section, to which it is appended, is further shown by the various amendments which have been made to the 3d section of chap. 182, of Code of 1860, which corresponds with the 3d section of the act we are now considering. That section was first amended and re-enacted by an act passed March 15th, 1867. The only amendment by that act, was to change the period of limitation from five years to two years. This section was again amended and re-enacted by the act approved June 30th 1870; and the only additional amendment was to change the amount, fixing the jurisdiction of the appellate court from one hundred to five hundred dollars. This 3d section was again amended and re-enacted by an act approved November 5th, 1870. The amendments to that act were contained in two provisos appended

549 thereto, in *the following words: "Provided, however, that the time from the 26th day of January 1870 to the passage of this act, shall be excluded from the computation of said period of two years: and provided further, that this act so far as appeals, writs of error and supersedeas heretofore allowed, shall be deemed and taken to have been passed and been in force since the passage of the act to which it is amendatory."

Thus it will appear that although the 3d section of chapter 182, (Code 1860), was three times amended and re-enacted, no similar proviso to that appended to the seventeenth section of the act under consideration, the effect of which was to extend the period of limitation from two to five years as to judgments and decrees rendered before the passage of this act, was ever incorporated in the 3d section. But on the contrary the only extension of the period of limitation as to the time within which a petition may be presented, is the time between the 26th January 1870 and the 5th of November 1870; to wit, nine months and ten days.

Upon the plain and obvious construction of the acts above referred to, we think it is clear that the longest period of limitation within which a petition for an appeal, writ of error and supersedeas can be presented, is two years, nine months and ten days as to final judgments, decrees or orders rendered before the passage of the act approved November 5th, 1870; and as to those rendered after the passage of that act, such period of limitation is two years.

As to what may be the effect of the 7th section of the act passed March 2d, 1866, known as the stay law, it is not necessary to refer to in this case; for conceding that the 7th section applies to appeals, writs of error, &c., in the case before us more than three years after the expiration

550 *of the stay law had elapsed, before the petition for a writ of error was presented.

We are, therefore, of opinion, that the writ of error to the judgment of the Circuit court of Roanoke was improvidently awarded, and that the same be dismissed.

The judgment was as follows:

On the motion of John B. Harding, by his counsel, to dismiss the said writ of supersedeas, as having been improvidently awarded, and for error of fact in awarding the same, the court is of opinion, for reasons stated in writing and filed with the record, that the said motion be sustained.

Therefore, it is considered and ordered that the same be sustained accordingly; and that the said writ of error and supersedeas be dismissed as having been improvidently awarded; and that the plaintiff in error do pay to the defendant in error, John B. Harding, his costs by him about his said motion expended. Which is ordered to be certified to the said Circuit court for Roanoke county.

Appeal dismissed.

551 *Barnetts v. Miller's Adm'r.

June Term, 1878, Wytheville.

Bond—Novation—Case at Bar.—M held the bond of G for \$700 executed before the war. In September 1863 G proposed to pay M in Confederate money, which she refused to receive, saying she would receive the interest, but not the principal of the money. His brother C said he wanted money, and G said if she would let C have the money, and give up his bond, he would go C's security. M then let C have \$100 of Confederate money, and C and G executed their bond to M for \$600, and she gave up G's bond. Nothing was said about the bond being paid in Confederate money; and G paid to C \$700 in that currency. **Held:** This was not a novation of the debt, but it retained its original character; and as to \$700 it was to be paid in full, and as to \$100 it was to be scaled.

The case is stated by Judge Moncure, in his opinion.

Hansbrough, for the appellant.

For the appellant, in answer to the argument of the appellee's counsel, that "if in a bill of exceptions to the refusal of the court to grant a new trial, the evidence and not the facts proved, is stated, if all the evidence was introduced by the exceptor, the Appellate court will not review the judgment," it is urged that even if it was true, it is plainly not in point in this cause, because, 1, here all the evidence was not introduced by the exceptor, the bond in suit having been introduced by the appellee, who was the plaintiff below; 2, and a review is not here asked of the judgment of the court below refusing a new trial, 552 but only of its final judgment *scaling part and refusing to scale the residue of the bond. And the final judgment, the appellant contends was erroneous because,

1, the bond was an entire transaction, not susceptible of division as by the judgment of the court. 2. The old debt of G. Barnett to decedent was paid, and his bond surrendered to him by decedent herself. 3. The bond in suit was a new transaction with a new consideration—Confederate money—a new debtor, C. Barnett, a new amount—\$800 instead of \$700. 4. It was not a renewal of Giles Barnett's old debt. Had a stranger become surety for C. Barnett in the bond, it would scarcely have been pretended that the bond was a renewal of the old debt; and yet G. Barnett sustains a totally different relation to the bond from that he sustained to the old debt. In the latter case, it being his own debt, he is obliged to pay it, and has no recourse for reimbursement. In the former, if he pays it, being only surety, his principal must reimburse him. In a word, "though he is the same man, yet as he occupies a different character in each transaction, he is virtually a stranger," and the case is as though an entire stranger had been surety in the bond, and not Giles Barnett. 5. Therefore, the bond (in suit) was a new transaction, unaffected by the previous dealings between the decedent and Giles Barnett; and is a bond for the loan of Confederate money, in whole and not in part merely. 6. Its character as such is not altered by the subsequent endorsements thereon. The appellant relies on the case of Dearing's adm'r v. Rucker, 18 Gratt. 427; and on the case of Stover, assignee, v. Hamilton et al., 21 Gratt. 273.

Blair and Edmondson, for the appellee.

The record in this case comes up upon a certificate of the evidence merely and 553 not of the facts. The case *below was heard and determined by the court without the intervention of a jury, and then the defendants moved the court to set aside its judgment and grant them a new trial; which being overruled the defendants excepted, and in their bill of exceptions set out a certificate of the evidence. The rule laid down in the case of Claffin v. Steenbock & Co., 18 Gratt. 842, is: "When a cause is heard by the judge, and there is an exception to his decision, the whole evidence is spread upon the record, and the appellate court must regard the case as upon a demurrer to evidence, considering the appellant as the demurrant." The rule laid down in Gimmi v. Cullen, 20 Gratt. 439, which was tried by a jury, is, that if, in a bill of exceptions to the refusal of the court to grant a new trial, the evidence and not the facts proved is stated—if all the evidence was introduced by the exceptor—the appellate court will not review the judgment; and it seems to us that if this judgment is reviewed at all, it must be as though it were on a demurrer to evidence and the appellant the demurrant. But if this case is to be reviewed upon all the evidence—

The appellee claims that \$700, part of the consideration of the bond of the appellants,

was for specie money loaned to one of the appellants before the commencement of the late war, and that it does not appear that the contract, to that extent, was according to the true understanding and agreement of the parties, to be fulfilled or performed in Confederate States treasury notes, or was entered into with reference to such notes as a standard of value; and to that extent the consideration of the bond sued on is not liable to scale, according to the act for the adjustment of liabilities. We insist that this bond, as to \$700, was only a renewal of the old indebtedness by Giles Barnett, one of the obligors, which was a specie debt, and it most certainly was

554 not *the agreement or understanding of Catharine Miller, the obligee in the bond, that it was to be fulfilled or discharged in Confederate States treasury notes; for she persistently refused to accept Confederate money for this debt at the time of the renewal and afterwards, as appears from the evidence of Giles Barnett, the only witness who testified in this cause; and if this was but a renewal of the specie debt, it is not liable to scale. (See the case of *Nicholas' Executors v. Tyler*, 1 Hen. & Mun. 332; *Daring's adm'r v. Rucher*, 18 Gratt. 427, opinion of Judge Moncure, page 454; and opinion of Judge Anderson in *Walker's per. rep. v. Peirce*, 21 Gratt. 722, 730 and 731.)

MONCURE, P., delivered the opinion of the court.

This is a supersedeas to a judgment of the Circuit court of Roanoke county, rendered in an action of debt, wherein Henry H. Brillhart, adm'r of Catharine Miller, dec'd, was plaintiff, and Charles T. Barnett and Giles Barnett were defendants. The action was brought upon a bond of the defendants to the plaintiffs' intestate for the sum of \$800, dated the 20th day of September, 1862, and payable one day after date. The only plea in the case was payment, on which issue was joined, though the defendants filed an account of set-offs. The parties, by consent entered of record, waived the right to have a jury; and thereupon the whole matter of law and fact was heard and determined, and judgment given by the court, "that the plaintiff recover against the defendants \$740, part of the debt in the declaration mentioned, (it appearing that the contract as to \$100 of the bond of \$800 on which this action is founded, was, according to the true understanding and agreement of the parties, entered into with reference to Confederate States Treasury notes as a standard of value, and that the true value thereof at the time the said

555 bond became due was \$40,) *with interest to be computed thereon after the rate of six per centum per annum from the 10th day of March, 1869, until payment, and his costs," &c. The defendants moved the court to set aside the said judgment and grant him a new trial; which motion was overruled; and they excepted to the opinion of the court. The bill of exceptions sets

out all the evidence given upon the trial. It states that the plaintiff, to sustain the issue on his part, introduced and read as evidence the bond aforesaid, and the endorsements thereon, which are set out in *haec verba*. The substance of the bond has been already stated. The endorsements upon it are as follows:

"The within bond shall not bear interest until called for. Feb. 20th, 1864.

"Interest from this date, July 29th, 1867.

"Received interest on the within bond up to this date. Feb. 20th, 1864.

"Received the interest on the within bond to this date. March 10th, 1869."

The bill then states, that the "defendants, to sustain their views of the cause and the issue on their behalf, introduced a witness, Giles Barnett, one of the obligors in said bond, who testified that the money that Charles T. Barnett got was Confederate money; that he, Giles Barnett, owed Mrs. Catharine Miller between 5 and \$700 for money borrowed before the war, for which she held his bond or bonds; that in September, 1862, he went to her, and offered to pay her the amount he owed her in Confederate money, which she refused to receive, stating that she was willing to receive the interest, but would not take the principal of the money. She did not say whether she refused because she did not want the money, or because it was Confederate money. That

Charles T. Barnett said he wanted

556 money, and Giles Barnett said, *if she would let Charles have the money and give up his bond, he would go Charles' security; that she then let Charles have enough Confederate money to make the amount up to \$800; and then they executed to her the bond in suit. He does not remember whether any thing was said about the bond being paid in Confederate money, at the time it was given. When Charles T. Barnett and witness gave their bond to Mrs. Miller, she then gave up the bonds of witness; that he let Charles T. Barnett have the amount of money he owed Mrs. Miller in Confederate money; but whether he paid Charles the money in Mrs. Miller's presence, or at another time, he does not recollect. What he borrowed from Mrs. Miller was \$500 at one time, to pay for negroes he had bought, and at another time he borrowed from her \$200. That Charles T. Barnett went in 1864 and offered to pay Mrs. Miller the amount he owed her in Confederate money, but she refused to receive the principal amount of the debt, but received the interest, and she agreed that he could keep the money without paying interest until further demand by her; that in March, 1869, the witness paid Mrs. Miller, with money that Charles had given him for the purpose, \$77.33 in greenbacks, as the amount of interest then due her; that at the time of the execution of the bond aforesaid of \$800, nothing was said as to the kind of currency in which it was to be paid, but witness expected it to be paid in Confederate States treasury notes. The defendants also filed as a set-off, an account

of \$77.33, paid by Charles T. Barnett, in United States currency on the — day of March, 1869, as interest on the said bond; which payment was proved as before stated. The defendants also offered in evidence a scale showing the value of Confederate States treasury notes in gold at different times during the war, which scale was
557 set out *in the certificate of the evidence. And this being all the evidence, the court gave judgment for the plaintiff as aforesaid. To this judgment the defendants applied to a judge of this court for a supersedeas, which was accordingly awarded.

The only assignment of error in this case is, that the court erred in deciding that the bond whereon the action was founded, was entered into by the parties thereto in reference to Confederate States treasury notes as a standard of value, only as to \$100, part of the sum of \$800 for which said bond was given, instead of deciding that the said bond, as to its entire amount of \$800, was so entered into in reference to such standard of value, and scaling the same accordingly.

We think there is no error in the judgment of the Circuit court. The debt for which the bond was given whereon the action was founded, was an ante-war debt, solvable only in constitutional currency, except one hundred dollars, which was loaned at the time in Confederate money, and was accordingly scaled by the court. The residue of the debt, seven hundred dollars, being the amount of the bond of Giles Barnett, was properly held not to be a Confederate money debt, and not scaled by the court. The grounds on which the plaintiffs in error contend that the whole debt is a Confederate money debt, are: that a new bond was taken during the war for the whole amount of the debt, including one hundred dollars loaned in Confederate money at the time: that the new bond was executed by two obligors, to wit: Charles T. Barnett and Giles Barnett, whereas the old bond was executed only by one, to wit, Giles Barnett; that when the new bond was executed, the old one was surrendered; that Giles Barnett was the only debtor for the original debt, whereas Charles T. Barnett was the principal debtor and Giles
558 Barnett only a surety *for the new debt; and that while Giles Barnett originally owed a specie debt, yet Charles T. Barnett received Confederate money only as the consideration of the bond executed by him as principal and Giles Barnett as his surety. The plaintiffs in error, therefore, contend that there was a novation of the debt, and that while the old debt was a good money debt, the new debt was a Confederate money debt, and consequently scalable.

We think this reasoning, though perhaps plausible, is yet fallacious; and there seems to be more reason for arguing, that the whole new debt partook of the original nature of seven-eighths of it, than that it partook of the nature of only one-eighth of

it. But we think there is still more reason in the judgment of the court which decided that the nature of the new debt, in its constituent parts, followed that of the consideration respectively, and that seven-eighths of the debt was still a good money debt, solvable by payment in full in good money only, while one-eighth of it was still a Confederate money debt, and therefore scalable.

In September 1862 Giles Barnett, owing a good money debt of \$700 to Mrs. Catharine Miller, offered to pay her the amount in Confederate money, which she refused to receive, stating that she was willing to receive the interest, but would not take the principal of the money. She did not say whether she refused because she did not want the money, or because it was Confederate money. But it is obvious that she refused because it was Confederate money. At that time the value of Confederate money, compared with gold, was as \$2.50 to \$1; and it is not reasonable to suppose that she would be willing to receive less than one-half of the value of her debt in full discharge of it. It does not appear that she was in want of money at all, much less of Confederate money; or that her debt
559 was not perfectly secure. *Why then should she be willing to receive payment in so depreciated a medium? She made the new arrangement purely to accommodate her debtor and his brother. Her original debtor still remained liable to her for his debt, though his position as principal was changed to that of surety. He as much owed the debt under the new bond, as he had owed it under the old. Her condition was not bettered by the change, unless it was by obtaining the additional obligation of another party. But it does not appear, as has already been said, that the original debt was not perfectly secured; and it is obvious that to accommodate Giles Barnett and his brother, and not to obtain additional security of the debt, was the only object of Mrs. Miller in making the new arrangement. If the new bond was to be paid in Confederate money, then the security of the debt could not have been the object of the new arrangement, because about the time of making it Giles Barnett offered to pay to Mrs. Miller the amount of his debt in Confederate money, which she refused to receive. Giles Barnett does not recollect whether he paid the money to his brother Charles, in Mrs. Miller's presence, or not; and it does not appear that she knew whether it was paid in Confederate money or not. But the fact is wholly immaterial. Giles Barnett proves that nothing was said as to the kind of currency in which the debt was to be paid, but he expected it to be paid in Confederate States treasury notes. Such expectation is not enough to make the debt so payable; but it is necessary that it should be the true understanding and agreement of the parties that the debt should be so payable. Whatever may have been Giles Barnett's expectation, it was certainly not Mrs. Miller's, that the debt should be so

payable; and such was not, therefore, the true understanding and agreement of the parties. That it was not, is confirmed 560 by what transpired afterwards between them. In March 1869 Giles Barnett paid Mrs. Miller with money that Charles had given him for the purpose, \$77.33 in greenbacks, as the amount of interest then due her.

The certificate in this case is only of the testimony and not of the facts proved on the trial, and the only testimony was that of Giles Barnett, one of the debtors, and the original debtor. That testimony fairly construed, without any bearing either way, conducts us to the conclusion which we have expressed. But it must be remembered that the case comes up to us, not merely upon the testimony of a single witness, and he one of the debtors, but also as an appeal from the judgment of the court below, to whose decision the whole matter of law and evidence was submitted by the parties: That such a case is to be considered by this court as upon a demurrer to evidence by the appellant, is now the settled doctrine of the court. So considering this case, can there be a doubt of the correctness of the opinion we now pronounce?

After we had considered this case (which we understood was submitted to the court by consent of parties by counsel) and had prepared the foregoing opinion on it, we received the brief of the counsel of the plaintiffs in error and have considered it. Though ingenious, it fails to show that there is error in the judgment, and does not render any addition to, or change in, the foregoing opinion necessary.

We think there is no error in the judgment, and that it ought to be affirmed.

Judgment affirmed.

561 *McCormick & Co. v. Hamilton, Wood, & Co.

June Term, 1878. Wytheville.

1. **Contract of Sale—Personalty—Refusal to Accept.**—H contracts to sell to M not less than 200 and not more than 300 good fat hogs, each to weigh not less than 180 lbs. gross; to be delivered at G by the 8th December, and to be weighed at the scales at G. And M binds himself to pay to H for the said hogs, when weighed, 18½ cents per pound gross weight, part cash and part in twenty days. H has at G on the 8th of December 241 good fat hogs, of which he gives M notice, but M declines to take them, and does not come to G on that day. H on that day procures R, the weighmaster at the scales, and G to weigh the hogs; and they weigh them in 16 parcels of from 7 to 30 hogs in a parcel, showing from the aggregate weight of all and the weight of each parcel, that the average weight is much over 180 lbs. gross. **Held:**

1. **Same—Same—Same—Action for Damages.**—H may maintain an action on the contract against M for the damages sustained by him for the failure of M to comply with his contract.

2. **Same—Same—Same—Same—What Seller Must Show.**—To entitle H to recover from M, it is not necessary for him to prove that of the whole 241

hogs each weighed over 180 lbs. gross, and were "good fat hogs;" but if he prove that any number of them over 200, were of such weight and quality, he is entitled to recover.

3. **Same—Same—Same—Same—Same.**—It is not necessary that H should have had each hog weighed separately in order to entitle him to recover, but if he proves to the satisfaction of the jury, that 200 or more of them each weighed 180 lbs. that is sufficient.

4. **Evidence—Opinion of Witness—Allowed.**—An experienced drover of hogs accustomed to butchering and weighing them, who was present when the hogs were weighed, and saw them and attended to the weighing of them, may give to the jury his opinion as to the weight of each hog.

562 *5. **Same—Same—Original Evidence.**—As the hogs had not been weighed separately, either at G or afterwards, the opinion of the witness is not substitutional, but is original evidence; and the best which under the state of facts is attainable.

6. **Same—Market Price.**—There having been no market price for hogs at G, on the 8th of December, H may show by testimony, what was the market price at that time, and shortly before and afterwards, in the surrounding country.

This was an action on the case in the Circuit court of Washington county, brought in January 1866, by Hamilton, Wood & Co. against McCormick & Co., to recover damages for the failure of the defendants to comply with a contract for the purchase of a number of hogs from plaintiffs. The declaration sets out, that the defendants on the 27th of November 1865 entered into a contract in writing with the plaintiffs, signed by the parties, by which the plaintiffs agreed to deliver at the scales, near Glade Spring depot, which plaintiffs aver was in the county of Washington, not less than two hundred and not more than three hundred good fat hogs, and each hog not to weigh less than one hundred and eighty pounds gross, at the above scales where all the hogs were to be weighed; said hogs were to be delivered against the 8th day of

***Evidence—Opinion—Non-Expert.**—In Tyler v. Sites, 90 Va. 542, 19 S. E. Rep. 174, the court said: "Undoubtedly there are questions upon which non-experts may give their opinions, as, for example, questions of identity, velocity, distance, and the like, because such questions usually depend upon a variety of circumstances which are incapable of being presented with their proper force and significance to any but the observer; and hence this court has held such evidence admissible on the question of insanity, its value depending upon the intelligence of the witnesses, their means of knowledge, and the reasons they give for their opinions. Cropp v. Cropp, 88 Va. 768, 14 S. E. Rep. 520. But opinions are never received if all the facts can be ascertained and made intelligible to the jury, or if the matter is such as men in general are capable of comprehending and understanding. 7 Am. & Eng. Ency. of Law, (1 Ed.) Expert and Opinion Evidence, 'p. 493."

That non-professional evidence is admissible to prove insanity seems well settled in Virginia, see Cropp v. Cropp, 88 Va. 759, 14 S. E. Rep. 520; Fishburne v. Ferguson, 84 Va. 87, 4 S. E. Rep. 675.

December 1865. For and in consideration of which the said defendants McCormick & Co. bound themselves to pay to the plaintiffs, for the said hogs, when weighed, thirteen and a half cents per pound gross weight, in the following way and manner, to wit: one draft on the city of Baltimore, for two thousand dollars in currency, five hundred dollars in currency, and as much as five hundred dollars more, if possible, on the day of delivery, and the balance in twenty days (all in currency) after the delivery of said hogs; and the plaintiffs aver that they in due time and manner proceeded to perform the said contract on their part,

in all things to be done by them, and
563 that they, in accordance with *the terms of said contract had, on the 8th day of December 1865 at the scales near the Glade Spring depot, in the county of Washington aforesaid, ready for delivery to the defendants, two hundred and forty-one good fat hogs, each not weighing less than one hundred and eighty pounds gross at the scales where all said hogs were, according to the said contract, to be weighed—of which the defendants had notice. And they further aver that the defendants did not attend at the said scales near the Glade Spring depot, to receive the said hogs, as by their contract they were bound to do. And the plaintiffs further aver that the defendants refused to perform their said contract at the time and place, and in the manner therein stipulated and provided; and that they did not attend to receive the said hogs on the 8th of December 1865 at, &c. as by their contract they were bound to do. And they then allege the breach of the contract in failing to pay the money, &c. Damages \$5,000.

McCormick & Co. appeared, and demurred to the declaration; but the court overruled the demurrer: and they then pleaded non assumpsit; on which issue was joined.

The cause came on for trial in September, 1871; and in the progress of the trial, the plaintiffs, after introducing the written agreement between the parties, which is correctly set out in the declaration, John Hamilton, one of the plaintiffs, was introduced as a witness, who proved that he delivered two hundred and forty-eight hogs at the scales near the Glade Spring depot, on the 8th of December, 1865, except seven which he sold to Dr. Smith, these seven being the smallest of the lot, leaving two hundred and forty-one hogs: that he sent notice to McCormick, one of the defendants, that he was ready to deliver the hogs; and that McCormick failed or refused to attend. Witness then procured M. A. Robinson, the

weighmaster, having control of said
564 scales, and *Dr. Smith, who weighed the said two hundred and forty-one hogs, and they weighed fifty-six thousand and forty-two pounds; witness kept a memorandum of their weight; that the hogs were not weighed separately; they were weighed in lots of from seven to twenty. Witness was then asked by plaintiffs' counsel, if in his opinion each hog would weigh

one hundred and eighty pounds. The court declined to permit the witness to answer the question; but ruled that if the plaintiffs could show by the witness that he was an expert, that he might be enquired of as to his opinion as to the weights. The witness thereupon in answer to a question by the counsel, said, that he had been dealing in hogs since he was fifteen, and he was then forty-three; that he had not driven hogs each year, but had bought and sold by weight, and tested his judgment by actually weighing the hogs, and that he considered himself a judge of the weight of the hogs offered to McCormick & Co.; and that in his opinion, there was no one of said hogs that would not weigh more than one hundred and eighty pounds gross. To the opinion of the court in permitting the witness to testify that he was an expert, and that in his opinion no one of the hogs offered to McCormick & Co. would weigh less than one hundred and eighty pounds, the defendants excepted.

In the progress of the trial the plaintiffs introduced L. F. Johnson as a witness. This witness gave the distances of Bristol, Abingdon, and other places from the Glade Spring depot; and he was then asked by the plaintiff's counsel to state what he knew about the market price of pork at Glade Spring, on the 8th of December, 1865, and throughout the surrounding country, extending as far as Bristol, which he had stated was twenty-eight miles off; to which the witness replied that he knew nothing

of the market price at Glade Spring;
565 that in *the last week in November he bought a lot of hogs at his house in Bristol, at ten cents net; and that about the 15th of December, 1865, he bought another lot at \$9.75 net. That ten cents net, according to the custom of the country, was about equal to eight cents gross.

The defendants then moved the court to exclude so much of the evidence of the witness as referred to a market price of pork at Bristol, until and unless the plaintiff could show that there was no fixed market price at Glade Spring, or at any point in the surrounding country nearer to Glade Spring than Bristol.

The plaintiffs' counsel then stated that they expected, after enquiring as to the market at Bristol, to introduce evidence as to Abingdon and other points mentioned by the witness; that they selected Bristol as the point at which they would begin the enquiry, because they expected to show it was a more extensive market than any other one of the designated points. The defendants still insisted on their objection to the evidence; but the court refused to exclude the evidence; and the defendants excepted.

After all the evidence had been introduced, the defendants moved the court to give to the jury the following instruction:

No. 1. Unless the jury believe from the evidence, that each hog of the two hundred and forty-one hogs in plaintiffs' declaration mentioned, weighed not less than one hundred and eighty pounds gross, at the scales

near Glade Spring depot, on the 8th of December, 1865, they must find for the defendant.

This instruction the court refused to give; and instructed the jury as follows:

Unless the jury believe from the evidence, that the plaintiffs had on the 8th day of December, 1865, at the scales near the Glade

Spring depot, ready for delivery to
566 *the defendants, not less than two hundred good fat hogs, each weighing not less than one hundred and eighty pounds gross, at the said scales, they must find for the defendants. To which action of the court the defendants excepted.

The defendants then asked the court to give the following instruction:

No. 2. The words "good fat hogs" in the contract, mean hogs that were sound, merchantable and free from disease, as well as fat; and unless the jury believe from the evidence, that each of the two hundred and forty-one hogs on the 8th of December, 1865, when they were weighed and ready to be delivered to the defendants, was sound, merchantable and free from disease, they must find for the defendants.

This instruction the court refused to give; and instructed the jury as follows:

The words "good fat hogs" in the contract mentioned in the declaration, mean sound, merchantable fat hogs, free from disease; and unless the jury believe from the evidence, that the plaintiffs had, on the 8th day of December, 1865, at the scales near Glade Spring depot, ready for delivery to the defendants, not less than two hundred hogs, each sound, merchantable and free from disease, then they must find for the defendants. And the defendants again excepted.

The defendants then asked for a third instruction, as follows:

No 3. The true construction of the contract between the parties in this case is: That the plaintiffs were to deliver to the defendants at the scales at Glade Spring, on the 8th of December, 1865, not less than two hundred and not more than three hundred good fat hogs, each weighing not less than one hundred and eighty pounds; and

567 that the weight of each hog was to be ascertained *by weighing it separately. And if the jury shall believe from the evidence, that the plaintiffs did not weigh each hog separately of the lot of two hundred and forty-one hogs offered to be delivered, then they did not comply with the contract on their part, and the defendants are not liable to them in damages. But the court refused to give the instruction: and the defendants again excepted.

The jury found a verdict in favor of the plaintiffs for \$3,082.31 with interest from the 1st of January 1866; and thereupon the defendants moved the court for a new trial, because the verdict was contrary to the law and the evidence, and because the damages were excessive. But the court overruled the motion, and rendered a judgment on

the verdict in favor of the plaintiffs. And the defendants again excepted.

Although the bill of exceptions commences by saying the following were all the facts proved, it proceeds to set out separately the testimony of each witness, as well as the written evidence.

It appears plainly from the evidence that the written contract between the parties is correctly set out in the declaration; that the plaintiff had on the morning of the 8th of December 1865, at the Glade Spring depot, two hundred and forty-one fat hogs, ready to be delivered to the defendants; that they gave notice to the defendant McCormick on the day before and on that morning, and that he declined to receive them; that neither of the defendants were at the place during the day of the 8th of December; that the plaintiffs procured M. A. Robinson, the weighmaster, at the scales, and Robert F. Smith, to weigh the hogs, which were driven upon the scales in sixteen different parcels, from seven to twenty in a parcel; that they kept a memorandum of the number of hogs in each parcel, and the weight, and that the

568 *whole number weighed fifty-six thousand forty-two pounds; and this memorandum was in evidence before the jury: that the plaintiffs kept the hogs at the Glade Spring depot until Sunday evening following, when they drove them to Dr. Beatties, and there they slaughtered and packed them. There were several witnesses who expressed the opinion that each of the two hundred and forty-one hogs, would weigh at the time, one hundred and eighty pounds gross. Robinson and Smith expressed a confident opinion that two hundred of them would each have weighed one hundred and eighty pounds gross; and believe that the other forty-one would have done it, but they would not be positive in that opinion. These witnesses also, as well as the persons who drove the hogs to the place, spoke of them as good fat hogs. Some of the witnesses who saw the hogs after they were killed, spoke of two or three of them that had spots on their skin, and which were packed separately; but the others, according to all these witnesses, were sound and healthy. There was some evidence, on the other hand, that there was cholera among the hogs in East Tennessee, in which these hogs were purchased; and there was proof that two died, one on the way to Dr. Beatties and the other on the night after they got there; but there was no proof as to the cause of their death. One of the witnesses who helped to dry the lard said she was to receive some of it for her compensation, and what she received was not fit for use; and others spoke of the diseased appearance of some four or five of the hogs. Several witnesses were examined as to the market price of pork on and about the 8th of December 1865. It appeared that there was no market price at Glade Spring; and the witnesses gave the price at Bristol and Abingdon about that date. From these it would appear that shortly after that

569 time, *the market price was about ten cents per pound net, equal to eight cents gross.

Upon the application of McCormick & Co., a writ of error and supersedeas to the judgment was allowed them.

John W. Johnston, Jno. A. Campbell and J. T. Campbell, for the appellants.

I. The demurrer to the declaration should have been sustained.

II. It was error to permit the plaintiff Hamilton to give his "opinion" as an expert of the weight of each hog.

1st. Because this is not a case in which expert testimony can be heard. *New England Glass Co. v. Lovell et al.*, 7 Cush. R. 319; 1 Greenl. Ev. n. 3, to § 440; 1 Smith's L. C. 772; *Norman v. Wells*, 17 Wend. R. 136.

2d. The opinion of Hamilton was merely substitutionary for the positive evidence which could have been obtained by the scales, and therefore inadmissible. 1 Greenl. Ev. § 82.

III. The Court held that the measure of damages in this action was the difference between the contract price and the market price, on the day and at the place of delivery. And if there was no market at the place of delivery, then the price of the nearest market was to be taken. *Shepherd et al. v. Hampton*, 3 Wheat. R. 200; *Gilpins v. Consequa*, 3 Wash. C. C. R. 184; *Shaw v. Nudd*, 8 Pick. R. 9; *Gordon et als. v. The Vaughan, &c.*, 1 Am. Law T. R. 9.

It was error, therefore, to receive such evidence as Jonas Kelly's and L. F. Johnson's, when objected to.

IV. The court erred in giving "Courts Instructions, No. 1 and No. 2," instead of "Instructions, No. 1 and 2." 6 Gratt. 285; 11 Gratt. 587; 15 Id. 230; 17 Id. 472.

570 *V. This is an action brought on a written contract of dependent covenants, to recover damages for the failure of the defendants in the court below to receive and pay for a lot of hogs. To entitle the plaintiffs below to recover, they must have shown a performance by them of all precedent conditions. This they failed to do. It was error to refuse to give instruction No. 4, asked for by plaintiffs in error. See *Cutter v. Powell*, 6 T. R. 320; *Brockenbrough v. Ward's adm'r*, 4 Rand. 325; *Notes to Pordage, v. Cole, Saund.* R. 319, a. b. c.; *Thorp v. Thorp*, 12 Modern R. 455; *Holdipp v. Otway*, 2 Saund. R. 102; 14 Gratt. 460, *Moncure, J.*; 9 Gratt. 154, *Daniel, J.*

VI. The verdict of the Jury should be set aside.

1st. It is contrary to the law as charged by the court in instruction No. 3.

2d. It is manifestly contrary to the evidence.

B. R. Johnston and James W. Sheffey, for the appellees.

1. There is no error in the ruling of the Circuit court, or in the verdict and judgment, or in the refusal to set aside the verdict and grant a new trial. The judgment

was just upon the merits and right upon principle.

The judgment appears from the whole record to be substantially right, and ought to be affirmed according to repeated decisions of this court. *Davis v. Miller*, 1 Call 127; *Norvell v. Wood*, 1 Munf. 555; *Hilb v. Peyton*, 22 Gratt. 550; *Calbreath v. Va. Porcelain & Earthenware Co.*, 22 Id. 697.

2. The contract on the part of Hamilton, Wood & Co. to deliver the hogs, imposed upon McCormick & Co. the correlative obligation to receive them at the time and place designated. *White's adm'r v. Ton-571 cray*, 5 Gratt. *179, 188, *Baldwin, J.*: "There can be no contract without mutual obligation." *Innis v. Roane*, 4 Call 379.

3. The case is one of entire readiness on the part of Hamilton, Wood & Co. to comply with the contract and to deliver the hogs according to contract at the time and place specified, and an absolute refusal on the part of McCormick & Co. to receive them, or even to be present, though notified before and after they were weighed of such readiness. When notified that the hogs were ready to be weighed and delivered, McCormick said he wanted to have nothing to do with them; and when notified that they were weighed and ready to be delivered, he said he would have nothing to do with them. The only reason for refusing to take them ever assigned by him, was, that hogs had declined; and the true reason was, that they had declined heavily. The action, therefore, was for breach of the contract, and for refusing to attend to receiving the hogs and to pay for them, as the defendants were bound to do. The measure of damages was that adopted by the jury and the court, the difference between the contract price and the market price at the time and place of delivery. *Merryman v. Criddle*, 4 Munf. 542; *Chitty on Contracts* 766; *Enders v. The Board of Public Works*, 1 Gratt. 364, 389; 2 Greenleaf on Evi. § 261.

4. "The jury are the proper judges of the damages; and where there is no certain measure of damages the court, ordinarily, will not disturb their verdict, unless on grounds of prejudice, passion or corruption in the jury." 2 Greenleaf S. 255. But, in this case, the market price at the time and place was proved, and the verdict of the jury, so far from being contrary to the evidence, was fully sustained by the facts proved, as certified. A conflict of testimony cannot disturb the verdict. *Peterson v. Ayre*, 76 Eng. Com. L. R. 351, 572 369, note; 2 *Parsons *on Contracts*, 647-8-653; 3 Id. 209-10; *Cost v. Ambregate Railway Co.*, 79 Eng. Com. L. R. 126, 140 to 147; 4 Rob. Pr. 294-5, 303-4.

BOULDIN, J., delivered the opinion of the court.

The first error assigned in this case, both in the petition and in the brief of the plaintiffs in error, is that the demurrer to

the declaration was overruled; when it should have been sustained. We understand, however, that this objection has been waived by the counsel in this court; and we think properly. The contract under consideration does not present the case of a condition precedent, to be strictly performed by the defendants in error before any liability would rest on the plaintiffs in error; but it is rather a case of concurrent promises, where the acts to be done are simultaneous, imposing correlative duties on both parties. In such cases "either party may sue the other for a breach of the contract on showing either that he was able, ready and willing to do his act at the proper time, and in the proper way, or that he was prevented from doing it—being so ready to do it—by the act or default of the other contracting party." 2 Parsons on Contracts, 5th ed., p. 677; 4 Rob. Practice, pp. 300 to 304, and cases cited.

Indeed, even in cases of conditions strictly precedent, it has been held by this court, that "whenever the defendant, by his own act or neglect, prevents the performance of the condition precedent, he thereby excuses it; and the plaintiff may recover, as if he had performed the condition." J. Moncure, delivering the opinion of the court in the case of *The Baltimore & Ohio Railroad Company v. Polly, Wood & Co.*, 14 Gratt. 447, 462.

We think that the plaintiffs below sufficiently averred in the declaration their ability, readiness and willingness to perform their part of the contract at the proper time and in the proper way, and that they were prevented from completing it by the default of the defendants. We are therefore of opinion that the demurrer was properly overruled.

The court is further of opinion, that there was no error in the refusal of the court below to give the first and second instructions, in the form asked by the defendants below, or in giving them as modified by the court. The first instruction asked for was as follows: "Unless the jury believe from the evidence, that each hog of the 241 hogs in plaintiffs' declaration mentioned, weighed not less than 180 pounds gross at the scales near Glade Spring depot, on the 8th of December 1865, they must find for the defendants."

The contract set out in the declaration, allowed the plaintiffs below, the option of delivering not less than 200 nor more than 300 hogs of the prescribed weight. Under that contract they clearly had a right to deliver 200 or 300, or any intermediate number of their proper weight; yet the instruction asked for would entirely deprive them of that option, and would defeat their action altogether, notwithstanding 240 of the 241 hogs tendered, might exceed the minimum weight. The court refused to give the instruction in that form, but modified it so as to make it conform to the contract of the parties. In this, there was no error.

The second instruction, as asked by the

defendants below, affirmed the same principle, and very properly received at the hands of the court the same modification.

The fourth instruction moved by the defendants below, affirmed two propositions, neither of which were sanctioned by the contract of the parties.

The first was, that it was incumbent on the plaintiffs below, in order to sustain their action, to show that each hog of the 241 mentioned in the declaration, was separately weighed at the time and place of delivery. The contract contains no such unreasonable stipulation. It only required that the hogs should be all weighed at the scales near Glade Spring depot, and that none of them should weigh less than 180 pounds. They were all weighed at the scales aforesaid in 16 lots, ranging from 7 to 20 in a lot, and the lots averaging from 209 to 249 pounds for each hog, and but two of the lots weighing less than 220 lbs. to the hog. Taking these weights into consideration with the other facts in the cause, it is apparent that there could not have been many of the hogs, if any, which would not obviously exceed the minimum weight; and had the defendants been present, as it was their duty to be, they would have seen at once that it was unnecessary and unreasonable to weigh 241 such hogs separately. They would at once, we doubt not, have said to the plaintiffs, let them be weighed in lots; and if they felt at all doubtful about the weight of any one or more of them, as they were driven on the scales, they could have required a separate weighing of those about which the doubt existed. But they chose deliberately to violate their contract, and did not attend; and now seek to punish the plaintiffs below with onerous and unreasonable requirements as a consequence of their own default. We think the court did not err in refusing to give that branch of the instruction.

The second branch of the instruction affirmed the same proposition which had already been twice rejected by the court, viz: If any one of the 241 hogs weighed less than 180 pounds, the jury should find for the defendants. Such not being the true meaning of the contract, nor the effect of the declaration, we are of opinion that the entire instruction was properly refused.

The court is further of opinion that there was no error in allowing the witness, Thomas Hamilton, to express his opinion as to the weight of the hogs. Such testimony, in the state of things existing at the trial of the issue between the parties, was the best that could be then adduced, and was not secondary but primary evidence. It was direct testimony to a fact. The hogs had not been weighed separately at the time and place mentioned in the contract, but as we have seen were weighed in 16 lots or parcels, ranging from seven to twenty in a lot. They were slaughtered afterwards without being separately weighed, and the exact weight of each hog could not then be known. In this

state of facts, Hamilton, an experienced drover, who saw the several lots on the scales, after being examined by the court as to his experience as a drover, and his capacity to form a correct opinion, was allowed to state whether, in his opinion, any hog would weigh less on that day than 180 pounds; and he expressed the opinion that no hog in the entire parcel of 241 would on that day come under that weight. This evidence was objected to, 1st, because the witness was allowed to express his opinion as an expert; and secondly, because the evidence itself was merely substitutionary for the positive "evidence which could have been obtained by the scales."

To sustain the last mentioned objection, reference has been made to 1 Greenleaf on Evidence, § 82. The general rule is there laid down, "that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence can be had." This rule plainly implies the substitution of weaker in the place of other and "original" evidence which was at the time in existence and accessible, and evidently applies to cases of written testimony, in which there is an attempt to use in the place of the "originals" either copies or parol proof of their contents. In such cases the "originals," if in existence, must be produced.

576 *It might be enough to say in this case, that the evidence required by the objection was not only not in existence at the date of the trial, and therefore could not be produced, but in point of fact never existed. The hogs were not weighed separately, and it was no longer possible to weigh them, and if it were necessary to show the separate weights of any of them, it could only be done by such proof as was offered; being the best that could then be had. It will be seen, however, from the section cited, that "the rule excludes only that evidence which itself indicates the existence of more original sources of information. But, where there is no substitution of evidence, but only a selection of weaker instead of stronger proofs, or an omission to supply all the proofs capable of being produced, the rule is not infringed." 1 Greenleaf on Evidence, § 82, citing *Taylor v. Riggs*, 1 Peter's R. 591-596; *United States v. Reyburn*, 6 Peters' R. 352-367; and *Minor v. Tillotson*, 7 Peters' R. 99.

To make the rule apply to Hamilton's testimony, then, it should have appeared that the hogs had been in fact separately weighed, and a list of weights kept; and that this original list of weights had been withheld without explanation, and a mere copy offered. Such was not the case. The best original testimony of which the case admitted was adduced; and the rule, therefore, is not infringed, nor did the court err in allowing the witness to express his opinion as an expert.

The nature of the testimony was such that it could only be given as his opinion: It did not admit of absolute certainty. Like questions of identity, handwriting and the

like, the opinion and belief of the witness was the only proper form of testimony, the only kind of testimony that could at that time be offered touching the fact in question. It was not properly speaking the

577 testimony of an expert, but was evidence of a "fact." Experts are generally called to express an opinion on testimony already before the jury; for instance, to say whether on a given state of facts a man was sane or insane; was diseased or not; whether a wound examined or described; was sufficient to cause death, and so in like or analogous cases. But here the witness testified to a fact in the cause as to which he was entirely competent to testify; and his being called an expert, and being previously examined by the court as such, did not render him the less competent; indeed that examination only showed more plainly his capability to testify intelligently and satisfactorily on the point in question; for we all know that an experienced drover becomes wonderfully accurate in estimating the weight of hogs; when required to cut off a lot of hogs of a given weight each, they very rarely commit a serious error. We are of opinion, therefore, that the testimony was legal and proper.

And we are further of opinion, that the testimony of Kelly, Johnson and others as to the market price of hogs at other places than Abingdon, in the vicinity of the place of delivery, was, under the circumstances, proper and admissible to show the value of the hogs at the time and place of delivery. It was not a case for trammelling the plaintiffs who were in no default with rigid requirements. There being no market for hogs on the day and at the place of delivery, it was competent to show their actual value at that time and place, which is the true point of enquiry, by "comparison of such prices and sales," (in the vicinity at or about that time,) as can be shown, and by reference to the reasonable probabilities of the case; and "in such case, recourse may be had to the sales which were made nearest in time and in the nearest market."

But this is a means merely of ascertaining the value at the time and place of delivery when *there is no market value there, or but an uncertain one, but not the only means. It may often be eminently proper to examine the sales and prices immediately preceding and succeeding the time of delivery, and at other places in the vicinity than the nearest market. See Sedgwick on the measure of damages, 4 edition, ch. 10, commencing at p. 294, but more especially p. 316, note 1, and cases there cited. We think this case, in which the plaintiffs below have not been in default, a proper one for indulging the widest latitude of investigation, and there was no error in admitting the testimony.

The only remaining questions arise on the motion for a new trial. Without going into an examination of the evidence, we will content ourselves with saying that the case was fairly submitted to the jury; that there was testimony in the cause to sustain

the verdict; and that it was approved by the judge who presided at the trial. Under such circumstances it is not the practice of this court to interfere with a verdict approved by the court of trial, although this court might be inclined to differ to some extent with the judge.

Upon the whole case we are of opinion that there is no error in the judgment of the Circuit court, and that the same be affirmed, with costs and damages to the appellees.

Judgment affirmed.

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*Cowan v. Fulton, J.

June Term, 1873, Wytheville.

Absent. ANDERSON and STAPLES, Js.

1. *Statute—Transfer of Causes—Constitutional.*—The 5th section of ch. 171, Sess. Acts 1869-70, p. 237, in relation to the transfer by the court of appeals to the Circuit courts, of causes lately pending in the District courts of appeal, to be there heard as by an appellate court, is constitutional.

2. *Same—Same—Mandamus.*—A judge of a Circuit court to which a cause has been sent under this act, may be compelled by mandamus from the Supreme court of appeals, to hear and determine the case.

**Statute—Transfer of Causes—Constitution.*—See, as to the constitutionality of this statute, a *foot-note* to Cowan v. Doddridge, 22 Gratt. 458, where the authorities are collected.

†*Same—Same—Mandamus.*—The proposition laid down in the principal case, that, where a cause had been sent to the circuit court under the act in question and the judge had stricken it from his docket on the ground that he had no constitutional right to hear it, such a dismissal of the cause was not a judgment (which should not be reheard nor reviewed on a writ of *mandamus*), but was simply a refusal to hear and decide the case at all, and a writ of *mandamus* properly lay to compel him to hear and determine the cause, has been approved by several subsequent decisions. See *Kent v. Dickinson*, 25 Gratt. 821 *et seq.*; *Danville v. Blackwell*, 30 Va. 43; *Richardson v. Farrar*, 38 Va. 767, 15 S. E. Rep. 117. See Cowan v. Doddridge, 22 Gratt. 458.

See also, the opinion of the court by BURKS, J., in Page v. Clopton, 30 Gratt. 415, as to the function of the writ of *mandamus*, citing numerous cases, among others, the principal case. *Com. v. Justices of Fairfax Co. Ct.*, 2 Va. Cas. 9; *Dawson v. Thruston*, 3 H. & M. 132; *Brown v. Crippin*, 4 H. & M. 173; *King William Justices v. Munday*, 2 Leigh 165; *Harrison v. Emmerson*, 2 Leigh 764; *Manns v. Givens*, 7 Leigh 689; *Morris ex parte*, 11 Gratt. 292, 297; *Yeager ex parte*, 11 Gratt. 655; *Randolph Justices v. Stalnaker*, 13 Gratt. 523; *foot-note* on "Mandamus" to Page v. Clopton, 30 Gratt. 415.

In *Wheeling, etc., Co. v. Paull*, 30 W. Va. 148, 19 S. E. Rep. 553, the court, quoting from *Ex parte Parker*, 120 U. S. 738, 7 Sup. Ct. 707, that, "the writ of *mandamus* properly lies in cases where the inferior court refuses to take jurisdiction where by law it ought so to do, or where, having obtained jurisdiction in a cause, it refuses to proceed in due exercise thereof," cites the principal case also as authority.

3. *Same—Same—Same.*—The judge to whose court the cause was sent, being of opinion that the said act is unconstitutional, refused to hear the case, and directed it to be struck from the docket. This is not a judgment in the cause which will prevent the issue of a *mandamus* to him to hear the case.

This is the sequel of the case of Cowan v. Doddridge, reported in 22d Gratt. 458. It is fully stated in the opinion of Judge Bouldin.

Walker, Terry & Pierce, for the plaintiff.

Doddridge, for the defendant.

With great respect for this honourable court, in support of the answer of the honourable J. H. Fulton, judge of the Circuit court of Pulaski county, and by way of defence of the rights of the said judgment creditor, the following reasons are submitted why a peremptory *mandamus* ought not to issue:

580 *First—That there has been no action whatever on the part of this honourable court, at any time or place, in the said case of Cowan v. Doddridge, which amounts to *res adjudicata*, nor any adjudication upon the questions of the constitutionality of the said 5th section, or of the pendency of said case in the District court of appeals, when the constitution took effect, or when the same did take effect.

Second—It is respectfully claimed that it was not so pending, &c.

Third—Granting that it was, and that said 5th section is constitutional, still the said judgment of the said Circuit court is final, to all intents and purposes; and so in any event, to compel that court to rehear or reverse the same by *mandamus*, or otherwise, is beyond the power of this court.

The counsel referred to the following authorities: *Marbury v. Madison*, 1 Cranch's R. 137; *Griffin v. Cunningham*, 20 Gratt. 31; *Grignon's lessee v. Astor*, 2 How. U. S. R. 319; 3 Dallas R. 116; 4 Bacon Abr. 515; 18 Eng. Com. L. R. 22, 190; *Owings v. Speed*, 5 Wheat R. 420.

BOULDIN, J., delivered the opinion of the court.

This is an interesting case, and has been ably argued; but, in our opinion, it is free from serious difficulty. It is the sequel of the case of Cowan v. Doddridge, reported in 22 Gratt. p. 458. By reference to that case, it will be seen that when the present constitution was adopted, the case was pending in the then District court of appeals at Abingdon, on a writ of *supersedeas* to a judgment of the Circuit court of Pulaski county. The case was sent to the Supreme court of appeals, under the act of June 23d, 1870, Sess. Acts 1869-70, ch. 171, p. 227, § 2; and under the 5th section of the same act, same *page, the Court of appeals, on the 6th of March, 1871, entered the following order, sending the case to the Circuit court of Pulaski: "The papers and record in this case, which was pending in

the District court when the present constitution took effect, and which was transferred by law to the Supreme court of appeals, having been received by the clerk of this court; and the said court not having jurisdiction of the said cause, it is ordered, that it be transferred to and docketed in the Circuit court of Pulaski county, whence the appeal was originally taken, there to be heard and finally disposed of as by an appellate court, according to law."

On the 20th day of September, 1871, the Circuit court of Pulaski entered the following order:

"This cause came on this day to be heard upon the petition of the appellant and the plea tendered at the last term of this court, denying jurisdiction of this court, and was argued by counsel; and the court having seen and inspected the record, and being of opinion that it has not jurisdiction to review, reverse or affirm the judgment heretofore rendered by the Circuit court of Pulaski, on the 23d of September 1869, doth therefore direct that the cause be dismissed and stricken from the docket."

A supersedeas to this order was awarded by a judge of this court; and at the June term 1872, a motion was made by the appellee, Doddridge, to dismiss the appeal as improvidently awarded; and this court being of opinion that the amount in controversy was below its jurisdiction, and being also of opinion that the constitutional right of the Circuit court to hear and finally dispose of the case as by an appellate court, had been directly adjudicated by this court, when under its order the cause was sent to the Circuit court to be so disposed of, held that an appeal did not

582 lie from the order of the Circuit court, and dismissed the same as improvidently awarded. But, on motion of the plaintiff in error, it was ordered that a writ of mandamus nisi be issued commanding the judge of the Circuit court to proceed to hear and finally dispose of the said cause as by an appellate court, according to law, unless at the present term of this court cause should be shown to the contrary. The judge made his return, stating, in substance, that he had stricken the case from his docket, without hearing it on the merits, because he was of opinion that he had no constitutional right to try the appeal; that the law requiring him so to do was unconstitutional; but that he regarded the opinion and order of this court as deciding that it was his constitutional right and duty to proceed with the cause; and in deference to that opinion he had caused the case to be placed on his docket, with the purpose of trying it according to what he understood to be the opinion of this court; but one of the parties insisting that he had misconceived that opinion, he had, at his instance, continued the cause, and made his return, in order that this court might definitively dispose of the question, either by discharging the rule or issuing a peremptory mandamus.

The case is now before us on this return.

The judge of the Circuit court was unquestionably right in his construction of the opinion and order of this court at its June term; and we are at some loss to conceive how any of the parties could for a moment suppose that the terms of the order were at all ambiguous. This court said, and intended to say, that it had already decided the constitutionality of the act requiring the Circuit court to hear and finally dispose of the class of cases referred to, as by an appellate court, when by its own order it sent this cause to the Circuit court to be heard and disposed of as afore-

583 said. It intended to treat the constitutional right and duty of the Circuit court to hear and finally dispose of the cause as by an appellate court, as a closed question, closed by the judgment of this court in that cause, and no longer open to appeal. But we feel no hesitation in saying, that we do not decide the question upon the ground alone of its being, *res adjudicata* in the cause. Upon mature reflection, and after re-argument, we are fully satisfied that the law is constitutional; that under the constitution and laws of Virginia, it was the right and duty of the Circuit court of Pulaski, the judge thereof not being the same who presided at the trial of the case, to hear and finally dispose thereof, as by an appellate court.

The general power of the Legislature to regulate the jurisdiction of the Circuit courts is conferred by the constitution, and is unlimited, except so far as it may be restricted by the jurisdiction conferred by the constitution on other courts. The act in question only confers on the Circuit courts a special jurisdiction, *ex necessitate rei*, in a limited class of cases, in which no appeal lies to this court, and encroaches on no jurisdiction conferred by the constitution. We see no constitutional objection to the legislation.

But it is insisted that conceding the law referred to, to be constitutional, still the judgment of the Circuit court, dismissing the cause for want of jurisdiction, and striking it from the docket, is a final judgment in the cause; and the term at which this supposed judgment was rendered, having passed by, it is not competent to the appellate court, by mandamus, to compel in effect a rehearing of the cause.

If the premises were true, the conclusion might perhaps be conceded; for it certainly is not regular nor proper to use the writ of mandamus to review or rehear the judgments of a subordinate court; but the 584 fallacy of the argument consists in the assumption that there was a judgment in the cause; whereas the court positively and unequivocally refused to pass on it at all, either "to review, reverse or affirm the judgment;" and merely directed "that the cause be dismissed and stricken from the docket." It was a simple refusal to hear and decide the case; and this court having held that no appeal lies from such refusal, it is exactly the case to which the highly remedial writ of mandamus is most

frequently applied, in order to prevent a defect or failure of justice. It issues at common law from the King's Bench to compel inferior tribunals faithfully to execute their legitimate powers "whenever the same are denied or delayed." Tapping on *Mandamus*, p. 154, (marg. 105). "Whenever there is a particular jurisdiction created by act of Parliament the court of K. B. may command the execution thereof by mandamus, and remove their proceedings by certiorari to see whether they have observed their authority;" *ibid* (marg. 106,) citing *Rex v. Inhab. Glamorganshire*, 12 Mod. R. 403; "because it is the duty of such court to correct the errors of inferior jurisdictions, and to grant a mandamus in all cases to which such writ is applicable, in order to prevent a failure of justice, or a public inconvenience by a defect thereof." *Ibid ubi sup.* In obedience to these principles of the common law it was held in the case of *The King v. The Justices of Kent*, 14 East. R. 395, that mandamus would lie to compel the justices to hear and pass on an application of the journeymen millers, to rate their wages under an act of Parliament, which the justices had solemnly determined did not confer on them that power, and for which reason they had declined to hear the case on the merits. The case seems to be in all respects analogous to this. Lord Ellenborough said, "We do not, however, by granting this mandamus, at all interfere with the exercise of that discretion which the Legislature meant to confide to the justices of the peace in session. We only say that they have a discretion to exercise; and therefore they must hear the application: but having heard it, it rests with them to act or not upon it as they think fit." It is proper to say that the case was one in which the act conferred on the justices a discretionary power to rate or not, as they might think proper. Grose, J., agreed. Le Blanc, J., said: "We only say that the justices have authority to act upon the subject matter of the application; and that they are to hear it, and then to determine whether in their discretion they think proper to fix a rate of wages." Bayly, J., "We tell the justices that they have authority by law to settle a rate of wages for the persons applying, but we do not say that they are to exercise that authority in this instance. Let them hear the application. The principles of that case were fully approved by this court in the case of *Yeager*, ex parte, 11 Gratt. 655.

Original jurisdiction to award writs of mandamus upon these principles of the common law, has been conferred on this court by the Constitution and laws of the State; and in accordance therewith, we say to the judge of the Circuit court of Pulaski, that he has the constitutional power to hear and finally dispose of the cause referred to, as by an appellate court; and that it is his duty so to do.

After the close of the argument in this case, we were referred by the counsel for the defendant, to the case ex parte New-

man, 14 Wall. U. S. R. 152. We have carefully examined the case, and find nothing in it in conflict with the views expressed in this opinion. On the contrary they are directly sustained by that decision of the Supreme court. The mandamus was refused in that case, not because it was not a proper remedy to compel the exercise of a jurisdiction belonging to and disclaimed

586 *by the inferior court, but expressly because that court had taken jurisdiction, and had acted on and decided the cause. In speaking of the writ of mandamus, however, the court say, p. 165, "Applications for a mandamus to a subordinate court are warranted by the principles and usages of law, in cases where the subordinate court having jurisdiction of a case, refuses to hear and decide the controversy," &c., &c. Now, that is precisely what has occurred in this case. This court has held that the Circuit court of Pulaski has jurisdiction to hear and determine the cause in question as an appellate court; but that court, disclaiming jurisdiction, refuses "to review, reverse or affirm the judgment," to hear the cause at all; but strikes it from the docket. We could not as for a more pertinent authority than ex parte Newman, for issuing a mandamus in just such a case.

Let a peremptory mandamus issue, commanding the judge of the Circuit court of Pulaski to hear and finally dispose of the cause in question, as by an appellate court, according to law.

The order was as follows:

Upon an alternative mandamus awarded at the last term and directed to the said Hon. John H. Fulton, judge as aforesaid, commanding him to proceed to hear and finally determine as by an appellate court, in pursuance of section 5 of chapter 171 of session acts of 1869-70, and in pursuance of the order of this court of the 6th day of March 1871, the cause of said John T. Cowan against C. E. Doddridge, which by said order is required to be transferred to and docketed in said Circuit court, there to be heard and finally disposed of as aforesaid, unless he should, on or before the 10th day of this term, appear here and show good cause to the contrary:

587 *This day came again the parties by their counsel, and the court having maturely considered the return made to the alternative mandamus aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said return is insufficient. Therefore it is considered that a peremptory writ of mandamus be awarded, directed to the said Hon. John H. Fulton, judge of the said Circuit court for Pulaski county, commanding him to hear and finally dispose of, as by an appellate court, in pursuance of said section 5 of chapter 171 of the acts of Assembly of 1869-70, and of said order of this court of the 6th day of March 1871, the said cause of John T. Cowan against C. E. Doddridge, in said order and in said alternative mandamus mentioned.

Peremptory mandamus ordered.

588 *Pierce's Heirs v. Catron's Heirs.

June Term, 1875, Wytheville.

Absent. ANDERSON and STAPLES, Js.

Parol Contract of Land—Specific Performance.*—In a suit for the specific performance of a parol agreement for the sale of land by the heirs of the alleged purchaser against the heirs of the alleged vendor, the principles announced in the case of *Wright v. Puckett*, 23 Gratt. 370, approved, reaffirmed and acted on.

The case is sufficiently stated by Judge Christian, in his opinion.

Gilmore and J. W. & J. P. Sheffey, for the appellants: 1st. The court erred in excluding the depositions contained in exhibit D as evidence, when it was shown that the witnesses, whose depositions had been taken in the cause, of which the exhibit was a record, were dead. 3 Greenl. on Evi. § 343; *Gresley's Evi.* (side paging) page 259-60, note E. and authorities there cited; *Carrington v. Cornock*, 2 Sim. R. 567; *Williams v. Broadhead*, 1 Ibid 151; *Coker v. Tazewell*, 2 P. Wms. R. 563; *Philips on Evi.* (side paging) p. 216-19; *Clements v. Kyle*, 13 Gratt. 468, 476 bottom and top of page 477.

2d. The court erred in excluding exhibits C, and refusing to permit it to be used, for the reason set forth in 2d assignment of errors in petition, *Tucker's Comm. Book* 2d, (side paging) p. 252, *Gresley's Eq. Evi.*, side paging, p. 146.

3d. The court erred in refusing to permit E. C. C. to be read as evidence in the case. 1 *Philips on Evi.* (side paging) 473, note 130; 2 Ibid 574, note 476; *Carver v. Jackson*, 4 Peters R. 1, 80.

4th. The court erred in the matter set forth in fourth and fifth assignments of error in appellants' petition.

5th. The complainants have an equitable right to have a conveyance from defendants of the legal title to the land in controversy, and the court erred in not decreeing such title. *Fry on Spec. Performance*, § 402.

6th. The laches imputed to David Pierce and his heirs, in not sooner asserting and prosecuting their claim to have a legal title conveyed to them, is imputable rather to Catron's heirs. They state in their answer, that during all the lapse of time from 1802 to this day, they have enjoyed the almost exclusive possession and profits of the land in controversy. The right of Pierce and his descendants was recognized and acquiesced in during the almost exclusive possession, until the naked legal title was asserted and enforced in the action of ejectment after the lapse of sixty-six years. *Evans & als. v. Spurgin & als.*, 11 Gratt. 622; *Fry on Spec. Performance*, note 33, to page 181, sec. 400.

7th. Catron's heirs having acquired from

Donald's heirs the legal title, are trustees for David Pierce and his heirs, of the title to the land in controversy; and under all circumstances, should be decreed to convey it.

Kent, Terry & Pierce and Caldwell, for the appellees.

1st. Exhibit D is not evidence in the case. It is no record. There was no privity between the parties to that suit and this. The case was dismissed for want of prosecution. The bill is no evidence, and non constat, that the depositions would have been permitted to be read at the hearing. 1 Greenl. Evi. §§ 23, 189, 190, 552, 553, and notes to same.

2d. Exhibit C is not evidence. It purports to be but a copy of a copy; and was not a paper required by law to be recorded at the date of the supposed record and copy. The recording of an instrument not required by law to be recorded, is a mere nullity. Aside from the statute, no copy is evidence at all, except as recorded evidence, and then only a sworn copy. It is not true any admission is made in reference to said supposed copy, or supposed original; the admission is only of a partition and not of any writing in regard to it.

3d. Exhibit C C is no evidence, for same reasons stated above. English was the father of Julia, the wife of Henry Catron; but she does not claim through him, but through her mother.

4th. The court did not decide that the 26 acres of land belonged to Catron's heirs; nor that so much of the land in controversy, as is included in the deed from Sanders and wife to David Pierce "belonged to said defendant," nor that any portion of the land in controversy "belonged to them." It was claimed by the bill of Pierce's heirs, that the ancestor of Catron's heirs had sold these lands to their ancestor, David Pierce; and what the court decided was that their claim was without sufficient warrant; no matter whose the lands were.

This decision was proper, even conceding all the evidence offered to have been admissible. For the claim of the bill was in effect to have specific performance of an alleged parol contract executed. No contract was stated intelligibly, much less with reasonable certainty. *Story's Eq. Pl.* §§ 23, 27, 28, 240, 241, 257; 2 *Rob. Prac.* (old) p. 281, 290; 1 *Dan. Ch. Prac.* p. 421; 1 *Lead. Cases Eq.* p. 534; *Harnett v. Yielding*, 2 Sch. & Lef. R. 549, 558; *Mosely v. Virgin*, 3 Ves. R. 184; *Colson v. Thompson*, 2 Wheat. R. 336; *King's heirs v. Thompson*, 9 Pet. R. 204; *Pigg v. Corder*, 12 591 *Leigh* 69; **Parkhurst v. Van Cortlandt*, 1 John's Ch. 274; *Anthony v. Leftwich*, 3 Rand. 238, 246; *Wright v. Puckett*, 22 Gratt. 307; 1 *Ball & Beat*, 65; *Graham v. Call*, 5 Munf. 396.

When the party seeks specific execution, on the ground of part performance of a parol contract, it is well settled that in order to relieve it from the statute of frauds, he must show acts unequivocally referring to and resulting from that agreement, such

*See foot-note to *Wright v. Puckett*, 23 Gratt. 370, for collection of authorities on this subject, and for the three things that must concur to justify a decree for specific performance of a parol contract for the sale of land.

as the party would not have done unless on account of that very agreement, and with a direct view to its performance; and the agreement set up must appear to be the same with that partly performed. *Phillips v. Thompson & Anthony v. Leftwich*, (supra;) 1 Lead. Cas. Eq. 570, and cases cited; *Clarke v. McClure*, 10 Gratt. 305.

As to the origin of the possession, the answer being responsive, is evidence. *Fant v. Miller & Mayhew*, 17 Gratt. 187; *Corbin et als. v. Mill's ex'ors et als.*, 19 Gratt. 438.

CHRISTIAN, J. This is an appeal from a decree of the Circuit court of Wythe county. The bill is filed for the specific performance of an alleged parol agreement between David Pierce, the grandfather of the appellant, and Christopher Catron, the grandfather of the appellees; and also for the purpose of enjoining and restraining the further prosecution of an action of ejectment, in which a judgment had been recovered in said court against Alexander Pierce, father of the appellants, by the appellees in the suit.

It is admitted that the land for which the appellants are here seeking to have a parol agreement executed, is the same land which was the subject of the action of ejectment.

592 *The record in the ejectment suit shows that at the October term of said Circuit court in the year 1869, the following judgment was entered: "This day came as well the plaintiffs by their attorney, as the defendant by his attorney, and the defendant relinquishes his former plea, and acknowledges the plaintiff's action for the land in controversy as laid down and described in the plat and report of William B. Foster, surveyor, filed in this cause, and bounded as follows: (and then follows a minute description of the land by metes and bounds). Whereupon it is considered by the court, that the plaintiffs recover against the said defendant, the premises in controversy, bounded as aforesaid; and the Commonwealth's writ of habere facias possessionem is awarded to the plaintiffs accordingly.

In March, 1870, Alexander Pierce, the defendant in the action of ejectment, filed his bill in the Circuit court of Wythe county, against the plaintiffs in the action of ejectment, in whose favor he had confessed judgment; in which bill he prays for an injunction from said Circuit court, to enjoin and restrain the said plaintiffs in the ejectment suit, from the further prosecution of said suit; upon the ground that he could not set up his defence, (which was purely equitable), in the action of ejectment, but could only obtain relief in a court of equity. The injunction was accordingly awarded. Before a final hearing, Alexander Pierce departed this life, and the suit was revived in the name of his heirs. At the February term of the said Circuit court, the cause came on for a final hearing, when that court dissolved the injunction and dismissed

the bill. From this decree an appeal was allowed to this court.

It is not necessary, in my view of this case, to consider other questions much argued at the bar, whether certain documentary evidence and certain depositions read in "another cause, are admissible to be read in evidence in this cause. Even if we regard them both as properly in the case before us, and give to the testimony which was excluded by the court below, the utmost weight to which it is entitled, the appellants have, in my opinion, utterly failed to make out a case in which the powers and jurisdiction of a court of equity can be invoked.

The father of the appellants, by his confession of judgment in the action of ejectment, acknowledged the superior legal title of the appellees. He confesses thereby that the legal title to the land in controversy was not in him, or in those under whom he claims, but was vested in the appellees. His heirs now come into a court of equity, and ask for the exercise of its extraordinary powers by way of injunction, to restrain the further action of the appellees under the judgment which they have recovered in their action of ejectment; and seek to set up in themselves a paramount equitable title, and one which they assert could not be relied upon in their defence in the action at law. The ground upon which they claim the interference of a court of equity, is, that sometime before the death of Christopher Catron, the ancestor of the appellees, who has been dead nearly three quarters of a century, there was a parol agreement between him and the grandfather of the appellants, one David Pierce, by which the land in controversy was sold by said Catron to said Pierce; and they assert that the whole of the purchase money was paid, and their ancestor, David Pierce, was put in possession of said land. They state in their bill, that the land contained 114 acres, and refer for boundaries for same to a survey made by one Robert Adams, in a suit brought by David Pierce against the widow and representatives of Christopher Catron, in the Chancery court at Staunton, in the year 1811. The prayer of their bill is,

594 "that the agreement made and entered *into between Christopher Catron, dec'd, and David Pierce, dec'd, may be specifically performed and carried into execution by the heirs at law of the said Christopher Catron, dec'd; and that the said defendants (the appellees) "may be compelled to convey the said land by a good and sufficient deed of conveyance," to the appellants; and that the defendants, (the appellees,) may be enjoined and restrained from any further prosecution of the said action of ejectment," &c. This is the statement of the parol agreement made by the plaintiffs in their bill, and of the relief which they seek. The answer denies all the material allegations of the bill on the points we are considering. It says, "it is not true as alleged in the bill, that David Pierce ever purchased from Christopher

Catron either the tract of 88 acres or the tract of 26 acres, making 114 acres claimed, of land in the bill mentioned. It is not true that Christopher Catron ever put him (David Pierce) in possession of any part of either of said tracts as a purchaser. It is not true that at the time of said Christopher's death, or at any time before or since, said David Pierce was in any such possession as purchaser from said Christopher Catron. * * * The answer further avers that the land now in controversy was at that time mainly in a state of nature. The Iron Works on the adjoining lands purchased in 1800 by David Pierce from Robert Sanders, were very near the dividing line between the two tracts, and more convenient to timber on Catron's land than on Pierce's own. Accordingly, by an arrangement in which each looked to his own convenience, Pierce to a cheap supply of timber for his Iron Works, and Catron to a speedy clearing of his land for crops, from a time soon after they became adjacent proprietors, and before any proposition of purchase had been mooted, or at least entertained, Pierce

595 had been permitted by Catron to *take wood from sundry portions of the land which he wished cleared, including certain portions from the 26 acre parcel and the 88 acre parcel, making up the 114 acres in the bill mentioned, and had of such portions such occupancy as was incident to such permission, and no other."

This is the case as made by the bill and answer. We have now to look to the proof of the parol agreement between David Pierce and Christopher Catron, to ascertain its nature and terms. According to well settled principles, the contract, sought to be specifically executed, must be established by competent proofs, to be clear, definite and unequivocal in all its terms. If the terms are uncertain, ambiguous or not made out by satisfactory proofs, a specific performance will not (as indeed upon principle it should not) be decreed. 2 Story's Eq. § 764. The reason is obvious enough; for a court of equity ought not to act upon conjectures; and one of the most important objects of the statute of frauds was to prevent the introduction of loose and indeterminate proofs of what ought to be established by solemn written contracts. Let us look then to the proofs of this parol agreement upon which the appellants rely, as establishing their superior equity, which they insist must override the legal title which they acknowledge is in the appellees.

First. Let us see what the contract (under which they claim) was, as stated by their grandfather David Pierce himself. Let it be premised that Christopher Catron died in the year 1802, leaving a widow and children, the oldest of whom was nine years of age at the period of his death. In the year 1811, David Pierce filed his bill in the Chancery court at Staunton for the very same purpose for which these appellants filed the bill we are now considering, to wit: for the specific execution of the very contract under which these appellants

596 now claim. *It is a fact to be noted, that while Christopher Catron died in 1802, and the alleged agreement was made some year or two before his death, David Pierce took no step towards asserting his claim under that contract until the year 1811; and that he suffered that suit to linger until the year 1832, (over 20 years) when it was dismissed for want of security for the costs.

But let us see what is his statement of his own agreement with Christopher Catron. These appellants say that the contract was to convey 114 acres, and that the whole of the purchase money was paid, and they gave the metes and bounds. What does David Pierce, under whom they claim, say as to the same contract under which they must stand or fall? He says of the same contract in 1811, (the appellants speak of the same contract in 1869,) that he "made a contract with the said Christopher Catron for a quantity of land adjoining the said reserved part, beginning at a line tree, and to run across a hill, so as to include an angle of land—the line to run across said hill to another line of the tract which made the angle. This land, by the said contract was then estimated at fifty acres; but it was agreed that whatever it might be, your orator (David Pierce) should have it at one dollar per acre." He avers that he paid only fifty dollars of the purchase money, and admits that there was no written agreement signed by the parties.

In this suit certain depositions were taken to prove the parol agreement. Two witnesses were examined to prove the contract. They say they "heard Christopher Catron declare that he had sold to David Pierce a quantity of land for one dollar per acre; that they asked Catron how much land he had sold; and he replied he did not know the exact quantity, but it was to begin about the blue hole, and run a square line across the hill to the other line, and that said Catron told them he had received 597 fifty *dollars towards the land. That if it was more than fifty acres upon a survey, Pierce would have to pay him the balance, and if it was less, Catron would have to pay back what he had received too much."

This is all the evidence that David Pierce could produce in the year 1811, as to his contract with Christopher Catron. This suit brought by David Pierce in the year 1811, for the specific execution of the contract upon which the appellants solely rely for their superior equity, was abandoned by him in the year 1832; he having suffered the suit to be dismissed for want of security for costs. The appellants now renew the same claim, abandoned by their grandfather more than forty years ago. And what do they prove? They introduce one witness only, an old lady eighty-eight years old. She gives certain declarations not of Catron but of Pierce, made not in the presence of Catron, made more than fifty years before. Her testimony amounts literally to nothing. She says, "I don't know what Pierce was

to give for the land, nor what he paid for it except the cows;" nor does she pretend to give a description of the quantity or boundaries of the land.

Now this is the whole proof as to the terms of the contract which the court is asked to specifically execute, except certain deeds in which the parties refer to certain lands claimed by David Pierce, the recitals of which are too indefinite (even if the appellees were bound by them, which is by no means clear), upon which to found a claim in a court of equity.

Here then is a case, in which the appellants come into a court of equity for specific performance of a parol agreement upon the ground of part performance. They assert that their ancestor purchased 114 acres of land, for which he paid the whole of the purchase money. The proof is, (if proof

it can be called), that he purchased 598 *an indefinite quantity of land estimated at fifty acres, for which he paid fifty dollars. They now ask that 114 acres of land may be conveyed to them, for which their ancestor, according to their own testimony, and according to his solemn admission, paid only fifty dollars, and that too without even an offer upon their part to pay the balance of the purchase money shown by their own evidence to be still due and unpaid. And all this is asked in pursuance of an alleged parol agreement of the indefinite, uncertain and ambiguous character of that which is proved in this case, and entered into so long ago that three quarters of a century have elapsed, and three generations have passed away.

The principles upon which courts of equity have avoided the statute of frauds, upon the ground of part performance of a parol agreement, are now as well settled as any of the acknowledged doctrines of equity jurisprudence. From the numerous decisions on the subject, this court has in a recent case, declared the following principles, which must be taken as the settled law of this State. 1st: The parol agreement relied on must be certain and definite in its terms. 2d: The acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved. 3d: The agreement must have been so far executed that a refusal of full execution would operate as a fraud upon the party, and place him in a situation which does not lie in compensation. When these three things concur, a court of equity will decree specific execution. When they do not it will be refused. See *Wright v. Puckett*, 22 Gratt. 370, and authorities there cited.

I think it is clear that this case does not come within these well recognized principles of equity jurisdiction.

Much was said in the arguments of the able counsel for the appellants, as to the long and uninterrupted possession

599 *and open and notorious acts of ownership exercised for so long a period by David Pierce and his heirs. If such continued occupancy and notorious acts of

ownership amounted to an adverse possession, which (as was contended) conferred title, they ought to have been relied upon in the action of ejectment. The confession of judgment in the action at law by the father of appellants, acknowledged that the legal title was in the appellees. His heirs cannot set up a title by adverse possession in a court of equity, which is in effect and not in terms attempted to be done in this bill. And their grandfather, David Pierce, with whom the alleged contract was made, having failed sixty years ago, to establish a case for specific performance, and having abandoned his claim, it is now too late for his heirs to set up the same claim after the lapse of so many years, and when there necessarily exists such great uncertainty as to the true character of the contract which is now sought to be specifically executed. I am of opinion that the Circuit court of Wythe did not err in dissolving the injunction and dismissing the bill; and that its decree must be affirmed.

MONCURE, P., and BOULDIN, J., concurred in the opinion of Christian, J.

Decree affirmed.

600

*Preston v. Hull.

June Term, 1873. Wytheville.

Bond—Blank for Obligor—Filled in by Agent under Parol Authority.—A paper perfect as a bond, except that there is a blank for the name of the obligee, is signed by P and M, and put into the hands of M for the purpose of borrowing money upon it. It is expected that F will lend the money, but if he does not it may be gotten from some other person. M obtains the money from H, and fills the blank in the paper with the name of H and delivers it to him. This is done in the absence of P and without his knowledge. It is not the bond of P.

This was an action of debt upon a bond in the Circuit court of Smyth county, brought in January 1870, by D. D. Hull against Charles H. C. Preston and B. F. Mantz. The suit was abated as to Mantz. The paper declared on was signed and sealed by Preston and Mantz, and bound them to pay to D. D. Hull sixty days after date, the sum of six hundred dollars.

Preston appeared and filed a plea of non

*Bond—Filled in by Agent under Parol Authority.—See *Rhea v. Preston*, 75 Va. 757; *Nash v. Fugate*, 24 Gratt. 302; and *foot-note*; *Penn v. Hamlett*, 27 Gratt. 337, 342; *Keen v. Monroe*, 75 Va. 428.

In *Lyttle v. Cozad*, 21 W. Va. 200, the court said: "There are also older cases in Virginia, in which the court held, that when an instrument was incomplete on its face and indicated that others were intended to sign it, it was not binding on those who did sign it, although the condition may not have been known to the obligee when it was delivered to him. See *Ward et al. v. Churn*, 18 Gratt. 801, and *Preston v. Hull*, 23 Gratt. 600." See also, on this subject, 2 Am. & Eng. Enc. Law, p. 249; 4 Am. & Eng. Enc. Law (2d Ed.) 642.

est factum, accompanied by an affidavit stating the facts on which he relied to support the plea. He also pleaded payment by Mantz.

The facts material upon the question decided by this court, are substantially as follows: B. B. Mantz was indebted to Preston for the purchase of cattle to the amount of about six hundred dollars; and informed Preston that he did not have the money, but that he could raise the amount in Marion if Preston would execute a note for that amount; Mantz said he thought he could get it from Governor Fayette McMullin. Preston and Mantz then signed the paper sued on, in which there was a blank left for the name of the payee; and it was left with Mantz for the purpose aforesaid. Preston said it was his impression that Mantz was to get the money from McMullin; but he was not instructed not to get it from any one else; and the blank was left in the paper for the name of the person from whom he should get the money. But Preston never did deliver the note to Hull, nor know that he had discounted it, until after the failure of Mantz, and the execution of a deed of trust by him; when he was informed by Hull that he held the note shortly after it fell due. And Preston thought the note he had signed and handed to Mantz had been destroyed; and he never received any money upon the bond or derived any benefit from it.

After the evidence had been heard, the plaintiff asked the court to instruct the jury as follows: If the jury shall believe from the evidence, that the defendant C. H. C. Preston, executed the single bill in the declaration in this cause mentioned, and delivered the same to his co-obligor B. F. Mantz with a blank in said single bill, where the name of the obligee D. D. Hull the plaintiff, is now inserted, with the understanding that the said B. F. Mantz was to procure money on the said single bill, and to write the name of the person from whom the money should be procured, in said blank as obligee, and to deliver the said single bill to such obligee; and if the jury shall further believe from the evidence, that the said B. F. Mantz procured money from the said D. D. Hull, the obligee aforesaid in said single bill, and wrote the name of the said D. D. Hull in the single bill, and delivered the same to the said D. D. Hull; then the said single bill is binding upon the said Preston, and the jury must find the issue for the plaintiff.

602 *The defendant objected to the courts giving this instruction: but the court overruled the objection and gave it: and the defendant excepted.

The defendant then moved the court to instruct the jury as follows:

If the jury shall believe from the evidence, that the paper sued on as the bond of the defendant Charles H. C. Preston, was placed in the hands of B. F. Mantz to raise money from F. McMullin on, and that when it was so placed in his hands, it was blank as to the name of the payee, and that

it was afterwards filled up with the name of D. D. Hull, without the knowledge, consent or authority of the defendant Preston, then it is not his deed, and they should find for the defendant Preston.

The court refused to give this instruction in the form offered; but gave it with the insertion of the word "only" after the word "money." To which opinion and ruling of the court the defendant Preston excepted.

The defendant applied for another instruction, which was refused; and he excepted: but it is unnecessary to state it.

The jury found a verdict for the plaintiff for \$600 and interest: And the court rendered a judgment accordingly; having overruled the motion of the defendant for a new trial; to which Preston excepted. And upon his application a writ of error and supersedeas was awarded by this court.

J. W. & J. P. Sheffey, for the appellant.
Gilmore, for the appellee.

STAPLES, J. A bond is a deed whereby the obligor promises to pay a certain sum of money to another at a day appointed. 2 Black. Com. 346. An obligor and obligee are essential to the existence and con-

603 stitution *of such an instrument. It is not indispensable that the party to whom the promise is made should be mentioned eo nomine, that his name of baptism and sir-name shall be given, but he must be in some unmistakable manner designated in the instrument. A writing, though executed with all the solemnities of a deed, without such obligee, is a mere nullity. It imposes no liability upon the party issuing it. It confers no rights upon him who receives or holds it. It is not simply an imperfect deed: it is no deed at all. It only becomes a deed when the name of an obligee is inserted, and delivery made by the obligee or by some one legally authorized by him. If the blank is filled by an agent, then the agent as certainly makes the deed as though the entire obligation had been written, signed, sealed and delivered by him. His act binds a principal not before bound. It creates a contract having no previous existence. It is true the act in question is merely the insertion of a name. Still, its effect is to impart vitality to a piece of waste paper. It calls new rights and obligations into existence. It is followed by all the consequences resulting from the execution of the most solemn instruments.

The argument sometimes advanced, that there can be no danger or difficulty in conferring the power by parol, when nothing remains to be done but the insertion of a name to render the instrument complete, does not meet the real issue. The question is not one of trust and confidence reposed, but of power conferred. In the numerous and diversified transactions of mankind agencies of the gravest character are often created by parol. A partner may bind his co-partner to any amount, for any matter

within the scope of the partnership, by a note executed in the partnership name. The authority of an agent to sell the land of his principal may be conferred

604 *without writing, and the latter may thus be bound irrevocably for his entire estate. In the execution and endorsement of negotiable paper powers may be and are often conferred by parol upon agents involving liabilities to the amount of millions. The law recognizes such agencies as essential to the commerce of the world. Why may not the agent, in all these cases, impose the same liabilities by deed, in the name of his principal? If he may sell the land, fix the price, and agree upon all the terms of the contract, why may he not perform the mere formal act of executing the conveyance? The answer is, the authority of the agent must be commensurate with the act he performs. The stream can never be higher than its source. If the act of the agent is the execution and delivery of a deed, his authority must be by deed. It does not matter how much of the instrument may have been written by the principal, if it is a mere nullity when it leaves his hands, and only becomes operative by act of the agent; upon every principle of sound legal reasoning the result must inevitably be the same. Whenever the agent undertakes to bind his principal by an act, his authority, in point of dignity, must be co-equal with the act. The question is not, therefore, whether it is expedient that a mere parol agent shall have the power to fill the blank with the name of an obligee; but whether it can be done and sustained without violating well established principles of law.

A little reflection will show that these principles are not without substantial reasons to support them. At common law a sealed instrument imposed peculiar liabilities. It was not affected by any statute of limitations. It operated as an estoppel. The obligee was not permitted to aver any want of consideration to avoid it; nor could he defeat an action at law therein by showing any failure of title, or breach of

605 contract, or mistake, or *fraud in the procurement of the bond. It is true that some of these obstacles have been removed by statute, and parties may now defend themselves in the common law courts upon grounds purely equitable; but both in Virginia and in England sealed instruments confer rights and impose obligations, which can never grow out of the execution of any mere parol contracts. It is reasonable and just, therefore, that a party setting up a deed, and seeking to enforce it, shall be prepared to show, if necessary, that it is the act of the grantor himself, or of some one empowered by an instrument of equal dignity with the deed.

When the writing which is the subject of this controversy left the hands of Preston, it was not a deed. It certainly did not constitute a contract. It was, indeed, of no more value than the paper which contained it. When it passed into the posses-

sion of Hull it had in some way become a deed and a binding contract, according to the theory of counsel. How did it so become a deed? Certainly not by the act of Preston, as he was then absent, and was not even informed of the transaction until some time afterwards. It was the act of the agent which gave efficacy to the paper and created an obligation by deed not before in existence.

At the time Preston signed the paper it was the expectation of both Mantz and Preston that the money could be obtained from Governor McMullin; but failing in that, it may be reasonably inferred it was expected to borrow it elsewhere; and authority was given to Mantz, the agent, to fill the blank in the bond with the name of the person making the loan. Governor McMullin did not advance the money, as was expected, and the arrangement was made with the plaintiff Hull, and his name inserted as obligee in the bond. The agent did not simply fill the blank with a

606 name previously *agreed on by Preston; but he called into existence a new and unknown party, and bound his principal by a contract with him. In this respect the case is much stronger than that of the simple insertion of a name already declared by the obligor. A deed must exist before it can be delivered—that is clear. If an obligation, complete and perfect, be delivered by the obligor to a third person for the use of the obligee, it is the deed of the obligor immediately. The deed only becomes inoperative by the refusal of the obligee to receive it. In such case the delivery is the act of the principal or obligor and not of the third person or agent. Skipwith's ex'or v. Cunningham, 8 Leigh 271. Whenever, however, the principal commits to the agent an instrument that is not complete and operative at the time, with a blank for the obligee or the sum to be paid, to be filled by the agent and according to his discretion, the act of mind, the disposing power, which are always essential and efficient ingredients of the deed, are the agents; and the instrument takes effect by his act of execution and delivery, and is binding upon the principal or not according to the authority conferred on the agent.

If Preston had endorsed his name upon a piece of blank paper with scrolls attached, and the agent had afterwards added the entire obligation under the previous verbal instructions of Preston, the agent in that case, would have performed an act of no greater dignity than he has in this. The trust reposed may be greater in the one case than in the other, but the result is the same. In each case the principal becomes bound by an obligation created by act of the agent.

If the name of the obligee may be inserted, why may not the sum also; and if these may be supplied, why not the mere formal parts of the deed. If we once

607 depart *from the rule, how is the line to be drawn consistently with the preservation of any rule at all. If we say

that the name or sum may be inserted by the agent, will it not lead us inevitably to the doctrine that the entire deed may be executed by the agent also. We shall be carried on step by step, if we mean to be consistent, until we have destroyed all the well settled distinctions between sealed and unsealed instruments.

It is asked what good purpose is to be observed by these distinctions. It is sufficient to say that they exist; having their origin in well established principles. In the language of Chief Justice Marshall, they have taken such firm hold of the law they can only be removed by the power of legislation.

We must bear in mind that one change in the law often involves the necessity of others. Much mischief ensues, many embarrassments often occur in the administration of justice, from the disregard of some well established rule of law intimately identified by a long course of decisions, with others which in their turn are interwoven with the entire framework of society. If deeds are to be placed in the particulars now contended for, upon the same footing with parol contracts, there are other distinctions between them that ought to be abolished. The same act of limitation should apply to a bond as to a promissory note. The defendant should be permitted to show a want of consideration in one case as in the other. And above all, sound policy it seems to me, requires that the whole technical doctrine of estoppel by deed should be greatly modified, if not entirely abolished.

It has been suggested that the doctrine of estoppel in pais might apply to a transaction like this; and the obligor estopped to deny the bond. It was said by Judge Gibson, of the Supreme court of
608 Pennsylvania, in relation *to a writing executed in blank, and afterwards filled by a parol agent, if it could be sustained at all, it would be upon the ground of estoppel in pais. But, so far as I am informed, he is the only Judge who has suggested the idea. No reference is made to it by Baron Parke or Chief Justice Marshall, or Judge Cabell, or by the Supreme court of the United States, or that of New York, in the cases before them. This proposition carried to its legitimate results, will show that a mere parol agent may always bind the principal by a deed. If the obligor who trusts his agent with a writing with blanks as to the names or sums is estopped to deny that it is his bond, when the blanks are afterwards filled by the agent, so must also the obligor who trusts his agent merely with his name and a scroll attached, when the entire obligation is afterwards added. In truth the doctrine of estoppel has no application to the case. The party advancing his money is put on his guard by the face of the paper. He sees that it is not a deed, and he is bound at his peril to inquire into the authority of the agent to make it a deed. He is presumed to know the law. He must know that the agent's authority

must be by deed. If he is misled, it is by his own folly and the act of the agent. It can not be justly said that he has been deceived by the party whose signature is attached to the writing.

Having thus considered the principles affecting the case, let us see how stand the authorities, bearing upon the question.

In England one of the earliest cases is that of *Texira v. Evans*, decided by Lord Mansfield. We have no contemporaneous report of the case. All our information is derived from the statement of an English judge, made long after *Texira v. Evans* was decided. However, the case was questioned at an early day by the most eminent

judges and lawyers, and has been long
609 since entirely *overruled in the English courts. I will not attempt to comment upon or even cite the various cases. A brief reference to that of *Hibblewhite v. McMorine*, 6 Mees & Wels. R. 200 will be sufficient. This case was decided by the court of Exchequer in 1840; the opinion being delivered by Baron Parke, than whom no more eminent common law judge ever adorned the English Bench. One question arising in the case, was, whether the writing was a deed or mere note. It was held to be a deed. He then said: "Assuming the instrument to be a deed, it was wholly improper if the name of the vendee was left out; and to allow it to be afterwards filled up by an agent appointed by parol, and then delivered in the absence of the principal as a deed, would be a violation of the principle that an attorney to execute and deliver a deed for another must himself be appointed by deed." He further declares: "The only case cited in favor of the validity of such a deed, is *Texira v. Evans*, which is not sustained by the authorities, and which cannot be considered to be law." After reviewing the various cases, and showing they are not in conflict with his views, he proceeds: "It is enough to say, there is none that shows that an instrument which, when executed, is incapable of having any operation, and is no deed, can afterwards become a deed by being completed and delivered by a stranger, in the absence of the party who executed it, and unauthorized by instrument under seal."

It has been suggested that this authority has been much weakened if not overthrown by the case of *Eagleton v. Gutteridge*, 11 Mees and Wels. R. 465. This is an entire mistake. The only point there decided, was, that a complete and operative power of attorney was not invalidated by the insertion of the attorney's christian name in the absence of the principal. The instrument was good without the addition,
610 and was not affected by *it. The opinion of Baron Parke in *Hibblewhite v. McMorine* was sustained by the unanimous decision in *Enthoven v. Hoyle*, 9 Law & Eq. R. 434; one of the latest cases; and is now the settled law of England. 2 Starkie Evi. 431; Buller nisi prius 281.

In the United States the authorities are

conflicting. The volumes containing the various cases are not to be found in this place. Many of the decisions are cited and distinguished in Mr. Robinson's Practice, 2 vol. new edition 86, to which I beg to refer. It seems that in New York and South Carolina, the courts have followed the doctrines of Lord Mansfield, in *Texira v. Evans*. In Pennsylvania formerly the same rule was adopted; but in *Wallace v. Harmstael*, 3 Harris R. 462-8, Chief Justice Gibson, speaking for the court, expressed very grave doubts of the correctness of *Texira v. Evans*, and said that case could only be sustained, if at all, on the ground the obligee had estopped himself by an act in pais.

In Massachusetts I am unable to say what the rule is. The case of *Smith v. Crooker & Cushing*, 5 Mass. R. 538, relied upon by counsel for defendant in error, does not decide, if it even raises the question involved in this controversy. There the instrument was a complete obligation when signed by the obligor; and the alteration subsequently made was wholly immaterial. Judge Parsons, however, in delivering his opinion, went far beyond the case before him. He declared, and this is now relied on, "That the party executing a bond knowing there are blanks in it to be filled by inserting particular names or things, must be considered as assenting that the blanks may be thus filled up after he has executed the bond." Chief Justice Marshall in "*United States v. Nelson*," hereafter to be considered, plainly shows that Judge

Parsons had reference to an operative
611 instrument when "executed, but having blanks to be filled with names or things already agreed on by the parties, and not to an instrument with a blank such as deprived it of all obligatory force when signed. A blank of such vital importance that the paper, while it so remained, was a mere nullity, does not seem to have been in the view of Judge Parsons.

I have thus named the States which are supposed to follow *Texira v. Evans*; there may be others. It is impossible to say in the absence of the reports in the various States of the Union.

On the other hand the Supreme court of North Carolina, when the Bench was adorned by the genius and learning of a Gaston and a Ruffin, has not hesitated to follow the later English cases, overruling the decision of Lord Mansfield. In *Davenport v. Sleight*, 2 Dev. & Bat. Law R. 381, an instrument signed and sealed by the defendants in blank, and delivered to an agent, with directions to purchase a vessel for the defendant, and fill up the instrument with the price to be agreed on, and deliver it, was held not a good bond, even though the defendant declared his approbation of what had been done. The court considered the insertion of the sum in the blank space intended to consummate the deed, as done without legal authority; and therefore that the instrument is void as a bond. And with this ruling it is believed, agree the

cases in Kentucky, Maryland, Texas and Tennessee.

The same principle is laid down in Parsons on Contracts, 2 vol. 723, in the following terms, and is there supported by a strong array of cases: "If there are blanks left in a deed affecting its meaning and operation in a material way, and they are filled up after execution, there should be a re-execution and a new acknowledgment."

612 *In the case of the *United States v.*

Nelson, 2 Brock. R. 64, Chief Justice Marshall did not hesitate to express his entire concurrence with the later English decisions. In that case the printed form of an official bond had been signed by the securities, with blanks for the date and penalty. It was afterwards signed by the principal and the blanks filled, in the absence of the securities, without their knowledge and without any authority from them other than might be implied from their having executed the paper with intention to bind themselves as sureties, and with full knowledge of the object of the bond. The Chief Justice held that the instrument was not binding upon the securities. In the course of his opinion, he said, no sum being mentioned in the bond the defendants were no more bound by the instrument they had executed, at the time of its execution, than if the paper had been all blank. He maintained there are certain differences between sealed and unsealed instruments which make it difficult to apply the principles of one contract to the other: that these differences and rules founded on them, though originating in a different state of society, have taken such fast hold of the law that they can be separated only by the power of legislation. Throughout the opinion he kept carefully in view the distinction between an instrument which is a mere nullity, and imposes no obligation whatever until it is signed and delivered, and an instrument which is complete when executed; and the alteration is merely in the words, or in filling blanks with names or things agreed on, and by consent of the parties. And he showed that the cases relied on as sustaining the validity of blank bonds afterwards filled up, were all of this latter character. He admitted that the Supreme court of the United States, in *Speake v. United States*, 9 Cranch R. 28, had gone very far in deciding that an obliga-
613 tion *may be originally created by virtue of an authority merely implied from the sealing and delivery of a paper which, in its existing state, could avail nothing; and he thought it probable the time would come when that court might completely abolish, in this particular, the distinction between sealed and unsealed instruments. But no one reading the opinion carefully can fail to perceive, that the learned Chief Justice did not incline to this view, and that he intended to adhere to the doctrines of the common law, as expounded in England. It is to be observed that the case of *Hibblewhite v. McMorine* was de-

cided many years afterwards; so that the Chief Justice arrived at his conclusions without the aid of the able and exhaustive opinion of Baron Parke.

The case of *White v. Ver. & Mass. R. R. Comp.* 21 How. U. S. R. 575, has been also much relied on as authority for the defendant in error. It was there held that the bonds of a railroad company, payable in blank, might be filled up by any bona fide holder, and made payable to his own order; but the reason assigned by the court, is, that the usage and practice of railroad companies, of capitalists and business men of the country, and the decisions of the courts, had impressed upon this class of securities the character of negotiability; being negotiable, they were of course, governed by the laws applicable to such instruments; one of which is, they may be executed, endorsed or uttered under a mere parol authority.

In the course of his opinion, Mr. Justice Nelson alluded to the case of *Texira v. Evans*; he admitted it was not the law in England. He said, however, that courts of the highest authority in this country have followed Lord Mansfield, and have not hesitated to meet the fears expressed by Baron Parke, that the effect would be to make bonds negotiable, by admitting the
614 consequence. *But the Supreme court of the United States have not yet gone that far; and Mr. Justice Nelson admits that Chief Justice Marshall was unwilling to do so. It is conceded on all sides, that to follow the rule declared in *Texira v. Evans* is to destroy all distinction between deeds and mere parol contracts. Are we prepared for that in Virginia? No one familiar with the opinion of the judges, and the decisions of our courts, can hesitate to affirm that the disposition here is to follow the common law decisions, and preserve unimpaired the distinction between sealed and unsealed instruments.

In *Harrison v. Tiernans*, 4 Rand. 177, the question was as to the validity of certain instruments taken by the sheriff as bail bonds. They were in the usual form, signed and sealed by the obligors, but without any sum being mentioned as the penalty of the bonds. Counsel, in arguing, endeavored to apply the principles governing bills of exchange and promissory notes, according to which a man who signs his name to a blank piece of paper will, under certain circumstances, be considered as giving authority to fill it up with a valid instrument. But this court said, Judge Cabell delivering the opinion, that bills of exchange and promissory notes are not deeds; and authority to execute them may be given by parol, or even inferred from circumstances; but a bail bond is a deed which cannot take effect without delivery; and that delivery can only be made by the party himself, or by some attorney legally authorized by deed for that purpose.

What are we to understand by this language: that the blanks in these bonds might have been filled by a mere parol

agent? Clearly not! Judge Cabell means that this could only be done and the instrument delivered by the parties themselves, or by attorneys authorized by deed. If he

does not mean this, his language
615 *does not admit of any fair and reasonable interpretation. He declares that the bonds were wholly inoperative by reason of the failure to insert a penalty. I beg to know what substantial difference there is between an instrument confessedly a mere nullity for the want of a sum to be paid, and an instrument which is a mere nullity for the want of an obligee to whom to be paid. The authority to execute and deliver, or complete and deliver such an instrument must of necessity be the same in both cases.

In *Cleaton v. Chambliss*, 6 Rand. 86, this question arose incidentally. According to my understanding, the proposition then announced, is, that any material alteration of a deed invalidates it, unless made under such circumstances of consent by the obligee as amounts to a re-execution or re-acknowledgment of the writing. The reason is obvious; the alteration changes the contract. The writing is no longer the deed of the obligor or grantor. In its altered state, it must be re-executed by him, and then it takes effect from the re-execution. Now whether it be the re-execution of an altered deed, or the execution of a new one, or the completion of an imperfect one, there can be no well defined distinction; and the same principles must govern in each case in respect to the act necessary to a valid instrument.

I am aware that in *Rhea v. Gibson's ex'or*, 10 Gratt. 215, 220, Judge Samuels admitted there was some conflict of authority upon this point; he, however, cited a number of cases as deciding that the filling of blanks in a bond will not give it validity, unless under circumstances which make a new execution thereof. And among the cases thus cited are those I have just mentioned. Why they are not authority for us I am at a loss to understand; but conceding they are not, they clearly show the bearing of the Virginia courts and
616 *judges, and they indicate a purpose to adhere to the common law doctrines until changed by legislation.

The cases of *Clegg v. Lemessurier*, 15 Gratt. 108, and *Stinchcomb v. Marsh*, ibid 202, though not involving the point in controversy here, exhibit the same tendency of our courts in this class of questions. In one of these cases, the counsel having cited the decisions of eleven States of the Union to show that the affixing of a scroll to the name is of itself sufficient evidence of its being intended as a seal, the court said, however desirable conformity with the different States might be, it furnished no sufficient reason for reversing our course of decisions. In the other case, the question turned upon the operation and effect of a power of attorney, and of acts done by a sub-agent thereunder. Counsel, in urging upon the court to give a liberal construction

to the instrument, had suggested that a spirit of self-reliance and directness of purpose will prompt the people of this age and country to disregard the formalities of conveyancing and the rules of law by which they are prescribed. Judge Lee said this constituted no sufficient reason, nor furnished any adequate authority to change the law, or overthrow plain, intelligible and well settled principles: That is the province of the Legislature, and not of the judiciary.

I think these cases strongly illustrate the reluctance of this court to reverse its course of decisions, because other States may have adopted a different rule, or because of casual instances of hardship occurring in individual cases.

In the present case it seems to be the safest course to adhere to our previous rulings and to the doctrines of the common law as expounded by the courts of that country from which we have derived our laws, our language and our system of

617 jurisprudence. It is true that "in many cases the principles of the common law, as sanctioned and enforced by the English courts, are ill suited to the temper of our people, and the genius of our institutions: but as a general rule, that State which most rigidly adheres to the course of English decisions and precedents, will in the end attain the wisest, the most stable and the most conservative administration of justice.

For these reasons I am of opinion the judgment of the Circuit court should be reversed, the verdict set aside, and a new trial had, in accordance with the principles herein announced.

The other judges concurred in the opinion of Staples, J.

The judgment is as follows:

This day came again the parties, by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said Circuit court erred in giving to the jury the instruction moved on the part of the plaintiff below, and set out in said defendant's bill of exceptions, number 1; and that the said Court, in lieu of the said instruction, should have given to the jury the instruction moved on the part of said defendant in that court and set out in bill of exceptions number 2. Therefore, it is considered that the said judgment of the said Circuit court, for the error aforesaid, be reversed and annulled, and that the defendant in error do pay to the plaintiff in error his costs by him about his appeal in this behalf expended. And this court, proceeding now to render such judgment as the said Circuit court ought to have rendered in the cause, it is further considered, that 618 the verdict of the *jury be set aside agreeably to the motion to that effect finally made by the said defendant in said Circuit court, and that a new trial be

awarded him, at which the court, if so moved, and if the evidence be substantially the same as on the former trial, shall instruct the jury in conformity with the foregoing opinion.

Which is ordered to be certified to the said Circuit court for Smyth county.

Judgment reversed.

619 *Trout v. Va. & Tenn. R. R. Co.

June Term, 1873, Wytheville.

1. **Right to Demurrer to Evidence—Exceptions.**—*The general rule is, that a party has a right to demur to the evidence: and an action for negligence is no exception to the rule. The exceptions to the general rule, are, when the case is clearly against him; or where the court doubts what facts should reasonably be inferred from the evidence demurred to.

2. **Demurrer to Evidence—Principles Governing.**—†The principles governing demurrers to evidence, as stated by GREEN, J., in *Whittington v. Christian*, 2 Rand. 353, and the opinion of STANARD, J., in *Ware v. Stevenson*, 10 Leigh, 155, approved and acted on.

***Right to Demurrer to Evidence.**—In *Clark v. R. & D. R. Co.*, 78 Va. 713, the court, citing the principal case, said: "The plaintiff in error assigns as error in this case that he was compelled in the circuit court to join in the demurrer. Either party, plaintiff or defendant, has a right to demur to the evidence, and the other party will be compelled to join in the demurrer unless the case be plainly against the demurrant, and his object in demurring seems to be clearly nothing else but delay." See also, as to right of either party to demur and compel the adverse party to join in the demurrer unless the case be plainly against the demurrant, and his object be nothing but delay, *Deaton v. Taylor*, 90 Va. 222, 17 S. E. Rep. 944; *Johnson v. Chesapeake, etc., R. Co.*, 91 Va. 173, 21 S. E. Rep. 238; *Hyers v. Wood*, 2 Call 589; *Hansbrough v. Thom*, 3 Leigh 147; *Rohr v. Davis*, 9 Leigh 30; *Boyd v. Savings Bank*, 15 Gratt. 503; *Green v. Buckner*, 6 Leigh 82; *Eubank v. Smith*, 77 Va. 206.

Same—**Exceptions.**—But that the court may refuse to compel the other party to join in demurrer, when the evidence is clear, see *Thweat v. Finch*, 1 Wash. 220; *Wroe v. Washington*, 1 Wash. 362; *Dunbar v. Beale*, 5 Munf. 24; or where the parol testimony is loose, indeterminate, and circumstantial, *Hyers v. Wood*, 2 Call 589; *Green v. Buckner*, 6 Leigh 82. In *Merchants' & M. Bank v. Evans*, 9 W. Va. 333, the court, citing the principal case, said: "The court ought not to compel a joinder in demurrer, when the case is clearly against the party demurring (*Hoyle v. Young*, 1 Wash. 150), or when the court doubts what facts should reasonably be inferred from the evidence."

Negligence constitutes no exception to the rule; it is the duty of the court to compel the other party to join in the demurrer to evidence. See *Johnson v. C. & O. Ry. Co.*, 91 Va. 171, 21 S. E. Rep. 238.

†**Demurrer to Evidence—Rule.**—It seems well established by a long line of cases in Virginia that, on a demurrer to evidence, the rule is that the demurrant is regarded as admitting the truth of all the demurree's evidence and all reasonable inferences to be drawn therefrom, and as waiving all his own evidence in conflict with that of the demurree and

3. **Stock—Injured on Railroad*—Negligence of Engineer—Liability of Road.**—In an action against a railroad company for injury to the plaintiff's horses, if it appears that the road runs through plaintiff's land, and the horses got upon the track of the road without any negligence or default of his, and were killed by the company's engine, the company will be liable for the damage sustained by the plaintiff, if the damage was done by the failure of the engineer to take the proper care to avoid doing the injury.

all inferences from his own evidence, which do not necessarily flow therefrom. See *Green v. Judith*, 5 Rand. 1; *Hansbrough v. Thom*, 3 Leigh 158; *Tutt v. Slaughter*, 5 Gratt. 573; *Union St. Co. v. Nottinghams*, 17 Gratt. 119; *Gillett v. Amer.*, etc., Co., 20 Gratt. 566; *Long v. Ryan*, 30 Gratt. 732; *Richmond, etc., R. Co. v. Anderson*, 31 Gratt. 820, and *foot-note* for collection of cases; *R. & D. R. Co. v. Moore*, 78 Va. 97; *Jones v. O. D. C. M.*, 82 Va. 148; *Tucker v. Sandidge*, 85 Va. 502, 8 S. E. Rep. 650; *Adams v. Hays*, 86 Va. 154, 9 S. E. Rep. 1019; *Richmond, etc., R. Co. v. Williams*, 86 Va. 167, 9 S. E. Rep. 990; *N. & W. R. Co. v. Thomas*, 90 Va. 206, 17 S. E. Rep. 884; *Richmond, etc., Co. v. West Point*, 94 Va. 676, 27 S. E. Rep. 460; *McDonald v. N. & W. R. Co.*, 95 Va. 106, 27 S. E. Rep. 821.

In *Lee v. Hill*, 87 Va. 504, 12 S. E. Rep. 1062, the court said: "The evidence for the defendant shows clearly that it was made in August 1886, for one year's service, to commence on the first of October next ensuing; and, as this is not in conflict with the plaintiff's evidence, it was not waived by the demurrer to evidence."

In *Allen v. Bartlett*, 20 W. Va. 53, the court citing the principal case, said: "The rule of law in cases of demurrer to evidence is well settled in this state. In such cases the general rule may be stated as follows: The demurrant must be considered as allowing full credit to all the evidence of the demurree, and admitting all facts directly proved by, or that a jury might fairly infer, from the evidence; and as waiving all the parol evidence on his part which contradicts that offered by the demurree, or the credit of which is impeached, and all inferences from his own evidence which do not necessarily flow from it." See also, *Hefhebower v. Detrick*, 27 W. Va. 21. See, on this subject, monographic note appended to *Stoneman v. Com.*, 26 Gratt. 887, on "Bills of Exceptions."

***Liability of Railroad for Injury to Stock—Negligence.**—In *Richmond, etc., Co. v. Noell*, 86 Va. 25, 9 S. E. Rep. 473, the court citing among others the principal case, said: "It may not be out of place, however, to observe that we have not discovered any other error in the instructions as given by the court, and the omission of the word 'gross,' as above stated, before the word 'negligence,' so as to hold the railroad liable for ordinary negligence towards stock on its track without the negligence or default of the owner, was not erroneous."

In *Wash. v. B. & O. R. Co.*, 17 W. Va. 212, the court said: "In *Trout v. Virginia & Tennessee Railroad Co.*, 23 Gratt. 619, the plaintiff's horses got out of his field on a railroad track, by some third person, without his knowledge leaving the gate open, and they were killed by the company's engine. The engineer had ample time after seeing the horses to stop the engine before reaching the place where they were killed; but he did not slacken his speed, but merely blew his whistle to frighten them off the track. On a demurrer to evidence by the defendant, the court

This is a supersedeas to a judgment of the Circuit court of Roanoke county, rendered in an action of trespass on the case, brought by the plaintiff in error, *Trout* against the defendants in error, the *Virginia & Tennessee Railroad company*, to recover damages for the destruction of two mares and the injury of a horse, belonging to the plaintiff, on the railroad of the defendants, alleged to have been caused by the negligence and carelessness of the defendants, their servants and agents in driving and running their engines and coaches, on said railroad, in said 620 county. The only plea in the case was "not guilty," on which issue was joined; and the case was tried by a jury. Four witnesses were examined in behalf of the plaintiff, including the plaintiff himself; and five in behalf of the defendants. The evidence being fully heard, the defendants tendered a demurrer thereto. The plaintiff objected to joining in the demurrer, but the court overruled the objection and required him to do so; which he accordingly did. Whereupon the jury found a verdict for the plaintiff and assessed his damages to the sum of \$500, with interest thereon from the 9th day of November 1869 till paid, subject to the opinion of the court upon the demurrer to the evidence. The court was of opinion that the evidence was not sufficient in law to maintain the issue joined on the part of the plaintiff; and accordingly gave judgment for the defendants. To that judgment the supersedeas aforesaid was awarded by this court.

The substance of the evidence set out in the demurrer, or so much of it as seems to be material, is as follows: The railroad runs through, and bisects the land of the plaintiff in Roanoke county, for a considerable distance; how far does not appear. At the time of the injury there was, and for many years prior thereto there had been, a fence on each side of the railroad, running through the plaintiff's land, if not to its whole extent, at least to a large part thereof. The fence certainly extended from the bridge across Peter's creek westwardly, for more than a half of a mile, to a cattle guard. It had been erected and kept up by the plaintiff, at his own expense, on the land of the defendants, by their consent. The fence on the north side of the railroad being fourteen feet, and that on the south side seven feet, from the road. It is proved by a witness of the plaintiff to have been a good fence at the time of the injury; a

held that the railroad company was liable. In this state it has been decided, that it is the duty of the servants of a railroad company, so far as is consistent with their other paramount duties, to use ordinary care to avoid injury to cattle on the track. They are bound to adopt the ordinary precaution to discover danger as well as to avoid its consequences after it is known." See also, *Bullington v. Newport News, etc., Co.*, 33 W. Va. 436, 9 S. E. Rep. 578; *Layne v. Ohio, etc., Co.*, 35 W. Va. 488, 14 S. E. Rep. 122.

See generally, monographic note on "Demurrer to Evidence."

portion of it being a plank fence, and
 621 the *balance rail. Across said road, running between these two collateral fences, the plaintiff had but one way leading from one part of his land on one side, to the other part on the other side, of the railroad; and he had a gate on each side of the railroad where it was crossed by the said way. That way, besides being used for plantation purposes and as a means of communication between the different parts of his land lying on either side of the railroad, was also used by him and one or two of his neighbors as a mill-road, and by a few of them as a neighborhood road. The gates had latches and pegs, with which they were generally kept fastened; though they may have been, and no doubt were occasionally, left open by persons passing through. There was no other outlet from the railroad through either of the fences except by draw bars in the fence on the north side of the road, between the crossing and the cattle-guard, and nearer to the latter than the former, unless there was also a similar outlet in the fence on the south side, about which the evidence was uncertain. The plaintiff was in the habit of pasturing his stock on his land, first on one side, and then on the other side of the railroad. At the time the damage was done, he was using the land on the north side as a pasture. In the night of the 9th of November 1869, during which the injury complained of was done, his two mares and horse named in the declaration, and three colts, got through the gate on the north side of the crossing upon the railroad and went up the road towards the cattle-guard. He could not tell how the gate happened to be open that night. He passed through and shut it that evening. They were somewhere between the crossing and the cattle-guard, but much nearer the former than the latter, when, about a quarter before ten
 622 o'clock at night, the defendants' engine *and train of cars, being the mail train going west, reached the bridge across Peter's creek. The plaintiff was then at his house some 500 or 600 yards from the railroad. He says, "the night the horses were killed his attention was attracted by the constant whistling of the engine. He thought the first whistling was east of the bridge. He heard brakes blown down, and then continuous whistling. The train did not stop where the blind mare was killed, but continued to whistle from there, as if it was after stock, until it got around the turn of the hill through the cut, and then commenced whistling much louder and faster, and he heard the train stop. There was continuous whistling from the time he first heard it east of the bridge, until the train got to the cattle-guard, except some momentary intervals. He does not think the speed was slackened at the point where the blind mare was killed, but he could not tell. He thinks they went through at the usual speed. The train was about an hour behind time. He left his house to go to the road $\frac{1}{4}$ before 10 o'clock.

He went there to see what was the matter; he heard the whistle of the engine through his land and heard the train stop; and that caused him to go. "When he went to the road, he found the blind mare dead, above the gate at the crossing. He continued then to go west, as far as the cattle-guard. When he got to the cattle-guard he found a train there, the front wheel of the engine being off the track. He found there the other mare dead, under the engine, and some one was trying to cut her in two to get her from under the engine. The brown horse was standing under the fire pan of the engine, in the cattle guard. He thought he would die; he was burned very badly, and was reeling as if just ready to fall." He turned out to be of no value. The plaintiff's
 623 two year old colt was pulled out *of the cattle guard, but was very little injured. The plaintiff in his testimony further says, that "from the place where the blind mare was killed the road was straight for 520 yards east of that place. The blind mare was killed 86 yards west of the gate at the crossing. She was killed in a cut between 3 and 4 feet deep. The cut did not extend from the place where the mare was killed quite 86 yards east. At the gate the road is level. A few yards from the gate the cut commences, and gradually deepens to 3 or 4 feet deep, where the mare was killed, and continues to deepen after that, till it is nine feet deep. From the cut you get on a fill, and then a curve commences, and then at a distance of 150 or 200 yards, a short cut again commences, 12 or 14 feet deep in the curve, and then gets to a fill out of the cut, which fill continues to the cattle guard, where it is near about level. From the last cut to the cattle guard west, he thinks, is 350 or 400 yards, but he did not measure it. It is up grade from the bridge to the curve. From the curve to the cattle guard, he is under the impression is about level. He does not know that one could see to the cattle guard from the west end of the cut, but thinks the cattle guard could be seen from a point 50 yards west of the cut; there is nothing to obstruct a view from that point to the cattle guard. The morning after the horses were killed, he saw tracks of horses on the railroad, from the gate to the cattle guard. The cattle guard on the railroad is at the end of his fences west. There are no cattle guards at the gates at the crossing where the road crosses the railroad. It would be much better to have cattle guards; it is inconvenient not to have them; he never applied for any there; he had applied for some at another point, and he mentioned to
 624 the section master *that there ought to be cattle guards at the crossing, who replied that it was useless to apply, as he could not get them."

The foregoing statement of facts is derived, almost entirely, from the testimony of the plaintiff himself. The testimony of the other witnesses of the plaintiff need not be repeated here. It relates to the description and value of the horses killed and

injured; the description of the ground over which the railroad runs through the land of the plaintiff; the distances of objects on the road from each other; the distance at which an object, such as a horse, can be seen on the railroad, in the night, by the head lights; the length of time required to stop a train running at the usual speed, or to check such a train, &c., &c.

The testimony in behalf of the defendants consisted mainly of the evidence of Hooper, the locomotive engineer in charge of the train at the time of the killing of the horses in the declaration mentioned. He testifies, among other things, that on the evening of the 9th of November, 1869, he was running the mail passenger train. About three miles west of Big Lick, his attention was called to an animal on the track; only one at first. As soon as he discovered the animal he blew down brakes and used every exertion in his power to check the train, as it had been the usual custom to do. The engine struck the animal, he supposes, at a distance of about seventy-five yards from the place at which he first saw him. The train, at the time the animal was struck, was checking up, and attained its lowest speed twenty-five or thirty yards west of that point. After he found the animal was off the track, and no damage done to the engine, he blew off brakes and proceeded west slowly, to the top of the grade. Before reaching the top of the grade, he saw

two or three other horses, some one hundred and fifty yards ahead, on the track. He blew his whistle, for the purpose of scaring them off from the point at which he saw them, till he reached the top of the grade, and saw nothing more of them until he was within thirty or forty feet of the cattle-guard. He thought when he reached the top of the grade, and saw nothing more of the horses, that they had gone out into the plaintiff's field, through the bars near the top of the grade. When he got in thirty or forty feet of the cattle-guard, he saw a body partly in and a portion of the body out of the cattle-guard. He blew down brakes repeatedly, reversed his engine, used sand, and used every exertion to avoid running into the animal in the cattle-guard. With all the exertions he could not avoid striking the animal. The animal was pulled out of the cattle-guard by the engine, and drawn the length of the engine. The fire pan stopped immediately over the cattle-guard; the back wheels of the front truck of the engine being thrown off the track. A large portion of the animal, nearly all of it, was under the truck of the engine, and had to be removed before the engine could be put on the track. He assisted in moving it; a portion had to be cut to pieces with axes, and a portion with knives, to get it out. After getting the animal from under the truck, we proceeded to put the engine on the track, which took about 20 minutes time. After getting the engine on, we backed over the cattle-guard, and put on cross ties to enable us to get the horse out that was burnt, and

took him out, and moved him to one side, and left and went on with the train. The road is straight from the point where he saw the first animal to the place where it was killed. The grade was up, say ten or twelve feet to the mile. The up grade continues about 325 yards from where he saw the first animal.

From the top of the grade down to the cattle-guard, *is a gradual down grade, averaging 40 feet to the mile. The distance is 1550 feet. A curve commences at the top of the grade, and continues to west of the cattle-guard, where the second horse was killed." "Starting from the top of the grade he could not, with the aid of head lights, see a horse on the track beyond the distance of forty-five yards, at no point between that place and the cattle-guard, where the horse was killed. From the time he saw the first horse he checked, and did not run more than three miles an hour. After seeing the second horse he did not run over five miles an hour; although he thought they had escaped he did not know it, and was running slowly until he discovered the horse in the cattle-guard. Thinks he can see a horse on the track by aid of the head light, in a straight line, 250 or 275 feet. In running along the curve, he could not have seen a horse on the track further than fourteen yards. As he approached the cattle-guard, he discovered a horse in it, but it turned out that there were two horses and two colts. One of the horses was killed and the other injured, and the two colts escaped uninjured. He could not put out the fire in the fire pan without scalding the horses under it. Pouring water in it to put the fire out, it would have run down on the horses and scalded the one that was already burnt and the one uninjured. When the first horse was discovered he was on time, and running at the rate of 17 or 18 miles an hour." "From his experience as an engineer, running at the speed he was at the time he first discovered the horse, that is 17 or 18 miles an hour, he could not have stopped the engine under 600 feet. At the time the first animal was struck, he thinks the engine was running at the rate of eight miles an hour; it was in the night and difficult to tell. An engineer excited in running over a horse cannot well tell how fast he is running.

He continued to blow his whistle *from the time he first saw the animal that was first killed till he struck it. Don't think the animal moved, from the time he first saw it until it was struck. He not only blew the whistle, but reversed the engine, before he struck the first horse that was killed." "At the time of killing the horses the brakes were in good condition. There is great danger of throwing the trains off the track when the engine runs over a horse, and the danger is increased when the train is running slowly." He testifies in his cross-examination, that "he is familiar with the track of the road through the plaintiff's land, and knew the fences were near the track, and that drawbars were near the track; thinks on both sides; knew they

were on the north side. Does not recollect that he noticed that night, whether the drawbars were open or closed. Does not think that his head lights would have extended to the drawbars, which were about 30 feet from the track; knew there was no cattle-guard between the bridge and where these horses were killed."

The foregoing is the substance of the testimony of this witness, who was the only witness on either side who was present when the damage was done. The other witnesses of the defendants (with perhaps one, and that an unimportant exception,) were officers and agents of the defendants, who were not present on that occasion, and whose testimony seems not to be very important. They testify, chiefly, as to the state of the railroad between the bridge and the cattle-guard, the length and the depth of the cuts, the time in which a train running at full speed can be stopped by the engineer, "the distance to which light is thrown by the head lights on a straight track and on a curve, &c., &c." Mitchell, a division master, in the employment of defendants, whose business requires him to go frequently over that part of the road where the horses were killed, and who is

well acquainted with it, describes
628 *it particularly. He says he "is familiar with the running of engines. He thinks a head light would throw the light in a straight direction where the first horse was killed 250 feet from the top of the grade towards the cattle-guard. I have rode along frequently on the engine in the night. At places I don't think the light would be thrown more than 65 feet on the strongest portions of the curve; at other places about 100 feet. At a point 100 yards east of the cattle-guard coming west, the head light he thinks would be thrown 100 feet on the track." Goodwyn, who is civil engineer or a roadmaster of the defendants, "is familiar with the running of engines and trains on railroads, and with the ground where the horses were killed; has been on the engine and noticed how far ahead light would be thrown on the track; thinks 100 yards would be the outside distance to which the light would be thrown in a straight direction. From the summit to the cattle-guard is a 3 degree curve. The light would be thrown straight ahead, but owing to the curve it could not be seen on the track more than 40 or 50 yards."

Hansbrough, for the appellant.

First: As to error in requiring plaintiff to join in demurrer to evidence. Vide, Bonney on Railway Law, 64; 1 Redfield on Railway Law, (4th ed.,) pp. 472, 474, § 19 and 502; 2 Redfield, p. 231; 2 American Railway Cases, 114 to 118, and 325; 2 Phillips on Evidence, 842-4.

Counsel for appellee, arguendo, admitted that had the court below instructed the jury that the facts proved did not constitute negligence, it would have been error. It is submitted that the mode adopted in this cause to effect the same end, is equally error,

because the result is the same, viz: the usurpation of the province of the jury, (2 Am. R. Ca., 117). The law defines

629 negligence *to be "the lack of such care as a prudent man takes of his own," (3 Phillips on Evidence, 328). Now is not "what is such care?" always a question of fact for the jury, to be judged of from the circumstances of the case? No decision is extant where, in an action the gravamen whereof is negligence, a party, against his protest, was required to join in a demurrer to the evidence. In the case in 17 Gratt., 115, this point was not raised and not decided.

Second: As to sustaining the demurrer to the evidence, and thus deciding either, first, that negligence on the part of the defendant did not entitle the plaintiff to recover; or, second, that the facts proved in this case did not constitute negligence.

1. As to Railroad Company's liability for its negligent destruction of domestic animals on its track. Vide, Bonney on Railroad Law, p. 39; 2 American Railway Cases, 114 to 118 and 325; 1 Redfield, p. 470 —note—(South Carolina case); Ib., 499, § 4, (Connecticut case); Ib., 477, (California case); Ib., 493, (New Hampshire case); Ib., 475, (Ohio case). See especially Ib., 470-1, § 11, for the comments of the author on the decision of Chief Justice Gibson on the (Pennsylvania) case of N. Y. & E. R. R. Co. v. Skinner, (that case being strongly relied on by the appellee's counsel, and cited in his brief,) which decision is there expressly declared by Judge Redfield not to be the law in any country where prevails the maxim, "Sic utere tuo ut non lædas alienum." See, too, Redfield's American Railway Cases, p. 255-6—note—where it is stated that the result of a collation of all the English and American decisions is, that Railroad Companies are liable for their destruction on their railroad tracks of all domestic animals when the destruction is caused by either recklessness, want of care or wilful injury.

630 *And lastly, see the case of the Philadelphia and Reading R. R. Co. v. Derby, reported in 14 How. U. S. R. 468, and mentioned in Bonney on Railway Law, 214, where the Supreme court of the United States declares that Companies employing the dangerous agency of steam, should be held to the greatest care and diligence, and that in such cases any negligence is "gross" negligence.

Now as to (2) whether or not the facts proved in this case constitute negligence.

Negligence is the want of such care as a prudent man takes of his own affairs. Does the evidence show the defendant to have been guilty of such negligence?

In case at bar, appellant is entitled, on the demurrer to the evidence, to the full benefit of all his own evidence, of all the appellee's evidence which is favorable to him, and of all reasonable inferences deducible from either and conducive to the establishment of the issue on his part, and to the exclusion of all the appellee's evidence

which either literally or in effect conflicts or tends to conflict with the appellant's evidence. (See 2 Tucker's Com's, 297-8; 3 Phil. Ev., 842-4.) The liability of the defendant may result either (a) from negligence whereby plaintiff's horses entered on the defendant's railroad track and were destroyed, or (b) from negligence of the defendant in failing to discover the horses after they were on the track as soon as they might with due care and diligence have been discovered, and in stopping the locomotive as soon as it might with due care and diligence have been stopped, so as to prevent the destruction of the horses.

It is submitted that the defendant was guilty of negligence in both of these particulars:

(a.) In neglecting to erect and maintain efficient cattle guards at the road crossing which led from one portion of the plaintiff's land to another over the railroad
631 *track. (See 1 Redfield, 469, §§ 9 and 10; Ib., 493.) In many States cattle guards at road crossings are required by statute. In some, on common law principles, the want of them has been decided by the courts to render Railroad Companies liable for animals straying on the track and destroyed by reason thereof.

In case at bar the road was not a "public highway," but it was a common neighborhood road, used by night and by day, by all who chose, as a mill road. It was the only good crossing there was over the railroad from one portion to another of the plaintiff's land. At every other point there was either a fill or a cut. It had evidently existed ever since, and probably before, the construction of the railroad there. The necessity for the cattle guard arose from the fact that the railroad penetrated the plaintiff's land nearly a mile, running east and west in a straight course; and that on either side of the railroad was a fence which terminated at the western extremity of the plaintiff's land at the cattle guard, thus creating a cul de sac, blind alley or trap; so that animals entering through the gates at the crossing, could wander along the railroad east or west from the gates; and if they wandered westward they would be necessarily caught in the trap by the defendant's locomotive. Had the defendant erected and maintained efficient cattle guards at this crossing, the plaintiff's horses, which were pasturing in their owner's adjacent field, could not have wandered along the railroad, and would not have been destroyed. It is true that the fences and gates were built by the plaintiff; but he built them with the consent and by the permission of the defendant, on the defendant's land, fourteen years before the injury; during all of which period the defendant had tolerated said fences and gates with full knowledge of all the necessities which arose and obligations

632 *which were created in respect to the erection and maintenance of cattle guards at the crossing as a means of safety both to the passengers on the trains and to

the plaintiff's stock. The fences and gates built under such circumstances, and acquiesced in for 14 years by the defendant, were the defendant's own act, though performed by the plaintiff, who pro hac vice, was the defendant's agent.

It is worthy of note that the plaintiff applied for cattle guards at the crossing, but that the defendant refused to erect them; and that the plaintiff kept the fences in good order, and closed carefully the gate with latch and peg the very night of the injury.

At all events, the statutory law of Virginia requires that for every person through whose land the road of a company passes, the company shall provide proper wagon ways across the road from one part of the said land to the other, and keep such ways in good repair. (See Code, ch. 56, § 22.) And it is evident that if the railroad be fenced by the Company, or (which is the same thing,) by its permission, no such wagon ways could be considered proper or as kept in good repair, unless efficient cattle guards were erected and maintained at such crossings.

(b.) In neglecting to discover the plaintiff's horses after they were on the road as soon as they might with due care and diligence have been discovered, and to stop the train as soon after the horses were discovered as with due diligence it might have been stopped.

The counsel then went into an examination of the evidence to establish his proposition.

Watts and Walker, for the appellee.

As to the demurrer to the evidence, the court is respectfully referred to the following authorities: Whittington
633 *v. Christian et al., 2 Rand., 353; Childers v. Deane et al., 4 Rand., 406; Green v. Judith, &c., 5 Rand. 1; Hansbrough's Ex'rs v. Thom, 3 Leigh, 147; Green et al. v. Buckner's adm'r, 6 Leigh, 82; Rohr v. Davis et al., 9 Leigh, 30; Tutt v. Slaughter's adm'r, 5 Gratt., 364; Union Steamship Co. v. Nottinghams, 17 Gratt., 115; Boyd's adm'r v. City Savings Bank, 15 Gratt., 501; Hardaway v. Manson, 2 Munf. 230.

By these authorities the following propositions are established:

1. Either party to a suit may demur to the evidence of the other; and this either before or after he has introduced testimony on his own part; and it is the duty of the court to compel a joinder in the demurrer, unless the testimony be plainly against the demurrant, and it appears he is only seeking delay or some improper advantage. [Rohr & Davis] supra.

2. It matters not how conflicting the testimony may be it must be all set forth in the demurrer; and the right to demur is not abridged.

3. By his demurrer the demurrant admits the truth of his adversary's testimony; admits all fair and reasonable deductions that may be drawn from it, and abandons

all of his testimony which conflicts with that of the demurree, and with such fair and reasonable deductions.

4. So much of the demurrant's testimony as is not in conflict with that of his adversary, or with any reasonable and fair deduction therefrom, may be and ought to be considered by the court. The case in 17 Gratt. is directly in point; and it makes no difference that there was no conflict of testimony in that case; for under the rule above laid down, all of the demurrant's conflicting testimony is discarded, and the demurree's testimony stands unimpeached. The authorities referred to by the appellant

assert no more than the familiar principle that the law *is for the court to decide, and the fact for the jury. They do not at all change our well established rules upon demurrer to evidence.

As to the second assignment of error, in sustaining the demurrer to evidence, the court is respectfully referred to "1st Redfield on the Law of Railways," (fourth edition) chapter 18, title, "Injuries to Domestic Animals," page 464 to 480 inclusive. It is also especially referred to the case of Railroad Co. v. Skinner, reported in Redfield's railway cases, p. 347. As to fences, it is referred to 1st Redfield on the Law of Railways, ch. 19, p. 480 to 502 inclusive. See also appendix, vol. 1st, p. 685.

From these authorities the following propositions are claimed as law:

1. There is no law, statutory or common, requiring the appellees to fence in their land and roadway which is to the extent of 80 feet in width, and is their fee-simple property.

2. There is no law requiring them, (the appellees) to make cattle guards at private farm crossings of their road. Such a requirement would be most unreasonable. (1st Redfield, p. 498 and note.)

3. The appellant, for his own convenience and use, had erected two fences, one on each side of the appellee's road, and on their ground; thereby making a long and narrow lane. At the farm crossing there were two gates, which was generally kept closed by the appellant, (it being his duty to do so,) but on the occasion of the killing and wounding the horses of the appellant, one of those gates, on the north side, was left open.

4. This was contributive negligence on the part of the appellant, and his horses were trespassers upon the property of the appellee.

5. To make the appellee responsible in damages, in such a case, if responsible at all, wilful, wanton, and reckless

*negligence must be shown, and the burden of proof is on the appellant.

6. No negligence of any sort is shown against the appellee; much less such wanton, wilful, and reckless negligence.

7. In determining the question of negligence, the duties due from the Railroad Company to the passengers upon its trains, and as carriers of the U. S. mail, should be considered. It would be impossible for the

Company to properly perform these duties if the running of its trains is to be constantly interrupted by vagrant, trespassing animals, and the Company is to be punished in damages when such animals are accidentally killed or damaged by its trains in the regular and lawful performance of their obligations to the public.

8. Sections b c d and e of the appellant's assignment of error seem to be based on the testimony of appellee's witness, and must be considered as waiving any objection to appellee's testimony, as he cannot pick and choose such of that testimony as may suit him and discard the rest.

9. The testimony elicited upon the cross-examination from appellee's witnesses, must be considered as part and parcel of the testimony in chief of the appellee, incorporated with and explanatory of it. To make the testimony of the appellee's witnesses that of the appellant, the witness must be re-called at the proper time and examined by the appellant as his witness. See 1 Greenl. Evi. p. 521, sec. 445. See also 1 Starkie Evi. p. 129, §§ 17, 18, 19, 20, 21, 22; 2 Starkie Evi. p. 1738, 3 American edition; 2 Stephens' Nisi Prius, p. 1773.

MONCURE, P., delivered the opinion of the court.

The plaintiff, in his petition for a super-sedeas, complains that the judgment is erroneous in two respects *only,

viz: 1st. In requiring the plaintiff to join in the demurrer to the evidence; and

2d, in sustaining the said demurrer. And—

First. We are of opinion that the court did not err in requiring the plaintiff to join in the demurrer to evidence. It is contended that the court did err in that respect, because the gravamen of the action, being negligence, which is a question of fact and not of law, and there being testimony tending to show negligence, the existence of the negligence is a question for the jury; and especially so, when there is any uncertainty as to the facts. That negligence is a question of fact for the decision of the jury, is no good reason for its not being subject to a demurrer to evidence; for all questions of fact are for the decision of the jury. We know of no authority for making the fact of negligence an exception to the general rule which gives to a party a right to demur to the evidence; nor do we know of any authority for making the mere uncertainty as to the facts, a ground of exception to the general rule. The decisions of this court on the subject, which are numerous, and most of which were cited by the counsel for the defendants in error, plainly show what is the general rule, and what are the exceptions to it. In 1 Rob. Pr. old ed. pp. 349, 353, the cases which had been decided before the publication of that work are collected. In Whittington, &c., v. Christian, &c., 2 Rand. 353, Judge Green lays down, both the rule and the exceptions. After referring to the English practice, he says: "The modern practice, especially in Virginia, where it has been

sanctioned by repeated decisions of this court, is to allow either party to demur, unless the case be clearly against the party offering the demurrer; or the court should doubt what facts should reasonably be inferred from the evidence demurred to; 637 in which case the jury is "the most fit tribunal to decide; to put all the evidence on both sides into the demurrer; and then to consider the demurrer as if the demurrant had admitted all that could reasonably be inferred by a jury from the evidence given by the other party, and waived all the evidence on his part which contradicts that offered by the other party, or the credit of which is impeached; and all inferences from his own evidence which do not necessarily flow from it." *Green v. Judith*, 5 Rand. 1, is a decision to the same effect; and in that case the practice as laid down by Judge Green in the case just cited, is reaffirmed; and so also is *Hansbrough's ex'ors v. Thom*, 3 Leigh, 147. In that case it was held to be "the settled practice in Virginia, on demurrers to evidence, that the demurrant shall set out the whole evidence, and that the court may compel the other party to join in the demurrer, without requiring the demurrant to make a formal admission on the record of all the issues of fact which the court may think fairly deducible from the evidence demurred to;" and also, that "by demurring to the evidence the demurrant waives all evidence on his part that conflicts with that of the other party, admits the credit of the evidence demurred to, admits all inferences of fact that may be fairly deduced from the evidence, but only such facts as are fairly deducible, and refers it to the court to deduce the fair inferences from the evidence." In that case Judge Cabell said: "Nor is it any objection to a demurrer to evidence, that the evidence is circumstantial, or even complicated; as will clearly appear from the case of *Stephens v. White*," 2 Wash. 203, 210. "If the defendant choose to risk a demurrer, I can perceive nothing in the case to deprive him of the right to do so." In *Green, &c., v. Buckner's ad'r*, 6 Leigh 82, it was held to be error to refuse to compel a joinder 638 in demurrer to evidence, where "the evidence is not plainly against the demurrant; and in *Rohr v. Davis*, 9 Leigh 30, there is the same ruling of the court. In *Ware v. Stephenson*, 10 Leigh 155, there was a demurrer to evidence, which was chiefly oral, and of which there was a great deal. Stanard, J., in his opinion, stated certain principles and considerations on the subject, which seem to be very reasonable. "In ascertaining the facts proved directly or by inference," he said, "we must not be unmindful of the effect of a demurrer to evidence. By it the demurrant allows full credit to the evidence of the demurree, and admits all the facts directly proved by, or that a jury might fairly infer from the evidence; and in determining the facts inferable, inferences most favorable to the demurree will be made, in cases in

which there is a grave doubt which of two or more inferences shall be deduced. In such cases it would not be sufficient that the mind of the court should incline to the inference favorable to the demurrant, to justify it in making that inference the ground of his judgment. Unless there be a decided preponderance of probability or reason against the inference that might be made in favor of the demurree, such inference ought to be made. The demurrer withdraws from the jury, the proper triers of facts, the consideration of the evidence by which they are to be ascertained; and the party whose evidence is thus withdrawn from its proper forum, is entitled to have it most benignly interpreted by the substitute. He ought to have all the benefit that might have resulted from a decision of the case by the proper forum. If the facts of the case depend upon circumstantial evidence, or inferences from facts or circumstances in proof, the verdict of a jury ascertaining these facts, would not be set aside, merely because the court might have made inferences different from those 639 made by the jury. To "justify the grant of a new trial, when it depends on the correctness of the decision between different inferences to be drawn from the evidence, it would not suffice that in a doubtful case, the court would have made a different inference. The preponderance of argument or probability in favor of this different inference should be manifest. When the question is, whether or no a fact ought to be taken as established by the evidence, either directly or inferentially, in favor of the demurree, I do not know a juster test than would be furnished by the enquiry, would the court set aside the verdict, had the jury on the evidence found the fact? If the verdict so finding the fact would not be set aside, it ought to be considered as established by the evidence demurred to." Cabell, J., concurred in this opinion. Tucker, P., concurred in reversing the judgment. Brooke, J., was for affirming the judgment of the court below, which was for the demurree. He says nothing in his opinion in regard to the principles laid down by Judge Stanard; but the presumption is that his views were at least as favorable to the inferences which ought to be made in favor of the demurree. We have no reason to believe that Tucker differed from Stanard, as he said nothing on the subject, and concurred in the judgment. At all events we have the concurring opinions of Stanard and Cabell, from which neither of the other two sitting judges dissented.

Such opinions are entitled to the highest respect, and approach very near to the point of authority. We think the views thus announced are sound, and ought to govern in cases of demurrer to evidence. We will refer only to two more cases on the subject, taking them, as we have taken those already cited, in the order of time in which they were decided. In *Tutt v. Slaughter's adm'r*, 5 Gratt. 364, there was

a great deal of evidence, both oral and written. Allen, J., in delivering the
640 opinion of *the court, reaffirmed the rule as laid down in *Green v. Judith*. In the *Union Steamship Co. v. Nottingham*, 17 Gratt. 115, negligence was the gravamen of the action, and yet there was a demurrer to the evidence.

We have referred thus fully to the cases before cited, on account of their bearing, not only on the first, but also on the second assignment of error. They show how great a risk a demurrer to evidence runs; and if he is willing to run it, he ought, generally, to be permitted to do so, as he does not thereby prejudice the rights of the other party, guarded as they are by the principles which we have seen apply to the case. So great is this risk that it seems the defendant, in *Green v. Judith*, lost his cause by demurring to the evidence. 1 Rob. Pr., old ed. p. 352. Taking the rule and exceptions to it as being correctly laid down by Judge Green, in the case first cited, of *Whittington, &c., v. Christian, &c.*, 2 Rand. 353, the rule is, that a party has a right to demur to the evidence; and the exceptions to it are, that he has no such right, when the case is clearly against him, or when the court doubts what facts should reasonably be inferred from the evidence demurred to. This case falls under the general rule, and not under either of the exceptions to it.

Secondly.—We are of opinion that the Circuit court erred in sustaining the demurrer to the evidence.

It does not appear that the plaintiff's horses got upon the defendant's railroad by reason of any fault or neglect on his part; but the contrary rather appears. He made and kept up a good and sufficient fence, on each side of the track, from the bridge across Peter's creek, all the way to the cattle-guard, at the west end of his land; and at his only crossing of the road in that whole space, he made and kept up a sufficient gate, with sufficient fastenings, on each side of the railroad; and it

641 *does not appear that he did not use due diligence to keep the gates shut and fastened. He passed through and shut them during the same night in which his horses were killed, and before the train that killed them passed over that part of the road. He has a right to use his land through which the railroad runs, as well for pasturage as for tillage; and to a convenient way across the track, from his land on one side to his land on the other, for his plantation and other purposes. The Code, chapter 56, § 22, p. 327, declares that "for every person through whose land the road or canal of a company passes, it shall provide proper wagon ways across the road or canal from one part of the said land to the other, and keep such ways in good repair." There is nothing unlawful in his permitting his neighbors to use the way thus provided for him across the track, as a mill or neighborhood road. If his horses, during the night when two of them were killed

and a third was disabled by the engine of the defendants, got through one of the gates and upon the railroad, by reason of the said gate having been left open by some person, without the knowledge or consent of the plaintiff, as was probably the fact, the plaintiff cannot, justly, be blamed therefor. Being without fault in this matter, he had a right to expect and require the defendants to be very careful not to injure his horses, thus found upon the road. And this gives him a great advantage in this controversy.

On the other hand there were no cattle-guards at the plaintiff's crossing of the railroad. If there had been, the horses could only have crossed the road, and could not have gone up or down upon it. None of them would have been killed or injured. The plaintiff had no right to make these cattle-guards; at least without the consent of the defendants. They only have a right to make them, or permit them to be

642 made. The plaintiff "mentioned *to the section master that there ought to be cattle-guards at the crossing; who replied that it would be useless to apply, as he could not get them." He, therefore, made no such application; the defendants knew there were no cattle-guards there, and that they would be of great advantage in preventing injury, not only to stock which might get through one of the gates and upon the railroad, but to passengers travelling over the road. It is unnecessary for us to decide, and we do not decide, in this case, whether the mere omission to make such cattle-guards, was, in itself, such negligence on the part of the defendants as made them responsible for the damage done to the plaintiff in the killing and disabling of his horses; but we think we may, at least say, that not having used that obvious precaution, the defendants were bound to be very careful not to injure the plaintiff's horses, which were enabled to go upon the road because there were no cattle-guards at the crossing.

This being the relative position of the parties, we now address ourselves to the question, whether, according to the settled rules of law which govern the court in its decision upon a demurrer to evidence, and to which we have already referred, there was such negligence on the part of the defendants, their servants and agents, as made them responsible to the plaintiff for the injury of which he complains in this action?

If we consider the case in reference only to the evidence in behalf of the demurree and the inferences of fact fairly deducible therefrom, and so much of the evidence in behalf of the demurrant as is not in conflict with the other evidence; which, as we have seen, is the true rule in such cases; then, we think there was, palpably, such neglect as made the defendants responsible. It appears from the evidence, so considered, that the engineer had ample time, after
643 seeing the first horse, to *stop the engine before reaching the place where

that horse was. He commenced whistling east of the bridge; no doubt because he saw the blind mare on the road, some two or three hundred yards ahead. According to his own admission, he could have stopped his engine within that distance, though he was going at the speed of 17 or 18 miles an hour; and so also, he could easily have stopped his engine after seeing the other horses, in full time to have avoided any injury of them. Instead of that, he did not slacken his speed, according to the plaintiff's evidence, from the time he saw the first horse, indeed from the time he first blew his whistle on the east side of Peter's bridge, until he got entirely through to the cattle-guard. Being behind time his plan seems to have been, to dash through at full speed, whistling all the way; and thus scare the horses off the track, or else throw them off by his engine. The mare that was first killed did not move from the place where she stood when she was first seen by the engineer, until she was killed and thrown off the track by the engine. She was blind, and in a deep cut, and could not get off the road, and knew not where to go nor what to do for safety. It does not appear that any of her limbs were broken, nor was she run over by the train. She was probably killed by the cow-catcher, and thereby thrown off the track, out of the way of the train, which continued to go on without interruption. In regard to the other horses, they were not driven off the road, nor overtaken until they were stopped by the cattle-guard, into which, it seems, they all were forced and crowded, and where one of them was killed and another disabled by the engine. The engineer well knew that there was no way of escape from certain destruction to the horses on the track between the crossing and the cattle-guard, except by getting on the side of the track until the train passed

644 *them, or by going out at the draw-bars, supposing that they happened to be down at the time. He could not have expected the horses to get on the side of the track until the train passed them. They were too much frightened for that, by the loud whistling of the engine, the strong head-light, and the close pursuit of the train, confined, as the track was, between two fences, and running, as it did, through deep cuts and on embankments. It was extremely improbable that the bars would be down, and extremely improper in the engineer, in so important a matter, to act upon the assumption that they were down. He says, "he thought when he reached the top of the grade and saw nothing more of the horses, that they had gone out into the plaintiff's field, through the bars near the top of the grade;" but he "does not recollect that he noticed that night whether the draw-bars were open or closed." He says he "does not think his head-lights would have extended to the draw-bars, which were about 30 feet from the track." The evidence in behalf of the plaintiff shows that they were nearer than that, and could no doubt have

been seen by the engineer, if he had looked that way. He ought to have looked that way; and even if he could not have seen them from the engine, he ought to have ascertained, certainly, before he passed them whether they were up or down. No doubt they were up; and he would have ascertained the fact to be so, if he had looked that way or made an examination. But, whether up or down, it was his duty, not seeing or knowing that the horses had made their escape, to proceed with the train very slowly, from the bars to the cattle guard, a distance of 350 or 400 yards, and thus have avoided the possibility, as in that way he would, of injuring the animals. Instead of that, he continued to go on in such speed that he drove and forced

645 all the remaining horses *into the cattle guard, and killed one and disabled another of them.

We think that, according to the evidence, the engineer did not exercise reasonable and proper care in running the engine to avoid injury to the horses of the plaintiff; that he was guilty of neglect, and even gross neglect, in regard to the same; and that in consequence of such neglect, two of the horses were killed and another one was disabled. The question now to be considered, is, whether the damage thus sustained is *damnum absque injuria* or not; whether the defendants are, or are not, liable therefor to the plaintiff?

We think the defendants are so liable. Their learned counsel, to show the contrary, relied very much on the case of *Railroad Company v. Skinner*, 19 Pa. State R. 298; also reported in *Redfield's American Railway Cases* 347. We find no fault with the decision in that case. It was an action of trespass on the case for killing the plaintiff's cow, which was at large, upon a narrow piece of unenclosed land, between the defendant's railroad and the public highway, when the mail train came along, running at their usual speed of 25 or 30 miles an hour. When about 300 feet from the train, the cow sprang upon the track. The whistle was sounded, the engine reversed, and signal given to apply the brakes. The engine ran over the cow, and one or two cars were partly thrown off the track. Gibson, J., in delivering his very able opinion in the case, said: "No doubt a company is answerable for gratuitous damage: but what evidence was there of such damage in this case? Absolutely none. The testimony is consistent, and it shows that the train was going at the usual speed; that it was within 300 feet of the spot, when the cow jumped suddenly from the ditch to the track; that the engine was instantly reversed, and the signal given to

646 *brake; and that alacrity could do no more. The repulsive power at the disposal of the engineer was applied in vain. Had he been able to stop the train in time to save the cow, he could not have done it without perilling the passengers. Granting what one of the witnesses testified, that the cow might have been seen at

the distance of 50 rods by the way side, and granting that the train might have been stopped within it, yet the engineer was not bound to stop it. He had no reason to apprehend that she would leap into the jaws of death, or that it was necessary to anticipate her."

"Now, all this is very sound reasoning, and applies properly to the case in which it was used. But in the sequel of his opinion the judge expressed general views to which we cannot, altogether, assent, although in some respects they are sound. "The irresponsibility of a railway company," he said, "for all but negligence or wanton injury, is a necessity of its creation." (Here we have an express admission of the responsibility of such a company, at least for negligence or wanton injury.) "A train must make the time necessary to fulfill its engagements with the post-office and the passengers; and it must be allowed to fulfill them at the sacrifice of secondary interests put in its way; else it could not fulfill them at all. The maxim, *salus populi*, would be inverted, and the paramount affairs of the public would be postponed to the petty concerns of individuals." "It may seem cruel to make a dumb brute suffer for the fault of its owner; but it must be remembered that the lives of human beings are not to be weighed in the same scales with the lives of farmer's or grazier's stock; and that their preservation is not to be left to the care which a man takes of uncared for cattle. Allowing them to prowl for their food, he may not wash his hands of the consequences of it. In a country so obnoxious to

647 *the charge of indifference to human safety, it is a high and holy charge of the courts to hold to their duty, not only those to whom it is immediately committed, but also those by whose defaults it may be remotely endangered; and to hold them hard. We are of opinion that an owner of cattle killed or injured on a railway, has no recourse to the company or its servants; and that he is liable for damage done by them to the company or the passengers. Now, the conclusion of this opinion of the court, "that an owner of cattle killed or injured on a railway, has no recourse to the company or its servants," could not have been intended to be used in a general sense, but only in connection with the case before the court; for it is directly in conflict with admissions contained in the same opinion, that a company is answerable "for gratuitous damages," and "for negligence or wanton injury." At all events, the conclusion is not true, in a general sense; as is fully shown by the authorities referred to by the learned counsel for the plaintiff.

In *Jackson v. Rutland & Burlington Railway Company*, 25 Verm. R. 150, also reported in a note to Redfield's *American Railway Cases*, supra, the court, after referring to some American cases, in which it had been held that the negligence of a railroad company, in driving their engines at the time, will not render them liable for

killing cattle wrongfully upon the road, said: "But this last proposition is expressly repudiated in the English cases upon the subject, and is most unquestionably unsound. The railway company cannot justify either recklessness, want of common care at the time and after the cattle are discovered, or wanton injury. But, short of that, it seems they are not liable, either upon principle or the decided cases." In 1 Redfield, on the *Law of Railways*, p. 471,

the learned author, speaking of the 648 *opinion of Gibson, J., above referred to, says: "The opinion contains many sensible suggestions, and is curious for the enthusiasm and zeal manifested by one already beyond the ordinary limit of human life. These views have sometimes been adopted in the jury trials in other States. But they are certainly not maintained to the full extent in any country where the maxim *sic utere tuo, ut alienum non laedas* prevails even to the limited extent recognized in the common law in England." See also what is said in the same volume, pp. 474, 475, 477, 493, 498, and the cases cited. In *Central Ohio Railway Company v. Lawrence*, 13 Ohio R. N. S. 66, referred to on page 475, (in which the author says, the subject of the responsibility of railway companies for injury to cattle running at large and coming upon their track is very carefully considered,) it is declared, that "the owner of cattle who does not keep them within his own enclosure, when he might do so by proper care, cannot require of a railway company to regulate the management and speed of their trains with reference to cattle coming upon their track. Such companies, like all others, have a right to regulate the management and conduct of their business, solely with reference to the security of persons and property in their charge, and the meeting of their reasonable appointments in regard to them; and may make their plans, upon the reasonable and legal presumption that other persons will perform all their legal obligations towards them; and consequently that the owners of domestic animals will keep them at home, where alone they belong, and not suffer them to stray upon the track of a railway company, unless they are prepared to incur the legitimate hazards of such an exposure. But when a railway company finds cattle upon its track, it is bound to avoid damage to them, if practicable, by the same degree of effort that

649 a prudent *owner of the cattle would be expected to do, properly considering the hazard both to the train and the cattle. And the proper enquiry in such a case is, whether the agents of the company exercised reasonable and proper care in running their engine, to avoid injury to the cattle of the plaintiff." These observations appear to be very reasonable.

But the cases just cited from the *Pennsylvania*, *Vermont*, and *Ohio* reports, were all cases, in which the animals destroyed or injured, were, at the time, going at large by the neglect of the owner. If, in such

cases, the agents of a railroad company are bound to exercise reasonable and proper care in running their engine, to avoid injury to animals on the track, a fortiori are they bound in such a case as the one now under consideration, in which the plaintiff was guilty of no neglect in regard to his horses getting on the railroad; in which, when they got upon the road, they were grazing upon his own land through which the railroad runs, as it was lawful for them to do; in which he had used every reasonable precaution to prevent them from getting on the road, by erecting and keeping up good fences and gates, and providing proper fastenings for the gates, and in which they got through one of the gates and upon the road, in the night time and without his default. Two of these horses having been killed and another disabled, in consequence of the neglect of the engineer of the defendants, in not exercising reasonable and proper care in running the engine to avoid such injury, we are clearly of opinion that the defendants are liable to the plaintiff for the damage thus sustained by him.

We do not mean to decide, because the question does not arise in this case, whether and to what extent and under what circumstances, a railroad company is liable for damage done to stock which happens 650 to be upon the railroad *at the time by the default of the owner of such stock. It will be time enough to decide that question when it arises. We mean only to decide, that in this case, in which the horses of the plaintiff, when they were killed and disabled, happened to be upon the defendant's railroad without any fault on the part of the owner, the defendants were bound to use reasonable and proper care in running their engine to avoid injury to the said horses; that they neglected to use such care, in consequence of which the damage was done of which the plaintiff complains; and that therefore he has a right to recover in this action.

If there be any public prejudice against railroad companies in controversies of this kind, which tends to prevent them from obtaining justice, as is sometimes said to be the case, it can hardly be necessary to say that certainly this court does not participate, in any degree, in such prejudice. Railroads are of great public utility, and indeed are now indispensable, as means of travel and of commerce. Those who construct them ought to be regarded as public benefactors; and at all events their owners are entitled to have their just and equal rights secured to them by law, and by the action of courts and juries. They are charged with the duty of carrying safely, the passengers whose lives are entrusted to their care; and as they are held by law to a strict accountability for the faithful discharge of this duty, which is one of paramount importance, they ought not to be prevented from properly performing it, by having to use means to avoid injuring cattle which may happen to be upon the road.

But subject to this paramount duty of taking care of the passengers under their charge, it is also their duty to be careful to avoid injury to stock which may happen to be upon their road; at least when there without the fault of the owner of such 651 stock. Fortunately *for all parties concerned, the means proper to be used to avoid injury to such stock, are generally the best means that can be used for the safety of the passengers.

We are of opinion that the judgment of the Circuit court is erroneous, and ought to be reversed, and judgment rendered for the plaintiff on the demurrer to evidence.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the said judgment of the said Circuit court upon the demurrer to evidence in the said record mentioned, is erroneous. Therefore it is considered that the same be reversed and annulled, and that the defendant in error do pay to the plaintiff in error his costs by him about his appeal in this behalf expended. And this court now proceeding to pronounce such judgment upon the said demurrer to evidence as the said Circuit court ought to have pronounced—it further seems to the court that the matter shown in evidence to the jury is sufficient in law to maintain the issue on the part of the plaintiff. Therefore it is considered by the court that the plaintiff recover against the defendant five hundred dollars with interest thereon to be computed after the rate of six per centum per annum, from the 9th day of November 1869, till payment, the damages by the jury in their verdict assessed, and also his costs by him about his suit in this behalf expended. And the said defendant in mercy, &c.

Judgment reversed.

652 *Strother & als. v. Hull & als.

June Term, 1873, Wytheville.

Absent—MONCURE, P., and STAPLES, J.

1. *Property of Testator Used by Administrator—Destroyed—Liability of Administrator.*—An administrator c. t. a lives in the dwelling house of his testator, and a part of the furniture is retained and used by him, until it is consumed by fire with the house. Though he had with him the younger children of the testator, for whose board he was paid, the furniture must be considered as having been taken as his own, and he must account for its value.

2. *Will—Construction—Case at Bar.*—In 1861 H dies, leaving several infant children, and a considerable estate, real and personal. He directs by his will, that on the marriage of his eldest daughter Ann, she shall have possession of the home place. If she will keep the younger children with her, and take good care of them; and this she does. He directs his executor to manage his estate until 1st January, 1861, when it is all to be divided equally among his children. S, the husband of Ann, becomes adm'r c. t. a., takes possession of

the estate, and does not invest the money, nor does he settle his administration account. **Held:**

1. **Same-Same-Same.**—Ann and her husband were entitled to the home place free of rent, and to be paid a reasonable board for the younger children whilst they lived with them.

2. **Administrator—Guardian—Compound Interest.**—The accounts of S, as administrator c. t. a., up to January 1st, 1861, are to be settled as guardian's accounts, and the interest to be compounded; and his sureties are responsible for the amount so found against him up to that time.

653 *3. **Same-Same-Same.**—Though S is responsible after the 1st of January, 1861, for compound interest upon the shares of such of the children as he continued to act for as guardian *de facto*, his sureties are not so chargeable.

4. **Same—Unsettled Accounts—Commissions.**—S not having settled his accounts as adm'r, and showing no sufficient reason for his failure to do so, is not to be allowed commissions, except upon receipts after January 1st, 1860.

3. **Same—Sale of Land as Commissioner.**—Prior to January 1st, 1861, land left to two of the sons, who were to account for the same in the division, was sold under a decree of the court, by S as commissioner, and he was decreed to hold the proceeds as part of the assets of his testator's estate. His official bond, in fact, covered only the personal assets. **Held:**

1. **Same-Same—Administration Account.**—The proceeds of the sale of the land were not in his hands as adm'r c. t. a., and should not be brought into his administration account.

2. **Same-Same—Liability of Sureties.**—But in no case are the sureties responsible for them, as their bond did not cover the real estate.

3. **Same-Same—Commissions.**—S is entitled to his commissions as commissioner on the proceeds of this sale, viz: five per cent. on the first \$200, and two per cent. on the balance.

4. **Same-Same—Settlement of Accounts.**—In settling his account as to the proceeds of this land, the mode stated in *Humphreys' adm'r & als. v. Carter & als.*, is to be pursued.

4. **Bill in Equity—No Damages Claimed—Liability of Administrator.**—The bill by the devisees not claiming damages for injury done to the fences and building on the land, S cannot be subjected to the payment of such, either in his account as adm'r or with the devisee.

5. **Amount Due Deceased Child Bears Interest from Her Death.**—One of the children having died in 1862, the amount found due to her by the administrator, should bear interest from the date of her death.

654 *6. **Errors—Correctable in Lower Court—Appellate Practice.**—The interest of the deceased child is divided, and the share of each of the survivors is credited to them in their ac-

*Administrators—Liability of Sureties.—See *foot-note* to *Murphy v. Carter*, 23 Gratt. 477.

†Fiduciaries—Commissions.—As to when a fiduciary is entitled to his commission, see the principal case cited in *Moses v. Hart*, 26 Gratt. 795, and *foot-note*; *Crigler v. Alexander*, 23 Gratt. 674, and *foot-note*; *Trevelyan v. Lofft*, 28 Va. 148, 1 S. E. Rep. 901; *Robertson v. Gillenwaters*, 25 Va. 119, 7 S. E. Rep. 273; *Hescht v. Calvert*, 23 W. Va. 231, 9 S. E. Rep. 94.

‡Errors—Correctable in Lower Court—Appellate Practice.—As to what will be done in the appellate court

counts with the administrator. The final decree, after giving to each the amount reported by the commissioner, gives each a further decree for his and her share of the estate of the deceased child. This is an error, which might have been corrected by motion to the Circuit court, under the statute, Code, ch. 181, § 5, p. 748; and this court would, therefore, dismiss the appeal, or correct and affirm it, with costs, to the appellees, if there was no other error.

This was a suit in equity instituted in July, 1866, in the Circuit court of the county of Smyth, and afterwards transferred to the Circuit court of the county of Tazewell, by D. D. Hull and six others, children of Thomas T. Hull, deceased, against Wade D. Strother, adm'r de bonis non with the will annexed of said Thomas T. Hull, and his sureties, for a settlement of his accounts, and the distribution of the estate.

Thomas T. Hull died in 1854, having made his will, which was duly admitted to probate in the County court of Smyth. He left eight children, all of them infants under the age of twenty-one years.

By the 1st item of his will he directed that all his personal estate should be immediately sold, except so much as in the opinion of his executor will be necessary for the immediate use of his children in general, and except, also, such things as in his opinion will be expedient for either of my oldest children to keep at appraisement price. And out of the money arising from said sale, all his debts and funeral expenses were to be paid.

By s. 2, he says: My home farm, that is, the land I bought of Blessing, and the poor-house tract, be kept and used for the benefit of raising my children, so far as my executor may think practicable, and so long as they may be kept together on

655 said farm. I hope my aunt, *Mrs. Denton, will remain with my family, and be to them as she has been to me, a mother.....

It is further my will that so soon as my daughter, Ann, shall marry, she shall have the use and benefit of my said home farm, by her taking special care of the younger portion of the family as members of her family, unless my executor shall see fit, in his discretion, to charge more for said land, and whenever he shall see fit to remove them for their benefit to school; then I wish the said farm so managed as he may think best for the benefit of my children up to the 1st of January, 1861, then I desire that my daughter, Ann, shall have my said home farm, if she is living at that time.

By the 3d and 4th clauses of the will he directs certain lands therein mentioned shall be used in the discretion of his executor, for the benefit of all his children, until the 1st of January, 1861. And then he gives that mentioned in the 3d clause to

concerning errors which might have been corrected in the court below, see *Tyree v. Donnelly*, 9 Gratt. 67; *Lewis v. Arnold*, 13 Gratt. 465; *Gunn v. Turner*, 21 Gratt. 385; *Dickinson v. Clement*, 27 Va. 41, 12 S. E. Rep. 105; *Flynn v. Jackson*, 26 Va. 245, 26 S. E. Rep. 1.

his daughter Nancy Jane, and that mentioned in the 4th clause, called the Miller and Kesner lands, to his two sons, David and John. And as he was sued for the Miller farm, he directs, if that is lost, David shall have the Kesner farm. His other real estate he directs to be sold immediately after his death.

By the 8th clause of his will he desires all his children to be liberally educated and equally at the expense of his estate.

Item 9. I desire that on the 1st of January, 1861, all my effects, lands, property, money, &c., be valued, and all my children be made equal. Those receiving property amounting to more than their shares will then refund, as all shall be equal in my estate, as they are all equal in my regard.

In the 10th clause, after directing that if one of his children to whom he has
656 devised lands, shall die before *the 1st of January, 1861, the same shall be assigned to some other of his surviving children, he adds: I authorize the County court of Smyth to appoint three valuers and commissioners to value and divide my estate aforesaid, so as to make my children equal; and I empower them, in the event contemplated in this clause, to decide to whom of my surviving children the lands shall be assigned.

And by the 16th clause, his executor was authorized to loan at interest any funds of his estate till necessary for distribution.

James W. Sheffey was appointed executor of the will, and he qualified and continued to act as such until 1854, when Wade D. Strother having married Ann, the eldest daughter of the testator, Sheffey procured himself to be removed, and Strother qualified as administrator de bonis non with the will annexed, giving a bond which only covered the personal estate; and he received from Sheffey all the assets in his hands, amounting in notes to a little upwards of \$12,000, and in property appraised at \$500.55.

Upon the marriage of Strother with Ann, the eldest daughter of Thomas T. Hull, they took up their residence at the home farm, mentioned in the second clause of the testator's will, and took charge of the younger children, who were kept with them, and were cared for by them in the manner contemplated by their father.

In March 1860 David D. Hull, being then over the age of twenty-one years, filed his bill in the Circuit court of Smyth county, against John N. Hull, then an infant, and the other devisees of Thomas T. Hull, asking the court to decree a sale of the land devised to himself and John N. Hull; and in April 1860 the court made a decree appointing Wade D. Strother to sell the
657 same, upon the terms of one-half of the purchase money to be paid on the 1st of January 1861, and the other half on a credit until the 12th of January 1864, with interest payable semi-annually; when John N. would have arrived at the age of twenty-one years. In September the commissioner reported he had sold the land on the terms

of the decree to Robert Goolsby for \$12,200: and in the same month the court confirmed the sale, and directed Strother to collect the first bond of Goolsby and hold the proceeds thereof, after defraying the expenses of sale, as assets in his hands as the adm'r de bonis non of Thomas T. Hull, deceased; and upon the receipt of this money to convey the land to Goolsby with special warranty, reserving a lien on the land for the payment of the second bond. And this was the last order made in the cause, except to continue it on the docket.

In September 1860 the County court of Smyth, in pursuance of the 9th and 10th clauses of T. T. Hull's will, appointed John M. Preston and two others, valuers and commissioners to value and divide according to the provisions of the will, his estate real and personal on the 1st day of January 1861, taking the balance which should be found due in the hands of Strother, as administrator of T. T. Hull, into the calculation, as it should be exhibited upon his settlement, which a commissioner of the court was directed to make.

The account of the administrator not having been settled, the commissioners proceeded to value the land devised to each of the children, except that devised to David D. and John N. Hull, and returned their report to the court.

In March 1867, Strother filed his answer in this cause; and the court made a
658 decree directing Joseph *W. Caldwell to settle the administration account of Strother. And in August 1867 another order was made directing Strother to deliver possession of the land devised to the testator's daughter Nannie, to her and her husband John B. Smith. After Nannie J. Hull, came of age she contracted in April 1861 to sell a part of the land devised to her, to W. D. Strother, for the sum she would have to account for to the estate of her father, with interest thereon from the 1st of January preceding. She married in November 1861, and afterwards Strother rescinded the contract with her husband John B. Smith, and delivered to him the agreement: but the land still remained in his possession.

In March, 1868, the commissioner returned his report. He brought down the administration account to January 1st, 1861, and in it he charged the administrator with rents of the land devised to the children, including the home place left to his wife Ann; and also for waste of fences and buildings \$133.25, and for furniture unappraised, which was retained in his house, and was destroyed when his house was burned, \$230, and stated the account as a guardian's account, compounding the interest; and the administrator not having settled his accounts as required by the statute, he allowed him no commissions; and he reported a balance due from the administrator of \$14,525.

On the 1st of January, 1861, he brought together the whole estate, charging the land of David and John, sold to Goolsby, at

\$12,200, and the other lands at the prices fixed upon them by Preston, &c.; and he then credited him with the price of the land devised to his wife and Mrs. Smith, with \$4,000 paid to D. D. Hull, by his order on Goolaby, and \$6,100 to John N. Hull's guardian, note of Goolaby, and he reported the balance due from

659 *Strother \$16,625. The commissioner then stated an account with each of the children. One of them, Mary C. Hull, had died in January, 1862; and ascertaining the amount due to her at that date, to be \$5,250, he divides this sum among the surviving children, to each \$750; and he brings this sum into their several accounts, and charges the administrator with it, and with interest thereon from the date of her death. In the account with Smith and wife, he charges Strother with the rent of her land during the whole period from January, 1861, including the time he held it under his purchase from Mrs. Smith; and he charges him also with \$235.63, amount estimated for waste of fences on this land since 1860. These individual accounts seem to be settled on the principle applicable to the accounts of executors and administrators, as to the interest; except that of Henry B. Hull, who was a minor when the suit was brought, in which the interest is compounded.

The defendants filed fifteen exceptions to the commissioner's report. The first was to the charge of \$230, for furniture unappraised. This furniture remained in the house and was used by the defendant, and was consumed when the house was burned. In his answer he admitted he should be charged with it. The fifth exception was to the charges, \$133.25, for waste of fences and buildings, on the ground that nothing of this sort is claimed by the bill, or justified by the decree for the account. The eighth exception is to the disallowance of commissions. The tenth is to the charge of rent of Nannie J. Hull's land, whilst he held and claimed the same as purchaser. The eleventh is to the charge of \$235.63 as damages to the said land, on the same grounds stated in the fifth exception. The thirteenth and fourteenth exceptions were to scaling payments made to merchants for goods furnished to four of the children, on the ground *that they were

660 bought at the old prices; though they were paid for with Confederate currency. The plaintiffs also filed exceptions to the report. First. Because the charge of \$230 for unappraised furniture is too small, being less than testified to by the witnesses. Fifth: Because he has allowed the administrator for board for the younger members of the Hull family, prior to 1861, and has charged him with rents of the home farm, contrary to the provisions of the will.

The cause came on to be heard on the 31st of March, 1871, when the court sustained the fifth, eighth, tenth and eleventh exceptions of the defendants, and overruled all the rest, and also all the exceptions of the plaintiffs, and recommitted the report to

the commissioner, with instructions to disallow the charges mentioned in the fifth and tenth exceptions, and the charge for rent upon Mrs. Smith's land after the 1st of January, 1861; and allow any other charges against Smith and wife that the administrator might prove; and to allow five per cent. commissions on his disbursements. And the cause was transferred to the Circuit court of Tazewell county.

The commissioner having returned his report, to which there was no exception, at the May term of the Circuit court of Tazewell county, Strother presented a petition, in which he asked that the previous decree might be opened, upon the ground, among others, that he should not be charged with compound interest, because that from the condition of the country from 1861 it was impossible for any fiduciary to have collected and reinvested money safely.

The cause came on to be finally heard on the 9th of May, 1871, when the court refused to allow the petition of Strother, and confirmed the report; and made a decree in favour of Strother against Smith and wife, and John N. Hull, for the balances 661 reported against them *respectively; and against him and his sureties in favour of D. D. Hull, Ellen V. Hull, Pauline A. Hull and Henry B. Hull, for the amounts reported to be due them respectively; and in addition decreed in favour of all the plaintiffs respectively, each for the sum of \$735.42 6-7, with interest thereon from the 1st of January, 1862, that being the share of each in the estate of Mary C. Hull, deceased. And from this decree Strother and his sureties applied to this court for an appeal; which was allowed.

J. W. Johnston, John A. Campbell and Strother, for the appellants.

Gilmore, for the appellee.

BOULDIN, J., delivered the opinion of the court.

We will consider the questions arising in this case, in the order in which they have been presented: noticing, first, the errors assigned in the petition for an appeal; secondly, those assigned in the appellant's brief; and lastly, the errors assigned by the appellees.

The first, second and fifth errors relied on in the petition for appeal, have been waived by the appellants, and need not, therefore, be further considered.

The subject of the third assignment of errors is the charge against the appellant Strother of \$230, being the estimated value of certain household furniture belonging to his decedent's estate, which was retained by him to his own use, without sale or appraisal. We think there was no error in this charge. It is certainly true that this property, or the greater part thereof, was destroyed in the year when the appellant Strother's house was consumed by fire; but it is also true that when destroyed, it must in law be considered to have been

Strother's property. It had been held 662 and used by him *down to that time, for his own use and benefit, as part of the furniture of his house, and not for the benefit of his testator's estate. True, a portion of the family of the testator lived with him as members of his family; but they lived with him as regular boarders, were charged as such, with a fair and reasonable board; and certainly should not, when thus paying board, be expected to aid in furnishing the house. Besides, the appellant Strother himself, admits in his answer that he is responsible for the value of that furniture; that it is properly chargeable to him; and the real controversy in the court below, was not as to his liability, but as to the amount and value of the furniture. To that point chiefly were the proofs in the court below directed, and the value was fixed by the commissioner at \$230. This sum is less than the estimated value of the property by the testimony in the cause, except that of Strother himself, and about fifty dollars less than its appraised value when retained by Mr. Sheffey, the executor, as appears from the appraisement. Under such circumstances we cannot regard the charge as excessive; and the exception thereto was properly overruled.

The fourth error assigned is, that it was improper and illegal to charge the appellant Strother with compound interest in the various accounts: That he was acting as personal representative of the testator Hull, and there was no reason in this case to depart from the usual and well established principle on which such accounts are stated.

There can be no doubt, as a general rule, that executors and administrators are not to be charged with compound interest; but it is as well established that this general rule will be modified when required by the nature of the trust or the express terms of the will. When the beneficiaries are 663 minors, and accumulation for their *benefit is the ruling intention of the will, compound interest will be charged, whether the fiduciary be an executor or guardian. He will be treated as having done what it was his duty to do, and his accounts will be settled as a guardian's accounts. *Garrett, ex'or, v. Carr & wife, &c.*, 1 Rob. R. 196; same case, 3 Leigh 407. In that case, 1 Rob. 213, Judge Allen referring to the case of *Raphael v. Boehm*, 11 Ves. R. 82, said, "the direction was to take an account against the executor (who was a trustee) with a computation of interest on all sums received by him while in his hands; and that the master do in such computation make half-yearly rests. The object of the direction was to charge compound interest. Lord Eldon remarks in that case, that 'where there is an express trust to make improvement of the money, if he will not honestly endeavor to improve it, there is nothing wrong in considering that he has lent the money to himself, upon the same terms upon which he could have

lent it to others; and as often as he ought to have lent it, if it be principal, and as often as he ought to have received it and lent to others, if the demand be interest, and interest upon interest.' And in another place, 'the court would shamefully desert its duty to infants by adopting a rule that an executor might keep money in his hands without being answerable as if he had accumulated.' And Judge Allen goes on to say: "These remarks apply with great force to the case under consideration, where the estate was considerable, the wards young, and accumulation for their benefit the governing intention of the will." This language of Judge Allen will apply with singular pertinency to the case before us, "where the estate was considerable, the wards, or beneficiaries, young, and accumulation for their benefit is the governing intention of the will." The learned judge then cites a decision of Chancellor 664 Kent, 1 John *Ch. R. 620, "who there held that if an executor convert trust moneys to his own use, or employs them in his business or trade, he is chargeable with compound interest."

We think there is no material difference between the will in this case, and that in the case of *Garrett v. Carr*: that under each alike, it was the duty of the executors to improve the estate; accumulation for the benefit of minors being the "governing intention of the will;" and that compound interest was properly charged in this case down to the 1st of January 1861; to which period the executor, as such, was required by the terms of the will, to keep the estate together for the common benefit of the testator's children. Down to that date the account of the appellant, as administrator, was properly stated on the principle of the guardian's account. His account as administrator should have been then closed, and his indebtedness as such to each legatee ascertained; and for the amounts thus ascertained, with simple interest only, ought his sureties as administrator to be held responsible, subject to such payments as may appear to have been thereafter made by him. But as the administrator continued to act as guardian de facto of a portion of the testator's children, without any actual settlement of his account as administrator, he should be individually charged in his accounts with such children, with compound interest in each case until the determination of the assumed guardianship.

It is unnecessary to notice the sixth assignment of error.

The objection to the decree of the court set forth in the seventh assignment of error is obviously well founded. The court in entering the final decree, after giving to each child all he was entitled to under the accounts as corrected and approved by 665 the court, inadvertently *added to each the sum of \$735.42 6-7 cents, being amount of each distributive share on Mary C. Hull's estate, already included in the several accounts. This error is obvious on the face of the decree, and is conceded by

the appellees' counsel; but it is contended that the mistake is one which could have been corrected in the court below by motion, under the 5th section of ch. 181, of the Code, p. 743; and therefore, that it is not the subject of an appeal. It is clearly an error coming within the purview of that statute; and were it the only error, this court would either dismiss the appeal as improvidently awarded, or correct and affirm the decree, with costs to the appellees. But as it will appear in the sequel, that there are other errors in the record, for the correction of which it will be necessary to send the case back to the court below, it is proper that this error should be noticed.

We come now to the errors assigned in the appellant's brief; the first of which is, that Mary C. Hull, one of the legatees, died a minor, and that the personal representative was not before the court. It was certainly irregular to proceed to the distribution of the estate of Mary C. Hull dec'd, although she died a minor, intestate and unmarried, without bringing her personal representative before the court; but in this case that would have been the merest matter of form. All the parties beneficially interested in the estate were before the court; and as it was not pretended that there were outstanding debts to collect or to pay, other than the estate in the hands of the appellant Strother, it was certainly more simple and less expensive to proceed, as has been done in this case, and no one could possibly be injured thereby. The court, therefore, would not, if no other error existed, reverse and send back the cause for this mere error of form

relied on in this court for the first time; but as the case will, for other reasons, be sent back to the Circuit court, the personal representative of Mary C. Hull will be there made a party, if insisted on by the appellant Strother.

The court is further of opinion, that it was error to charge the appellant Strother with the rents of the home place. It is very obvious from the testator's will, that it was his ruling interest and earnest wish that his younger children should be reared and trained under home influences: and to effect that object he provided that his eldest daughter, so soon as she should marry, should have the use of his home farm on condition of "her taking special care of the family, as members of her family." We understand by this, that the testator merely intended that the eldest daughter should extend to her younger brothers and sisters, as members of her own family, the affectionate care and training of a mother; that so far as she was able she was to be a mother to them. He certainly did not intend, could not have intended, that this labor of love imposed on his daughter, should be a grave pecuniary burden on her future husband; and thus have a tendency to defeat his cherished wishes. On the contrary, he plainly and providently intended to make it to the interest of his future son-in-law, to gratify this natural desire of an affectionate parent, by departing in that particular in-

stance, from the general scheme of his will, and making to his eldest daughter, immediately on her marriage, a liberal advancement on the condition named. The advancement made was appropriate to the testator's purpose. The eldest daughter was to have on her marriage the home place, there to keep around her the younger members of the family, and in a home circle to extend to them the tender and affectionate care of an elder sister; second only to the watchful solicitude of a mother's love.

667 This priceless *boon the testator designed to secure to his orphan children, not by imposing on his future son-in-law a heavy pecuniary burden which would certainly tend to defeat his object; but through his wife to confer on him, a substantial benefit. That he regarded it a decided benefit is evident from the discretion vested in his executor to terminate the arrangement whenever he might think it proper to charge more for the farm. Such a provision would have been simply absurd, had the testator already provided in his will, that his son-in-law, by boarding his family of children, should really pay about double the annual value of the farm; for such the board of the children has been proved to be. The testator, provident and affectionate as he appears to have been, certainly never intended that all the anxieties of the mother of a large family should be cast upon his young daughter, and about one-half the expense of subsisting his children should be imposed on his son-in-law, without the aid of one cent from his estate. Yet such would be the practical result of the construction contended for by the appellees; the cost of boarding being about double the value of the farm. Our opinion is, that the home place was to be an advance to the testator's eldest daughter on her marriage, free of charge, on condition that she should extend to her younger brothers and sisters the affectionate care of an elder sister as members of her family, at her own home, where they were in other respects to be supported by the estate. It has not been attempted to be shown by the testimony, nor has it been suggested in argument, that she failed in any respect, in the performance of this duty; on the contrary, it has been abundantly shown that the grave responsibility thus early cast upon her, was bravely met, and the sacred trust faithfully performed.

668 *We think, therefore, that it was error to charge the appellant Strother with rent for the home place.

It was error also to blend that portion of the proceeds of the Miller and Kesner lands, not paid over to D. D. and John Hull, with the general assets of the estate. These lands were specifically devised to D. D. and John Hull, and were sold under a decree of the court of Chancery in another suit, as the property of those devisees. The proceeds belonged not to the estate, but to them, subject only to the duty of each on general division, to be accountable for any excess over his due proportion of the estate. The

land was sold by the appellant Strother as commissioner of the court; and although ordered by the court in that case, to hold a portion of the proceeds, as assets of T. T. Hull's estate, the proceeds were never properly in the hands of the appellant Strother, as administrator, and constituted no part of the assets of the estate. But if they were, being proceeds of land, and not covered by the bond of the administrator in this case, his sureties are not responsible for his administration of that fund; but a separate account thereof should have been taken on the principles established by this court, at its present term, in the case of *Murphy's adm'r & als. v. Carter & als.*, not yet reported. The bond of the representative was the same in that case, with that in this; and Judge Anderson, delivering the unanimous opinion of the court, says, of the sureties, "they are responsible for the true and faithful administration of the personal fund. But that was mixed with the proceeds of the land sales; the testator by his will having blended both into one common fund for the payment of debts and legacies. And the sureties of the administrator are only bound for the true and faithful administration of so much of this common fund as was derived from the

669 *personal estate. The administrator is clearly chargeable with the whole amount of his receipts, whether derived from land or personalty: but such is not the responsibility of his sureties." He then goes on to ascertain the principles on which the account, in such case, should be stated when payments have been made by the administrator out of the common fund, without designating from what source the payments were made; and he holds that where "both funds were so mixed and blended that it cannot, with any certainty, be ascertained," out of which fund payments were made, they should be applied ratably to both, in proportion to the amounts of each in the hands of the administrator. This rule, we think, a just and equitable one; that it should be applied to this case, and the accounts should be reformed accordingly.

It is true that no exception raising this question was taken in the court below, nor has it been raised in this court; but the error being apparent on the face of the accounts, it is proper that it should be noticed and corrected.

The 3d, 5th, 6th and 7th points in the appellants' brief have been already disposed of in considering the errors assigned in the petition.

The 4th objection to the decree is, to the charge against the administrator, of interest on the estate of Mary C. Hull, from the day of her death. We think there was no error in the charge, under the circumstances of this case. This estate was a balance in the hands of the administrator, due and unpaid to Mary C. Hull at her death, and was then bearing interest. It was an interest bearing debt against the administrator; and there is no reason, under the

circumstances of this case, why the amount of one year's interest on his debt, or any part of it, should be remitted to him.

670 *This brings us to the errors assigned by the appellees, under the 9th rule of the court. The first is, that the court below erred in allowing commissions to the administrator, he having wholly failed to settle his accounts, until compelled so to do by decree entered in this cause March 30th, 1867, about thirteen years after his qualification.

The statute in force during the entire period of the transactions of this administrator, and applicable to personal representatives, provides that "any such fiduciary who shall wholly fail to lay before such commissioner a statement of receipts for any year, for six months after its expiration, shall have no compensation whatever for his services during the said year." Code, ch. 132, § 8, p. 602. There are some exceptions to the rule, set forth in the statute, but they have no application to the case before us, and need not be noticed. The forfeiture thus prescribed has been held by this court to be arbitrary and absolute; and, therefore, not under the control of the courts. 6 Leigh 271; 3 Gratt. 113. But it has been argued, that the forfeiture should not be enforced in this case, because, by the amendatory act of March 1, 1867, *Seas. Acts 1866-7*, ch. 279, p. 704, a discretion is allowed the courts to enforce the forfeiture or not; that the allowance of commissions is discretionary with the courts. Without enquiring whether that amendment should be construed to have a retrospective operation—a construction not favored in law—it is enough to say that it was clearly intended to be exercised in cases in which there should be some reasonable excuse for the delay; to cases in which, under all the circumstances, it should appear unjust and inequitable to exact the forfeiture. Such is not the case before us. This administrator was not prevented from the discharge of this obvious duty, by accident, inadvertence, or other extenuating cause; but

671 *the failure occurred from a deliberate purpose, on his part, formed and avowed, not to settle under the provisions of the will until compelled thereto by law. We see nothing in such a case to justify the court in exercising the discretion invoked, conceding it to exist; and we are of opinion that it was error to allow the administrator commissions on his transactions down to the 1st day of January 1860. On all transactions subsequent to that date, he should, under the operation of the act of March 2, 1866, entitled "an act to preserve and extend the time for the exercise of certain civil rights and remedies, and of the seventh section of the stay law," be allowed the usual commission; and on the land fund he should be allowed the commission prescribed by law for special commissioners making judicial sales, viz: 5 per cent. on the first \$300, and 2 per cent. on the residue.

The court is further of opinion, that there was no error in refusing to charge the ad-

ministrator with damages done, or alleged to be done to the land of N. J. Smith; nor in refusing to charge him, as administrator, with the rents of that land whilst in possession. But the court is of opinion that the appellant Strother should be charged individually, in his account with Mrs. N. J. Smith, with such rents, he having withheld her land from her for his own use until compelled to surrender the same by order of court.

And finally, we think there was no error in adopting the valuation of the home place as set forth in the report of Preston and others.

The decree of the Circuit court reversed, with costs to the appellants; and a decree entered in accordance with the principles above declared.

The decree was as follows:

672 *The court is of opinion, for reasons stated in writing, and filed with the record, that the Circuit court did not err in charging the appellant Strother with the sum of \$230.00 for the furniture of his testator, retained by him; nor in charging him, in the same character, with compound interest down to the 1st of January, 1861, (after which time he is to be charged with like interest as guardian de facto, but not as administrator; and for such interest his sureties, as administrator, are not to be held responsible;) nor in charging him with interest on the amount due Mary C. Hull, dec'd, from the day of her death; nor in refusing to charge him, as administrator, with damages to the land of N. J. Smith; or with rent for the same; nor in adopting the valuation of the home place, reported by Preston and others.

But the court is further of opinion, that the Circuit court erred in the following particulars, to wit: in decreeing to the several legatees the sum of \$735.42 6-7 each, in addition to the amounts reported in their several accounts, the same having been already included in said accounts; also, in charging the appellant with rent for the home farm; also, in blending the proceeds of the Miller and Kesner lands with the personal estate. These funds should have been kept separate, as the sureties are not responsible for the proceeds of the lands. Any unpaid balance of that fund is an individual debt of the appellant Strother; and in ascertaining this balance, when payments have been made out of the blended fund, with no means of showing out of which they were made, they should be applied ratably to both, in proportion to the amount of each in the hands of the administrator.

The court is further of opinion, that there was error in allowing to the administrator commissions on the receipts of any year prior to the year ending the first day of January, 1861; all compensation for his services for those years having been forfeited by his failure and refusal to settle his accounts according to law. For the year ending as aforesaid, and after that time he is to be allowed,

under the operation of the stay law, the usual commission on his receipts; and on the proceeds of the Miller and Kesner lands he will be allowed the usual commission of a special commissioner, viz: 5 per cent. on the first \$300 and 2 per cent. on the residue.

The court is further of opinion, that the appellant Strother should be charged individually with a reasonable rent for the land of N. J. Smith, the same having been held by him for his own use, until compelled to surrender it by order of court, but not with damages. An account of these rents will be taken; against which the said appellant will be allowed to establish any payment or legitimate offset.

The court is further of opinion, (although in this case the merest matter of form,) that it was irregular to distribute the estate of Mary C. Hull, dec'd, without having her personal representative before the court, if required by the appellant; and should he now insist on it, such representative should be made a party.

It is therefore decreed and ordered that the said final decree of the Circuit court of Tazewell county, and all previous orders and decrees in conflict with this decree, be reversed and annulled, so far as they may conflict herewith; and that the cause be remanded to the said Circuit court, to be further proceeded in, according to the principles of this decree.

And it is further decreed and ordered that the appellees do pay to the appellants their costs by them about their appeal in this behalf expended.

Decree reversed.

674 *Boyd's Sureties v. Oglesby & als.

June Term, 1873. Wytheville.

Absent—STAPLES, J.

1. **Administrators—Authority of.**—An administrator is invested by law with full dominion over the assets, and with full discretion for the liquidation and settlement of all claims due to or from the estate. He may make settlements and compromises with creditors, and give them confessions of judgments.
2. **Administrator of Deceased Partner—Settlement with Surviving Partner—Must Be Bona Fide.**—An administrator of a deceased partner may settle and compromise with the surviving partner, with a view to the interest of the estate he represents. And if he acts fairly, in good faith, and with a due regard to the interests of the estate, the distributees will be bound by his acts, and he will be protected.
3. **Same—Same—Same.**—The fairness of a contract, like all its other qualities, must be judged of as at the time it was entered into.
4. **Same—Same—Case at Bar.**—The administrator of O, a deceased partner, who had the sole management of the business of the concern, is employed by G, the surviving partner, to wind up the partnership affairs; and after the input capital is returned, he enters into a contract with G to allow the latter a certain sum for his share of the net

profits; and G relinquishes to the administrator all the remaining assets of the partnership. At the time this contract is made there is a large claim in suit against one of the debtors of the firm, who sets up a payment of \$1,000 as having been made to O; but which he had not entered on the books of the concern; and this contest delays the trial of the case, until the debtor who was solvent when the contract was made, becomes insolvent; and then the credit is allowed by the jury, and a verdict and judgment for the balance

Held:

675 ***1. Verdict—Judgment—Conclusive.**—The verdict and judgment is conclusive that the debtor was entitled to the credit.

2. Judgment—Charged to Estate of Deceased Partner.

—It being owing to the conduct of O, the deceased partner, that the administrator and surviving partner were not informed of the true state of the account when the contract between them was made, and also that the delay in the suit occurred; in estimating that contract the estate of O is to be charged with the \$1,000, and also the amount of the judgment.

3. Fiduciaries—Commissions.*—The amount of commissions to be allowed to an administrator or executor is not fixed by law, and though five per cent. on receipts is generally allowed, yet this allowance may be increased, and the court of probate is the most competent tribunal to make the allowance; and this court will be disinclined to disturb the allowance, especially after a long acquiescence in it by the distributees of the estate.

On the 23d of October, 1835, Nicholas P. Oglesby and Robert Gibbony entered into partnership for the purpose of carrying on a merchandising business at the town of Evesham, in the county of Wythe, which was to last three years. Each partner was to put in \$4,000 as capital in the concern; and for any other sums put in by either of them, he was to be allowed interest. Oglesby was to have the whole management of the business, for which he was to be allowed \$350 a year; and at the close of the partnership, after payment of debts and expenses, and the allowance to Oglesby, the capital furnished by each partner was to be returned to him; and the net profits to be equally divided between them. And it was agreed that the money on hand at the termination of the partnership should be applied, first to pay the expenses, then to pay the capital put in, first paying any overplus of capital furnished by either, with its interest; and the balance of money, if any, should be equally divided between them; and if they should not at the close of the partnership, make a distribution

676 ***of the uncollected debts, Oglesby was to have the management of their collection; but either partner might at any time after the expiration of the three years, require a division of said debts.**

The partnership was continued until the death of Oglesby. He died intestate, in

February, 1838, leaving a widow and four infant children; and the widow having renounced her right to administer on his estate in favour of Thomas J. Boyd, he qualified as administrator of Oglesby in March; and the business of collecting the debts and winding up the business of the partnership was committed to him by Gibbony, the surviving partner.

Boyd seems to have proceeded with great diligence and efficiency, to collect the debts due to the partnership, and to pay the debts they owed. The former were numerous, and generally for small amounts, nine-tenths of them ranging from twenty-five cents to fifty dollars. To pay the debts of the concern, he borrowed near \$5,000, for which he bound himself personally; by which means he seems to have prevented all suits by the creditors of the partnership. He sold to Gibbony the one-half of the goods on hand to which Oglesby was entitled; and in August, 1840, Gibbony being then indebted on account of goods received by him, in the sum of \$2,213 89, they entered into an agreement, by which Gibbony was to retain of that sum, \$2,013 89, in full satisfaction of his entire interest in the net profits of the partnership; and in consideration therefor, he surrendered all claim to any part of the uncollected funds of the partnership. And he was not to be responsible for any debts of the concern, or for the failure to collect any part of any due to it, except for one-half of so much as George R. C. Floyd should obtain credit for, on an account due by him to said firm, then

677 in suit in Wythe *county, unless Gibbony could show that by law Oglesby should lose the whole of such credit.

In 1842 commissioner Mathews settled the accounts of Boyd as agent of Gibbony, the surviving partner, and also as administrator of Oglesby. In the first account it appeared, that including the money he had borrowed to pay the debts, he had received up to March 1839, \$14,516 98; and including payments of part of the money he had borrowed, the disbursements amounted to \$14,097 89. And the commissioner allowed him a commission of five per cent. on \$16,324 74, which is the balance of receipts and disbursements for the year, after excluding \$12,290 14, which made up the money he had borrowed and paid back, and moneys collected or paid by Gibbony; on which no commissions were allowed. In the year ending March 1840, his receipts were \$7,751 57, and his disbursements were \$8,565 39; but there was included in these disbursements, moneys retained by Boyd, as adm'r of Oglesby. And he was allowed 5 per cent. commissions on \$6,399 84, which sum was the balance of receipts and disbursements, after deducting the sum of \$9,200 for moneys retained by Boyd as above stated, that being double the sum so retained. From March 11 to August 1st 1840, when Gibbony and the administrator contracted for the adjustment of the partnership accounts, as before stated, the receipts were \$4,165 35, including the debt

*See *Whitehead v. Whitehead*, 85 Va. 878, 9 S. E. Rep. 10; *Gregory v. Parker*, 87 Va. 456, 12 S. E. Rep. 801; *note to Strother v. Hull*, 23 Gratt. 652, 4 Min. Inst. (2d Ed.) 1872.

of Gibbony to the partnership, and the disbursements including the moneys retained by the administrator, were \$4,165.35; and the same commissions were allowed on \$1,836 48, the balance after deducting Gibbony's debt, and the amount retained by the administrator.

The administration account of Boyd is stated by the commissioner, and he
678 brings into it all moneys received *by him, whether of Oglesby's individual estate, or from the partnership effects, and he credits the administrator with the payments made to the widow and guardian of the children; and allows him five per cent. on receipts and disbursements. And the account shows that the administrator paid over the moneys received by him, to the widow and guardian as fast as he received it.

In April, 1858, Jane C. Oglesby, the widow of Nicholas P. Oglesby, and his four children, one of them an infant by his next friend, filed their bill in the Circuit court of Wythe county, in which after setting out the partnership, the death of Oglesby, the qualification of Boyd as his administrator, and the agency of Boyd in settling up the partnership business, and the settlement of his accounts by commissioner Mathews, they say that in the conduct and management of Boyd in his agency, and in the settlement of that, apart from the individual estate of Oglesby, they find nothing of which they propose to complain. But they do object to the purchase made by said Boyd of Gibbony's interest, after returning all capital advanced, and allowing him, as surviving partner, the sum of \$2,013 89, on the score of net profits; because Boyd, after returning to the estate of Oglesby, all capital stock which had been paid in, failed to realize for the benefit of the estate an amount of profits equal to that allowed and paid to the surviving partner. And they object further to the allowance of five per cent. commissions on the receipts and disbursements in the settlement of Boyd's account of his administration on the estate of Oglesby. And making Boyd and his sureties and Gibbony defendants, they pray that the administration account of Boyd be surcharged and resettled as to the allowance of \$2,013 89 to Gibbony, and the commissions of five per cent. upon receipts and disbursements; and for general relief.

679 *Gibbony and Boyd answered the bill. They both relied on the account settled by Mathews, and the time that has since elapsed, as forbidding the opening the account at this late day. Boyd insisted that he had authority to make the contract with Gibbony, and that it would have been favourable to the estate, but for the action of Oglesby in relation to moneys received by him on Floyd's debt, and of which Boyd was not informed when the contract was made. He insisted further, that the question of his commissions had been well considered by commissioner Mathews, when he made the allowance; and indeed, under all the circumstances of the case, was a

small compensation for the time, labour, and responsibility which he was subjected to.

In September, 1859, the court directed a commissioner to take an account of Boyd's administration upon the estate of Oglesby. And subsequently upon application by the commissioner to the judge in vacation, for instructions as to the principles upon which the account should be stated, he was directed to ascertain the net profits realized by the firm of Oglesby & Gibbony, and what proportion of such profits Oglesby's administrator is entitled to, and charge him with such amount; and that he allow the administrator five per cent. commission on receipts; and also what in his opinion would be a reasonable compensation to said Boyd in the way of commissions, if in his opinion five per cent. was not enough. The accounts already settled, so far as they went, to be taken as the basis of his settlement, with the foregoing exceptions.

In February, 1867, commissioner Caldwell returned his report. In ascertaining the net profits of the partnership, he disregarded the contract between Gibbony and Boyd, of August 1st, 1840; and holding that it was the duty of the surviving partner to
680 wind up the business *without compensation, he struck out of the agency account all the credits for commissions, and added these amounts to the balances of net profits; and charged the administrator with one-half of the net profits so ascertained. And allowing five per cent. upon his receipts, charged in the administration account, and \$367.38 arrears of interest, as an additional allowance, he reported the administrator to be indebted to the estate of his intestate, on the 17th of February, 1847, in the sum of \$2,008 93, of which \$1,866 95 was principal, and \$522 21 is interest.

The defendants filed twenty-six exceptions to the report; but it is not necessary to state all of them. They excepted, first, to the agency account, because no such account was directed by the court; and because the bill expressly disclaimed any intention to complain of that account as settled by comm'r Mathews: Again, because in both accounts the agreement between Gibbony and the administrator was disregarded: Again, because the commissions allowed by comm'r Mathews were disallowed in the report; and no compensation having been allowed for settling up the business of the partnership: Again, because Oglesby's estate was not charged with the \$1,000 paid to him by Floyd, and not credited to the partnership on their books. There were further exceptions to particular items of charge in the administration account, some of which were included in other charges.

In relation to the Floyd debt it appeared that George R. C. Floyd dealt with the concern; and on the 7th of March 1838 he owed upon his account, \$2,417.10; upon which there was a credit on the books of the partnership, of \$1,000 under date of April 23d 1837. Floyd insisted that he had

paid to Oglesby the further sum of \$1,000.

In July 1840 suit was instituted
681 *against him by Gibbony as surviving partner, in the Circuit court of Wythe county, for the recovery of the debt. In this suit Floyd claimed credit for this additional payment; and in consequence of this dispute, the case was not tried until April 1842, when the jury allowed the credit claimed by Floyd, and rendered a verdict for \$427.83, with interest from the 12th of August 1838; and the judgment was accordingly. It appears further that Floyd was good for the money in 1840; but when the judgment was obtained in 1842, he had become bankrupt.

The cause came on to be heard on the 28th of March 1872, when the court held that the plaintiffs, by their bill, acquiesced in the account rendered of the partnership transactions of Oglesby and Gibbony, including the allowance of commissions to the defendant as agent for settling the partnership business; and therefore sustained the exception to the disallowance of these commissions; and overruling all the other exceptions, confirmed the report in all other respects; and directed a commissioner to restate the account.

The account as restated found Boyd to be debtor to his intestate's estate, on the 17th of February 1847, in the sum of \$1,199.75 of principal and \$340.68, of interest. And the cause coming on to be finally heard, on the 2d of April 1872, the court confirmed the statement and made a decree in favour of the plaintiffs for this sum, with interest, against Boyd and his sureties. And thereupon the representatives of two of the sureties who were dead, applied to this court for an appeal; which was allowed.

B. R. Johnston, Gilmore and Baxter, for the appellants.

J. W. & J. P. Sheffey and Terry & Pierce, for the appellees.

682 *ANDERSON, J., delivered the opinion of the court.

In April 1858, the widow and children, distributees of Nicholas P. Oglesby, dec'd, filed their bill in chancery in the Circuit court of Wythe county, against Thomas J. Boyd, administrator of said Oglesby, and his securities, and Robert Gibbony, surviving partner of Oglesby & Gibbony. The bill alleges the partnership of Oglesby & Gibbony, the death of Oglesby, the taking out letters of administration on his estate by said Boyd, and his undertaking, under an agreement with the surviving partner, to collect and settle up the business of the firm of Oglesby & Gibbony; the payment to Gibbony on the 1st of August 1840, \$2,013.89, in full of his entire interest in the concern, having previously paid him the capital which he had put in, and the advances, with interest, which he had made to the firm; which was in effect allowing him that sum, as his share in the net profits; that afterwards said administrator blended

Oglesby's individual estate with the unsettled business of the firm: and on the 1st day of August 1842, made a settlement before commissioner John P. Mathews, in which they were so treated after the 1st of August, 1840: a copy of which settlement is exhibited with the bill.

The complainants then say: "In the conduct and management by said Boyd, as the agent for the surviving partner of the business of the firm of Oglesby & Gibbony, and in the settlement of that, apart from the individual estate of N. P. Oglesby, complainants find nothing of which they propose to object. But complainants do object to the purchase made by said Boyd of said Gibbony's interest, after retaining all capital advanced, and allowing him as surviving partner, the sum of \$2,013.89, on the score of net profits; because com-
683 plainants *allege that said Boyd, after returning to the estate of N. P. Oglesby, dec'd, all capital stock which had been paid in, failed to realize for the benefit of the estate an amount of profits equal to that allowed and paid to the surviving partner." They then aver that said arrangement was such as the administrator and surviving partner had no right to make, and that it is not binding on them; and that both are responsible, and should be held accountable to them for whatever profits should have been realized by the estate of N. P. Oglesby, from the business of the firm. And they charge that by this arrangement between the surviving partner and the administrator, there was lost to the estate a considerable sum.

They also allege, that in the settlement of the administration account, the adm'r is allowed 5 per cent. commissions upon the aggregate receipts and disbursements; and they insist that 5 per cent. commission upon the receipts, under the circumstances, would have been ample compensation. And they surcharge the said settlement upon these, and only these two grounds. Their prayer is, that an account may be taken to show the true amount of net profits realized by the firm of Oglesby & Gibbony, and that there be such a reduction of commissions, and only so much allowed the administrator, as would be proper under the circumstances, and a decree for the balance which may appear to be justly due them, and for general relief.

Upon the first ground, for the impeachment of the settlement of 1842, made in the court of probate, the court is of opinion that an administrator is invested by the law with full dominion over the assets, and with full discretion for the liquidation and settlement of all claims due to or from the estate; these powers being necessary to a proper discharge of the duties of his office.

He may make settlements and com-
684 promises *with creditors, and give them confessions of judgments. Braxton, adm'r, &c., v. Harrison's ex'ors, 11 Gratt. 54; Wheatly v. Martin's adm'r, 6 Leigh 62, 71. He has a right to demand and receive from the surviving partner of

his intestate the share of the partnership effects due to the estate of the deceased partner, whom he represents. And to this end he has the power to settle and compromise with him, with a view to the interest of the estate. It is true that in such transactions he may lay himself liable to a devastavit. But if he acts fairly, in good faith, and with a due regard to the interests of the estate, the distributees will be bound by his acts, and he will be protected.

The transaction complained of, was in effect a compromise and settlement, between Boyd, as the representative of the deceased partner, and Gibbony, the surviving partner. The latter agreed to take \$2,013.89, in full of his remaining interest in the concern, and to turn over, and relinquish the balance to the estate of his deceased partner, with the understanding that he was not to be liable for any further claims against the firm, or any losses which might be sustained upon debts due the firm, except as hereinafter noted. Was this a fair and reasonable compromise and settlement between the adm'r of the deceased partner and the surviving partner?

"The fairness of a contract, like all its other qualities, must be judged of at the time it was entered into." Fry on Specif. Perf. top p. 173, side p. 107. At the time this contract and settlement was made, there appears to have been partnership effects in the hands of Thomas J. Boyd, (including an account against George R. C. Floyd, amounting to \$1,417.17,) sufficient to pay to the distributees of Oglesby, after paying all the debts of the firm, a larger sum on account of profits, than

685 *had been paid to the surviving partner. The books of Oglesby & Gibbony, which were kept under the sole direction of Oglesby, showed that the whole of the said sum was due from Floyd to the firm, no credit having been entered on the books for the one thousand dollars, which Floyd claimed to have paid Oglesby on the 23d of March 1837, and which would be determined by the suit then pending in the name of the surviving partner against Floyd. The suit was brought on the 28th April, 1840; and in consequence of this controversy, judgment was not rendered until the 14th of April 1842. The verdict is for \$427 83, with interest from the 12th of August, 1838; which is confirmed by the judgment of the court. Floyd had property and credit when the adm'r entered into this settlement on the 1st of August 1840, and was then good for the whole amount of the account; but at the date of the judgment he had become insolvent, and the whole debt was lost. Boyd could not have known that this account, which appeared, from the books kept by his intestate, to be due to the firm, was subject to a credit for \$1,000, which had been paid to his intestate, according to the proof in the cause, and which he had neglected to credit. He was justified, therefore, in including the whole of this debt, in the estimate which he made of the profits of the business. But, through

abundant caution, he required Gibbony to stipulate in the contract, that if that credit should be allowed to Floyd, he would return one-half the amount, unless he could show that the whole of it was chargeable by law to Oglesby, and the distributees are entitled to whatever of benefit that stipulation gives. If it has not been shown that Oglesby's estate is chargeable in law to the firm, with the amount so paid to him by Floyd, its recourse is upon Gibbony, who is before the

court in this suit in the capacity of 686 surviving *partner, and not against Boyd, who has paid the money to Gibbony, and has not a dollar of it in his hands. But Gibbony was only liable to pay the one-half of it, in case the whole of it was not legally chargeable to the deceased partner. Has that been shown?

The court is of opinion that, in the absence of all fraud and collusion, the judgment of the court in the suit by the surviving partner, who represents the firm, against George R. C. Floyd, is conclusive against the distributees of the deceased partner, in the matters decided thereby, and that the effect of the said judgment is to sustain the claim of said Floyd, that he had paid the money to Oglesby. And the proof in the record, upon which the verdict is found, if it proves that the money was paid, proves that it was paid to Oglesby; and he not having given the firm the benefit of it, by entering it as a credit to the account of Floyd on the books of the firm, he is debtor to the firm in the place of Floyd, for the amount so received; and in computing the assets or effects of the firm, it is proper to charge his estate with the whole amount so received by him and interest thereon; and consequently, Gibbony is not bound by his said stipulation, in his said contract with Boyd, to pay back any thing on account of the credit to which Floyd established his right.

But if the surviving partner and the administrator of the deceased partner, had the power to make a settlement and compromise as to what was due from the one to the estate represented by the other, the former had the right to propose to pay so much to the administrator for the interest of his intestate, just as he had to purchase his interest in the stock of goods; or vice versa to take so much for his interest, and to surrender the balance to the estate of his deceased partner; and the representative of the deceased partner had the right

687 *to accept his proposition. And if the contract was fair and unaffected by fraud or collusion, it would not only be binding on the parties to it, but would conclude the distributees. If there was fraud or collusion the distributees might obtain relief in a court of equity to set aside the contract, and to hold both the parties to it responsible to them; or if they could show that the administrator had not acted in good faith, or that by a careless disregard of the interests of the estate which had been entrusted to him, he had allowed himself to be over-reached and the

estate involved in loss, they might hold him to a devastavit. But the court is of opinion, that in this case there is no ground for such an imputation against the surviving partner or the administrator. On the contrary, the contract was fair and reasonable, and as matters stood at the time, was to the advantage of the estate; and that it did not prove to be such in the end, was no fault of the administrator.

But if the administrator had, in this instance, erred in judgment, and had made a contract of settlement with the surviving partner, which at the time was injudicious, from a mistaken view of the true interests of the estate which he represented, after the extraordinary devotion which he had evinced to the interests of the estate, by his abnegation of personal interests, and the assumption of personal responsibilities for its benefit, by which numerous suits were probably avoided, and large sums saved to the estate in the shape of costs; after his extraordinary success in collecting the numerous debts due the firm, a large portion of which were unsettled, and due by open account, through a period of the most unexampled pecuniary distress—a fact of public history which may be judicially known—and paying the numerous debts due from the firm, largely to northern merchants, without loss to the estate or to

688 the firm, or the *costs of suit to enforce their collection in a single instance; or by the payment of discount on the depreciated currency, which prevailed in the country where the debts were due the firm, and in which they had chiefly to be collected; exhibiting, it is but just to the administrator to say, a diligence, carefulness and financial skill, and fidelity to the trust confided to him, which it is to be regretted is rarely exhibited in the conduct of fiduciaries; and of which the plaintiffs in this suit are enjoying the fruits. After all this, even in the case supposed, it would be extremely harsh and rigorous, to hold the administrator to a devastavit.

But when as we have seen, 1st, that the administrator and surviving partner were invested with power to make such a contract of settlement; 2d, that it was bona fide and reasonable, and beneficial to the estate of the deceased partner at the time it was made; and that its not being so in the end, was not the fault of the administrator; 3d, that it was approved by the commissioner who settled the accounts in July 1842, and by the court of probate; and 4th, that it was acquiesced in by the widow and the guardian of the infant distributees, for nearly sixteen years before the bringing of this suit, the conclusion cannot be resisted that said contract of settlement is binding not only on the parties to it, but that the distributees are concluded by it.

With regard to the only other ground charged in the bill, for the impeachment of the settlement of 1842, the allowance of excessive commissions to the administrator, it is usual, and we think most proper to allow commissions only on the receipts.

But in this case commissions are not allowed on all the receipts and disbursements, and we find from an examination of the accounts, that 5 per cent. commission upon all the receipts alone, with which the said

Boyd is charged, both as administrator and as *agent of the surviving partner, would be inconsiderably less than the commission which he has been allowed. This includes a commission on the money borrowed, which was a most advantageous operation for the estate and firm, and involved personal responsibility and labor on the part of the administrator and agent, which ought to have entitled him to a commission, though none was claimed by him. It also includes a commission on all moneys which passed through the hands of the administrator as such, or as agent, all of which involved trouble and responsibility, though upon a considerable part thereof he did not claim commissions, for the reason, doubtless, that upon a part of the funds which passed through his hands, he had been allowed commissions both on the receipts and disbursements. But there is no law which prescribes what commission shall be allowed an executor or administrator. The amount that should be allowed him is not fixed by law, but rests in the discretion of the court; and what court is so competent to make the allowance as the court of probate. In some cases, perhaps, less than 5 per cent. has been allowed, and in some cases as high as 10 per cent. has been allowed, and approved by this court. We are disinclined to disturb the settlement upon this ground, especially after it has been so long acquiesced in by the widow and the guardian of the infant distributees. Indeed it seems to us that the administrator's compensation is not greater than his services were worth to the estate.

The settlement of 1842 shows that the administrator, on the day said settlement was closed, paid to the widow and to the guardian of the infant distributees, their respective shares of the exact balance which appeared to be due them by that settlement, for which they gave their several receipts. And having acquiesced in that settlement so long; and the account exhibited by 690 the administrator *with his answer, showing that all the assets which came into his hands subsequently to that settlement, have been fully administered, and that there is nothing in his hands due the distributees, the court is of opinion that this suit ought not to have been brought, and that the decree must be reversed, and the plaintiffs' bill dismissed, with costs.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the said decree is erroneous. Therefore it is decreed and ordered that the same be reversed and annulled, and that the appellees do pay to the appellants their costs by them about their appeal in this behalf expended. And this court, proceeding now to render such decree as the said Circuit court ought

to have rendered in the premises, it is further decreed and ordered, the bill of the appellees, who were plaintiffs below, be dismissed, and that the said appellees do pay to the defendants below their costs by them about their defence in that court expended.

Decree reversed.

691 *Teel & als. v. Yancey & als.

September Term, 1873, Staunton.

1. **Statute—Enabling Act—Constitutional.**—The act of March 5th 1870, commonly called the Enabling Act is a valid act, except the proviso which authorizes the Court of appeals to review the decisions of the Court of appeals organized under the reconstruction acts; and the District courts of appeal, sitting in December 1869 had jurisdiction to hear and decide the causes then pending therein.

2. **Judicial Sale of Land—Objections—Valid.**—A judicial sale of land is excepted to, 1st: Because the land was sacrificed; 2d: Because one of the commissioners to sell was interested in the purchase of one-half of the land. 3d: Because a material advance was offered by a substantial bidder. 4th: Because there was no memorandum. These are valid objections, and the sale was properly set aside.

3. **Same—Same—Invalid.**—It is not a valid objection to a judicial sale of land, that one of the commissioners was a plaintiff in the suit, in his own right and as administrator, and also had an interest in the land sold, both in his own right and as trustee of another, and as next friend of the infants.

4. **Same—Bonds—Payable in United States Currency.**—In May 1868 there is a decree for the sale of land, and in August 1868 there is a sale by the commissioners, who announce publicly the terms of sale to be, on a credit of one, two and four years; the purchase money to be paid in the currency which may be in use when the respective payments fall due; but with the privilege to the purchaser to pay one-half of the purchase money upon the confirmation of the sale by the court. The land, which was worth in gold eighty dollars per acre, sold for one hundred and forty-two dollars per acre; and the sale being confirmed, the purchasers paid one-half the purchase money with Confederate currency, executing their bonds for the other half, which fell due in August 1866 and 1867. They must pay off these bonds in the currency of the United States; that being the currency in use when they fell due.

692 *This case is sufficiently stated by Judge Christian, in his opinion.

The case was argued by Baldwin and

***Statute—Enabling Act—Constitutional.**—In *Bolling v. Lersner*, 26 Gratt. 43, the principal case is cited as holding that the enabling act is a valid act, except the proviso, which authorizes the Court of appeals to review the decision of the Court of appeals organized under the reconstruction acts.

As to the unconstitutionality of the proviso, see foot-note to *Griffin v. Cunningham*, 20 Gratt. 31.

†**Judicial Sale of Land—Objections—Valid.**—As to the four exceptions to a judicial sale of land laid down in the second headnote being valid objections, see *Kable v. Mitchell*, 9 W. Va. 517.

Sheffey for the appellants, and by Woodson, Yancey and Wm. Robertson, for the appellees.

CHRISTIAN, J. This is an appeal from a decree of the late District court of the 6th Judicial District, affirming a decree of the Circuit court of Frederick county.

The following facts disclosed by the record, are necessary to be adverted to in order fairly to present the question this court is now called upon to consider.

Col. Wm. B. Yancey, of the county of Rockingham, departed this life in the year 1858, leaving a large real estate. After his death several suits were brought, having for their object the sale of his real estate, for the payment of his debts and the partition of the surplus among his heirs at law. It is not necessary to notice the proceedings in these several suits, (which were afterwards consolidated into one,) except the fact, that on the 3d of June 1860 the Circuit court of Rockingham entered a decree directing a sale of the real estate of which Col. Yancey died seized, and Thomas L. and Wm. B. Yancey were appointed commissioners to sell the same. This decree was not executed until January 1863.

The land at this sale was bid off by C. A. Yancey, one of the heirs, at \$80.50 per acre. The upper part (one-half) was afterwards sold privately to Bernard P. Teel, at \$80 per acre; and Wm. B. Yancey, the commissioner, who made the sale, agreed to take the other half at the same price. This sale was reported to the court, and its confirmation was resisted, upon the ground of inadequacy of price; and much evidence was taken upon that question.

The result was, that the court refused to confirm the sale; and by its decree entered on the 25th of May 1863 directed that Charles A. Yancey and Joseph R. Logan, who were appointed commissioners for the purpose, should proceed to sell the land theretofore decreed to be sold in these causes, at public or private sale, upon the following terms: One-fourth in sixty days, one-fourth in twelve months, one-fourth in two years, and one-fourth in four years from the day of sale, with interest payable annually from the day of sale, taking from the purchaser bonds with good security for the payment, and retaining the title as ultimate security; with the privilege of paying one-half the purchase money upon the confirmation of the sale by the court. This decree was executed on the 7th of August 1863.

At this sale Bernard P. Teel and Wm. B. Yancey became the purchasers; Teel purchasing one-half of the home farm (of 457 acres) at \$142.00 per acre, and Yancey the other half, at the same price; the wood land was also purchased by the same parties; one hundred and thirty-seven acres being taken by Teel, for which he agreed to pay the sum of \$1,570; and one hundred and thirty-eight and a half acres being taken by Yancey, for which he agreed to pay the sum of \$1,402.32. This sale was reported to the court and confirmed without

objection; and Teel and Yancey, in accordance with the terms of the decree allowing the purchasers to pay one-half the purchase money upon the confirmation of the sale by the court, accordingly paid down in cash one-half the purchase money, and executed their bonds for the deferred payments, payable in two and four years from the day of sale.

These bonds fell due after the close of the late war, to wit, on the 7th of August 1865 and the 7th of August 1867.

694 *Suit was instituted by the heirs of

Col. Yancey, for the purpose of subjecting the lands in the hands of the purchasers, (upon which a lien was retained,) to the payment of the balance of the purchase money. This claim was resisted upon the ground that the sale of the land was made for Confederate currency, or with reference to said currency as a standard of value; and it was insisted that the bonds due August 1865, and August 1867, should be scaled to their gold value. Numerous depositions were taken to show the terms of the sale, and the agreement of the parties as to the kind of currency for which the property was sold. And on the 25th July 1868, the Circuit court of Frederick entered its decree, declaring that "the court is of opinion that the testimony satisfactorily proves that at the sale made on the 7th day of August 1863, pursuant to the decree of May 1863, the deferred instalments of the purchase money were not payable in Confederate States treasury notes, but were payable in current funds; by which was understood and intended by the parties to said contract of sale, such funds as might be current at the dates when said instalments might fall due; that is to say, in the events which have occurred, in lawful money of the United States. It is therefore adjudged, ordered and decreed that one of the commissioners of this court ascertain what amount is still owing from the purchasers at said sale, with interest, &c., allowing full credit for the full nominal amount of the Confederate money paid in cash, &c.

Upon the return of the report under this decree, showing the indebtedness of Wm. B. Yancey, one of the purchasers, to be the sum of seventeen thousand five hundred and forty-five dollars and seventy-one cents, and of the other purchaser, Bernard P. Teel, the sum of seventeen thousand six hundred and twenty-nine dollars and seventy-five cents, the court decreed against them

695. and *their sureties, the payment of these several amounts; and further decreed that "if they and their sureties, shall fail to pay the said sums of money respectively, within sixty days from the date of this decree, then Charles A. Yancey, who is appointed a commissioner for that purpose, shall proceed to sell to the highest bidder, on the premises, so much land as may be necessary to pay what is due from each defaulting vendee upon his said purchase, upon the following terms, viz: one-fourth of the purchase money in cash, the

residue in equal sums of nine, eighteen and twenty-seven months from the day of sale; all to bear interest from the day of sale, and to be secured by deed of trust on the land."

To these decrees an appeal was allowed to the District court at Winchester. On the 3d of December 1869, that court affirmed the decrees of the Circuit court of Frederick: and an appeal was allowed from the decree of the District court to this court.

In the petition of appeal to the District court and to this court there are several errors assigned, and relied upon, in argument here, which I will now proceed to notice.

As to the first error suggested in the petition for appeal to this court, to wit: that the District court had no jurisdiction "to hear the cause or make any decree therein," it is sufficient to refer to the act of Assembly approved March 5th, 1870, commonly called the "Enabling Act," and the construction of that act by this court in the case of Griffin's ex'or v. Cunningham, 20 Gratt. 31.

If the District courts were not continued by the operation of the schedule, their acts were declared legal and binding by the act referred to; and that act was declared by this court, to be valid; except the proviso

696 which gave this court the authority to rehear and review causes *decided by the court of appeals, organized under the reconstruction acts; the majority of the court holding that the Legislature had no authority to confer such power upon this court, and that the proviso was in this respect void. But in all other respects the statute was held by all the judges of this court, to be constitutional, valid and binding. The question raised is therefore res adjudicata, and no longer open for discussion.

Another error assigned, is, that the Circuit court of Rockingham ought to have confirmed the sale made by Wm. B. Yancey, surviving commissioner, on the 13th of January 1863. That sale was excepted to, 1st: Because the land was sacrificed at private sale. 2d: Because Wm. B. Yancey, the commissioner, was interested in the purchase of the lower tract. 3d: Because an advance upon the price was offered by Mr. Price. And 4th: Because there was no memorandum of the sale.

The Circuit court sustained these exceptions, and set aside the sale. There was no error in that decree. It is manifest from the evidence taken upon the exceptions to the sale, that persons were prevented from attending the sale, in consequence of the prevailing impression that no sale would take place at the time advertised; which was based upon the current report that the widow would not consent and unite in the sale. The doubt and uncertainty as to whether the widow's dower would be sold with the land, manifestly affected the price (\$80 per acre) for which it was sold; several witnesses stating that the land would have brought \$100.00 per acre, if it had been as-

certained that the widow was willing to unite in the sale; and one witness, Geo. W. Price, (whose responsibility was not questioned,) binding himself to bid at the start \$90 per acre, if the land should be put up again. It was also shown that one-half of the land was bought by the commissioner, Wm. B. Yancey, who *made the sale. Under these circumstances the Circuit court very properly set aside the sale, or rather refused to confirm it, and directed another sale to be made.

Another alleged error is the appointment of Charles A. Yancey, as commissioner to make the second sale, who was one of the plaintiffs in the suit, in his own right and as administrator de bonis non of his father, Wm. B. Yancey, as trustee of one of the other parties interested, and as next friend of certain infants.

There was nothing in these relations which disqualified him as a commissioner to do the behests of the court. In fact a commissioner is but the agent of the court. A sale by a commissioner is a sale by the court; his acts are subject to the control and superintendence of the court, and are liable to exception by any person interested; and, indeed, there is no sale without the approval of the court. The fact that Charles A. Yancey was one of the plaintiffs does not affect the validity of the sale.

Under the English practice in chancery proceedings, the conduct of the sales is usually given to the plaintiff, or other party having the charge of the general proceedings. (See 2 Dan. Ch. Pr. 1267.) Nor is there any thing in the rules of chancery practice in our courts, which forbids such appointment. The commissioner is the officer of the court, and acts under its supervision. His errors, when brought to the notice of the court, or when appearing on the face of the proceedings, will be corrected.

It is no where proved, or even charged, that the conduct of the commissioner was not perfectly fair and impartial. No objection was made to the commissioner in the court below, nor was the court asked to substitute another; nor was the sale objected to on account of the commissioner being a party to the suit. The 698 *objection is made for the first time in this court, and comes too late, even if it could have availed the party in the court below. See *Goddin v. Vaughan's ex'x*, 14 Gratt. 102, *Roberts v. Roberts*, 13 Gratt. 639.

The remaining assignment of error, and the one mainly relied upon by the counsel for the appellants, is that the court below erred in decreeing that the deferred instalments of the purchase money for the land sold pursuant to the decree of May 1863, "were not payable in Confederate States treasury notes," but "in such funds as might be current at the dates when said instalments might fall due;" and in decreeing against the appellants' payment of these sums in the present currency.

It is insisted for the appellants, that the

sale was made for Confederate currency, or with reference to said currency as a standard of value; and that therefore the instalments falling due in 1865 and 1867 ought to be scaled. They rely in their answers, mainly upon the fact that the land sold for so large a price, \$142.50, as to preclude the idea that it was sold for any other than depreciated Confederate currency. Teel says, "the prices at which these lands sold show that the payments were to be made in current funds, or Confederate money, and that currency was the standard of value in the contemplation of the parties."

Price, who was the purchaser from Wm. B. Yancey, of his part of the purchase at the sale, says in his answer: "The price was so far above the regular value of the property in any other currency as to preclude the idea of any other standard of value." They both insist that the deferred payments should be scaled. It is a noteworthy fact that neither of the defendants make any reference to what occurred at the sale as to the terms upon which the land was sold as announced by the commissioner and auctioneer, but rely entirely upon 699 the presumptions *arising from the price agreed to be paid for the land, as fixing the standard of value with reference to which they purchased.

Before referring to the evidence in the record, which is clear and uncontradicted, it may be observed that the mere fact that the land brought nearly double its value in gold, is not of itself a conclusive presumption under the circumstances of this case, that the sale was made for Confederate currency, or with reference to such currency as a standard of value. It must be remembered that the real value of the land is fixed at 75 or 80 dollars per acre, that it was assessed before the war at \$80 per acre. The purchaser had the privilege of paying down in cash one-half of the purchase money, and the balance was to be paid in two and four years. The home farm, 457 acres, sold for \$67,379 00. Half of this amount, \$33,689.50, the purchaser could, if he chose, pay in Confederate currency, worth \$2,406.32 in gold. With this privilege he could get one-half the land at from five to six dollars an acre, which was worth from \$75 to \$80 per acre. He might therefore, be perfectly willing to take the risk of paying for the other half in a sound currency. But the risk was a small one at best; for if required to pay the balance of the purchase money in gold it would not be more or very little more than the value of the land. On the other hand, he had the chance, and not a remote one, of paying the whole in a depreciated currency. Indeed, if the war had lasted four months longer, one-fourth more of the purchase money would have been received in a still more depreciated and nearly worthless currency. It, therefore, by no means follows, that the large price for which the land sold, furnishes a conclusive presumption that it was sold for Confederate currency when it was sold upon such long credit, and the purchaser had the

700 privilege of paying for one-half in *a currency depreciated fourteen to one. The presumption is rather in favour of taking the risk of paying the deferred instalments in a sound currency, especially when there was every thing to gain, and nothing to lose.

But in this case we are not left to presumptions arising upon isolated facts: but we have clear, distinct, and uncontradicted proof of the terms upon which the land was sold by the commissioner and purchased by the appellants. Seven witnesses were examined, among them the commissioner who made the sale and the auctioneer who cried off the land. They all concur in the statement, that the terms were publicly announced, and that these terms were, that one-half of the purchase money would be received in cash when the sale was confirmed, and the other half to be paid in two and four years from the day of sale, in the currency which might be in circulation at the maturity of the deferred payments.

Mr. Logan, one of the commissioners who made the sale, says: "The notes were drawn payable in one, two, three and four years; payable in current funds; the purchaser having the privilege of paying the two first payments upon a confirmation of the sale; the two deferred bonds to be paid in the currency at the time they fell due." "I recollect distinctly announcing the terms myself." "I announced it to the crowd for the benefit of all concerned." In answer to the question: "You state the deferred bonds were to be paid in the currency of the country at the time they fell due: Explain whether you mean the currency of the country, which existed at the date of the sale, or the currency which should exist when the bonds matured." Answered: "The currency which should exist at the maturity of the bonds; that was my understanding."

Mr. Bowman, the auctioneer, states:
701 "It has been *my habit to announce the terms of any sale previous to its commencement. I think I did in this case, but am not certain: I recollect also that Mr. Logan announced the terms of the sale too, but at what particular time, whether at the commencement or after the bidding had begun, I can't say; I think it was after the bidding begun. There was some difficulty or contention as to the manner of the payments, and Mr. Logan got upon the block, and announced the conditions. I went there, in the first place, not as an auctioneer but as a bidder, with the determination to buy the property. I was employed after I got there to cry the sale, and announced to them that I intended to bid. I did bid upon the property to a certain amount, and declined bidding further on account of the conditions of the sale, for this reason: As I understood the conditions, whatever was the currency of the country when the bonds matured, would have to be paid; and I was very apprehensive that Confederate money would not be the currency then." He further states, that his

last bid was \$142.25, and that there were several bids afterwards.

Five other witnesses who were present at the sale, concur in stating that it was distinctly announced by the commissioner making the sale, that the deferred payments were to be made in whatever might be the currency in circulation when these payments became due. Not one of these witnesses is contradicted; nor can a witness be produced who was present at the sale, who will say that the terms were different, or that they were not announced as stated by these witnesses, on the day of sale. It is a pregnant fact that neither of the purchasers are examined as witnesses to prove that they did not so understand the terms of sale; and in their answers, neither say one word on the subject, but rely
702 *exclusively on the large price bid as affording a presumption that the sale was for Confederate money.

I have already shown, that without looking to the evidence in the cause, this presumption would by no means be a conclusive one. But if it could be raised, is entirely overcome by the undisputed facts in the cause. There is still another fact which, standing alone, would go far to show conclusively that the whole of the purchase money was not to be received in Confederate money, but the deferred payments in such currency as might be in circulation at their maturity; and that is the fact that two hundred dollars per acre was actually offered in Confederate money, and was refused.

The witness, Gibbens, says: "I was offered that day (the day of sale) \$200 per acre, if I would purchase and agree to take the responsibility of the deferred payments."

Mr. Logan says: "I was offered privately \$200 per acre for the land, by Mr. Branch, of Petersburg."

I am of opinion that it is conclusively shown by the evidence, of which there is no conflict, that the true understanding and agreement of the purchasers, that the bonds maturing on the 7th of August 1865, and the 7th of August 1867, should be paid in the present currency, that being the currency in circulation when the bonds fell due; and that in accordance with the principles settled by this court in *Boulware v. Newton*, 18 Gratt. 708; *Kraker v. Shields*, 20 Gratt. 379; and *Morgan's adm'x v. Otey*, 21 Gratt. 619, the decree of the District court should be affirmed.

I am the more satisfied with this conclusion, not only because it is based upon well settled principles, which must now be regarded as firmly settled by this court, but because it meets all the equities of the case.

If it were possible to regard the sale in
703 this case as a sale in *full for Confederate money, and scale the payments, then the purchasers would be confirmed in their title to this real estate, for the most part the property of infants, who are the special subjects of protection in a court of chancery, by paying the paltry sum of be-

tween five and six thousand dollars, when the land is shown by all the evidence, to be worth over thirty-four thousand dollars. On the other hand, when the appellants pay the amount decreed against them, they will pay not more than the real value of the land. I am not disposed, therefore, to disturb that decree, and think it ought to be affirmed.

MONCURE, P., and STAPLES, J., concurred in the opinion of Christian, J.

ANDERSON and BOULDIN, Js., dissented.

Decree affirmed.

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**Johns v. Scott & als.*

September Term, 1873, Staunton.

Absent—MONCURE, P., and ANDERSON, J.

1. *Will—Construction—Case at Bar—Slaves.*—G by his will gave to his wife for her life, all his slaves and their future increase, and at her death in the lifetime of his daughter H, to his daughter H for her life. "From and after the decease of my wife and daughter E, I hereby emancipate and set free from slavery all of my slaves together with all their future increase." And G directed his executrix to set aside and invest the sum of \$8,000 in her own name as executrix, and receive and reinvest the interest and dividends, until such times as his slaves may be entitled to their freedom under his will; it being his intention to provide a fund to aid in the removal of his slaves from Virginia to their future homes, when they acquired a right to freedom under his will. And he directs that this sum of \$8,000 with all its accumulated interest, shall be applied to the purpose of removing his slaves as aforesaid; and that any residue of the fund shall be distributed to them as near equally as possible. The wife takes possession of the slaves and holds them until they are freed by the results of the war; when they leave her. She lives until 1868, her daughter surviving her.—The persons who had been slaves of the testator and their increase do not answer the description of the legatees described in the will, and are not entitled to the legacy.

2. *Same—Same—Bequests to Classes.*—For the principles governing the construction of bequests to classes, see the opinion of BOULDIN, J.

Joseph Glasgow, of the county of Rockbridge, died in 1856, leaving a will, which was duly admitted to probate in the county court of Rockbridge; and leaving
705 *surviving him his wife and one child, Elizabeth Johns. After devises of land to his wife, for her life, and to his daughter other lands, and also the remainder in that left to his wife at her death, he gave to his wife, for her life, all his slaves, with their future increase; the profits of said slaves to be her absolute property; and if his wife should die in the life-time of his daughter, he directed that his daughter

should hold the said slaves during her natural life, with their future increase. The seventh and eighth clauses of the will are as follows:

7th. And from and after the decease of my wife and daughter Elizabeth, I hereby emancipate and set free from slavery, all of my slaves, together with all of their future increase, including the slaves now in the possession of my said daughter, together with all their future increase. It being my intention, and I so expressly declare it to be my will, that all of my slaves, together with all their future increase, shall be emancipated and forever discharged from slavery, whenever my wife and daughter Elizabeth have ceased to live.

8th. And I hereby direct my executrix hereinafter named, to set aside and invest the sum of three thousand dollars, in her own name, as my executrix; and receive and reinvest the interest and dividends thereon annually; so that the same may accumulate in the way of compound interest, until such time as my slaves may be entitled to their freedom under this will; it being my intention by this clause, to provide an accumulating fund to aid in the removal of my slaves from the Commonwealth of Virginia to their future homes, when they acquire a right to freedom under this will. And I hereby direct that the said sum of three thousand dollars, with all its accumulated interest, shall be applied to the purpose of removing my slaves as aforesaid; and that any residue of the fund which
706 may remain, shall *be distributed among them as near equally as possible.

By another clause of his will the testator directed his executrix to sell a tract of land named; his object being, as he says, to provide a fund to aid in the payment of his debts and to raise the fund of \$3,000 provided for in the 8th clause of his will. He made his wife his residuary legatee, and appointed her executrix of his will.

At the death of Joseph Glasgow his slaves amounted to thirty-eight in number. They remained in the possession of Mrs. Glasgow until the end of the late war; when they left her. She died in 1868, when Mrs. Johns qualified as her administratrix, and as administratrix de bonis non with the will annexed of Joseph Glasgow.

In 1869 Jack Scott and nineteen others, some of them the slaves of Joseph Glasgow at the time of his death, and others born after that time, filed their bill in the Circuit court of Rockbridge county, against Elizabeth Johns in her own right and as administratrix of Mrs. Glasgow, and adm'x de bonis non with the will annexed of Joseph Glasgow, in which they set out the will of Joseph Glasgow, and say, that they served Mrs. Glasgow faithfully until they were discharged from slavery and forever set free, by the operation of the late civil war, by the amendment to the constitution of the United States, and by the law of Virginia; and that they were never at any time the property or slaves in possession of the said

*See a discussion of the decision in this case in *Simmerman v. Songer*, 20 Gratt. 17 et seq.

Elizabeth Johns; and ask that the defendant may be required to pay to themselves and the other former slaves of said Glasgow the legacy of \$3,000, with its accumulated compound interest; or if this could not be done in the life-time of Mrs. Johns, that she may be required to bring the same into court, to be placed in the hands of a
707 receiver to be invested *and reinvested at compound interest, until the death of said Elizabeth Johns.

Mrs. Johns answered the bill, and contested the right of the plaintiffs and the other parties in interest with them to the legacy, on the ground that they did not answer the description of the legatees in the will; they having been emancipated, not by the will, but by the results of the war.

In the progress of the cause much testimony was introduced, and accounts were taken; none of which are necessary to be stated to present the only question considered by this court. There is no doubt that Mrs. Johns had ample estate of her father and also of her mother, to pay the legacy with its accumulations; and the court having fixed the amount at \$5,716.84, as of the 1st of December 1870, on the 30th of October 1870 made a decree directing her, out of the estate of her intestate Mrs. Glasgow, to pay to the general receiver of the court that sum with interest thereon from the 1st day of December 1870, to be compounded annually until paid, and the plaintiff's costs. There were directions for lending out the money, and for enquiries, which it is unnecessary to state. From this decree Mrs. Johns applied to this court for an appeal; which was allowed.

Tucker, Baldwin, and Anderson, for the appellant.

Brockenbrough and Sheffey, for the appellees.

BOULDIN, J., delivered the opinion of the court.

Several questions of much interest and importance have been discussed at the bar in this cause, with great research and ability, by counsel on both sides; but in the view taken of the case by the court, it will be necessary to consider only one of those questions, viz: Do the persons whom the

Circuit court has declared to be entitled *to the legacy of \$3,000 named
708 in the decree, answer the description and character given by the testator to the legatees of that fund? Do they constitute the class described? If not, then the decree must be reversed.

It will be observed that none of the appellees are named in the will; and if they are entitled at all to the legacy aforesaid, they must show themselves to be thus entitled by showing that, although not named in the will, they are plainly described thereby. They must bring themselves clearly within the descriptive terms used by the testator. The bequest was to a class

of persons of a designated character, and bearing certain relations to the testator; and this character and these relations evidently constituted the inducement to the provision. The legatees to whom the bounty was to accrue were not particular individuals, but elect characters. They were to be the testator's freedmen, his slaves, emancipated by him, under his last will, which, in this respect, was not to take effect until the death of the survivor of the wife and daughter of the testator; down to which time, by the express terms of the will, this class of legatees were to remain slaves, and as such to serve the testator's wife and daughter. At the death of the survivor of them, and not until then, the testator's slaves were to be entitled to freedom; and for such of these "slaves," to use the testator's own language, "as may be entitled to their freedom under this will," the provision was to be made "when they acquire their right to freedom under this will." The class of persons for whom this provision was made were slaves of the testator, serving his wife and daughter as such until the death of the survivor of them, and then, and not until then, acquiring their right to freedom under the testator's will. The description is plain and unmistakable; and the question is, do

709 the *appellees, Jack Scott and others, answer to that description? Do they bear the character and relations designated by the testator? Not having been named in the will at all, but only described, they must of course bring themselves within the terms of the description. Have they done so?

The solution of this question will depend on the just application of well established rules of construction, to some of which we will briefly advert.

It is well settled that wills should be liberally expounded to carry into effect the intention of the testator, apparent on the face of the will, as elucidated and explained by the light of the facts and circumstances surrounding the testator at the date of its execution. To give effect to that intention, when thus ascertained, a court of construction, when absolutely necessary, will disregard and reject terms and expressions obviously in conflict therewith; but this will never be done, when consistently with that intention due effect can be given to every part of the will. The will of the testator, as written by him, each and every part thereof, when consistent with itself and the law of the land, is the law of the case, and must be enforced as such.

In the will before us, provision has been made for certain legatees, not designated by name, but who are required by the will to answer a certain description and character therein set forth; and we may safely say that "in general, no rule is better settled than that legatees must answer the description and character given of them in the will; so that a bequest to the seventh child of B will not entitle an eighth, who, by the death of the seventh before the tes-

tator, becomes the seventh." 1 Rop. on Legacies 65.

To sustain that proposition, Mr. Roper cites the case of *West v. The Lord* 710 *Primate of Ireland*, 3 Bro. C. C. *148; a very strong case to show how far the courts have gone in adhering to the exact description and character given to the legatee by the testator, even when, under the circumstances of the case, it would be reasonable to suppose that the testator would have used different language, could those circumstances have been foreseen. In that case the testator bequeathed as follows: "I desire that my executor would at his decease, bequeath 100 guineas to Lord Cantalupe for the use of his seventh, or youngest child, in case he should not have a seventh living."

Lord Cantalupe has six children at the date of the bequest. Another child had been born previously thereto, but was then dead. Two months after the testator's death another son was born to Lord Cantalupe, whom he named Septimus; and afterwards other children were born, the youngest of whom was named Matilda; and the question was, whether Septimus or Matilda was entitled to the legacy. Lord Thurlow was of opinion that although Septimus was at the time the legacy accrued the seventh living child of Lord Cantalupe, yet as he was in point of fact the eighth, in order of birth, he could not take by the description of the seventh; and the legacy was given to Matilda; and this decree, the chancellor affirmed on rehearing. 1 Rop. 65-6.

We would not be understood as affirming that in a case exactly like that, this court would carry the principle as far as Lord Thurlow did. We have referred to it to show how very reluctant the courts have ever been to depart in any respect from the descriptive terms of the will.

"Of such importance is it," (says Mr. Roper,) "for a legatee to answer the terms of the bequest, that if he do so, he may even make a good title to the legacy or portion, notwithstanding it may appear 711 contradictory to the *testator's intention." 1 Rop. 67; citing the case of *Trafford v. Ashton*, 2 Vern. R. 660, and 2 Eq. Ca. abr. p. 213, pl. 8, same case.

The case of *Trafford v. Ashton* was, in principle, the same with *West v. The Lord Primate of Ireland*, already referred to. It is stated by Mr. Roper, as follows:

"Mr. Vavasom devised all his estate in trust for his daughter for life, remainder to her second son to be begotten in tail male, and so to every younger son: remainder to her eldest daughter and the first son of her body; the testator apologizing for omitting the eldest son, from the expectation of his daughter marrying so prudently as to insure a provision for such son. The daughter married Sir Ralph Ashton and had children, Edmund, the eldest, Richard, and Ann Trafford. Edmund died shortly after his birth, and then Richard was born who was the only and eldest son of Lady Ashton. The question was, whether he was entitled

under the description "second son," to Mr. Vavasom's estate; and it was determined in the affirmative; the Chancellor observing that second son was second in the order of birth. Richard, therefore, answering that description, was entitled, although it was contrary to the testator's intention." This case, it will be seen, is the converse of the case of *West v. The Lord Primate of Ireland*, but is the same in principle; and whilst we would not be understood as saying that we would follow either of them upon precisely the same state of facts, yet we do not hesitate to say that we approve the principle intended to be affirmed, viz: that legatees, especially when designated by class and description only, must in general bring themselves clearly within the description and character given to them by the testator. This description and character will only be departed from by a court of

712 construction when on the face of the will itself, as explained by the *facts and circumstances attending its execution, it shall be made to appear that there was a mistaken description in the will, or that the description was itself immaterial. This proposition is sustained by the case of *Bristow v. Bristow*, 5 Beav. R. 289, which is thus stated by Mr. Roper, same Vol. p. 170. "A legacy of £800 was given to the four eldest children of my cousin G. B. (naming them,) equally," and "£200 to the remaining children of my uncle G. B." The testatrix had both a cousin and an uncle G. B.; the cousin had seven children only, known to the testatrix, and the uncle had only one, S. whom the testatrix in her will called cousin, and who had three children. Lord Langdale, M. R. held, that the three remaining children of the cousin G. B. were intended."

Now, in this case, although the parties declared to be entitled to the legacy did not literally answer the description annexed to their names, yet there was enough on the face of the will, as explained by the state of the families at the date thereof, to show clearly that there was a mistaken description, and that they were really the persons intended to be described. In such case the principle laid down is not invaded. The will itself, in connection with the surrounding facts and circumstances, showed plainly who were intended to be described; the parties declared to be entitled, thus brought themselves clearly within the description intended by the will expounded as aforesaid. But how stands the case before us? Who were the persons, or rather class of persons intended to be provided for by the testator in this case? Clearly, not any particular individuals, for none are named; and the guarded terms of the bequest preclude the idea of individual benefit. A class only was provided for, to answer a certain description and character, pointed out in unmistakable terms by the testator himself.

713 For this class, as a class, answering, at the time *they should become the recipients of his bounty, the description and bearing the relations designated

by the testator, and for this class only, was the provision made. What was the class? and what relations were they to bear to the testator when his bounty should be invoked? We answer from the will itself, and almost in its words, his slaves remaining such down to the death of the survivor of his wife and daughter, and in their service; and then, and not until then, to be emancipated by and under his last will. This was the class, and thus to be emancipated, for whom the testator intended to provide. They were to be his freedmen, made such at that remote period in the future, by his will, and claiming their rights to freedom thereunder. Such is the class described in this will, and as none of the class are personally named, only those who can bring themselves fairly within the descriptive terms of the will, can claim the testator's bounty. Do the appellees answer that description? Do they claim the legacy in question as having been slaves of the testator down to the death of the survivor of his wife and daughter, and by virtue of emancipation then, by and under the testator's last will? Is this their claim? Far from it. The event, on which alone such claim is dependent, has not yet occurred. The testator's daughter is yet alive, and may live for many years. Ere she dies, every one of the persons now claiming a legacy dependent on that event, may themselves be dead. They do not pretend, and could not pretend, that the event had happened on which the provision was to take effect; for their suit is now pending against the testator's daughter. Nor do they claim in the character given by the testator to this class of legatees. They do not claim as his freedmen emancipated by his will. Such is neither their claim nor their status. They claim their right to freedom under another and higher

714 power, and directly *against the testator's will; and do not, therefore, pretend that they come within the liberal terms of the bequest. But it is insisted that they are within its spirit, that they were to be provided for, when free; and having successfully asserted their right to freedom, that it was immaterial whether they became free under the will or otherwise. We are of a different opinion. We do not think that the testator, could he have foreseen the events which have occurred, would have so modified the terms of the bequest as to allow it to take effect in favor of the appellees, and against the prime objects of his affection and bounty—his wife and daughter. On the contrary, we think that the future status of this class of legatees, as his freedmen, made such by his will, was the inducement to his bounty to them. It was in that character alone that they were to take. And could he have foreseen that they would acquire and assert their right to freedom, independently of his will, and against its provisions, disturbing and to a great extent overthrowing the same, we think the presumption reasonable that he would have made no attempt to provide for them at all.

We see nothing, therefore, in the circumstances of the case, nor in the intrinsic justice and merit of the claim, which should induce the court, in disregard of the principles above laid down, to dispense with the plain description and character given to the legatees by the testator. On the contrary, we think that we have, in the circumstances of the case before us, every inducement to a just and faithful application of the rule, that the legatee must show himself entitled to the legacy in the character and according to the description set forth in the will. We think, as we have already said, that the character in which the legatees should claim was, in this case, of the essence of the bequest; and in that aspect, the principle

715 which should control our action *is the same in effect with that established in a class of cases in which a legacy is given to a person by name, but under particular description or character superadded, which has been falsely assumed; or where a testator, induced by the representations of third parties to regard a legatee in a relationship which claims his bounty, bequeaths him a legacy by a description according with such supposed relationship; and no other motive for such bounty can be supposed. In such cases the law will not allow the legatee to claim the legacy, notwithstanding it be given to him by name. Although he be the person in point of fact named as the legatee, yet as he does not bear the character and sustain the relation to the testator set forth in the will, and which induced the bequest, he cannot take. The cases of *Kennell v. Abbot*; 4 Ves. R. 802, and *Exparte Wallop*, 4 Bro. C. C. 90, are of this character. In the first, a woman supposed to be married, under a power made a will in favor "of her husband, Edward Lovell." It turned out that at the date of the supposed marriage, Lovell was the husband of another woman, and of course was not the husband of the testatrix.

The other was a case in which the testator was induced by a woman with whom he was living, to believe that she was the mother by him of certain children, which she showed to him. The children shown him were neither hers nor his, but he gave them legacies as such. In neither of these cases was there any doubt as to the persons to whom the legacies were given. They were known in each case to the testator, and personally named. But the legacies were given to them, under a certain description and character; and says Mr. Roper, in commenting on them, "the description and character of the legatees were of the essence of the bequest; and it was a reasonable presumption that if

716 *the testators had known the real situation of the legatees, they would have not been objects of their bounty;" 1 Roper 171.

The principle applies a fortiori in this case, in which no one is named, and the legatee must claim by "description and character" alone. The "description and character" of the legatees, as freedmen of

the testator, acquiring their right to freedom under his last will, at the death of the survivor of his wife and daughter," were of the essence of the bequest; and "it is a reasonable presumption that if the testator 'could have known that they would not remain his slaves, and render to his wife and daughter the service required of them, but would assert and maintain their right to freedom outside the will, and thus disturb and break up its provisions, to the great loss and damage of the first objects of his bounty, he would have made no attempt to provide for them. The terms of the will do not entitle them to demand the legacy; and we see nothing in the facts and circumstances of the case to make it either just or reasonable that they should have it.

Suppose, for instance, that after the testator's death, these same appellees had instituted against the wife and daughter of the appellant a suit "in forma pauperis," to establish their freedom; and had established the same outside and against the will, could it be for a moment pretended that such persons were entitled to a legacy given to a class of persons, who, at the death of the survivor of the testator's wife and daughter, should become entitled to and acquire a right to freedom under and not against his will. Could they be said in any sense or degree to answer the "description and character" set forth in the will? We think not yet; such is in effect the attitude of the appellees. They claim under a power paramount to the will, and against its provisions. They not only

do *not answer the description and character required by the will, but present themselves in a character utterly variant therefrom, and in irreconcilable conflict therewith. Under such circumstances we are of opinion that the appellees have shown no title to the legacy in question or any part thereof; and the decree must be reversed, and their bill dismissed.

This view of the case renders it unnecessary to consider the questions of election, compensation and apportionment so earnestly and ably argued at the bar.

Decree reversed, and bill dismissed.

718 *Shiflett v. Long's Adm'x.

September Term, 1878, Richmond.

Contract for Sale of Land—Confederate Currency.*—On the 19th of December 1862, L and S made an agreement in writing, which recited that L had that day purchased of B two tracts of land, one of 100 and the other of 50 acres, adjoining, for the price of \$1,708.25; and L agreed to let S have the use and possession of the land for five years from date, on condition that S would pay to L punctually at the end of each year, the interest on said sum; and if at the end of five years S had paid the interest, and would then pay the whole of the said principal sum, L would make such a deed in fee simple to S for the land as B should make to L. And S agreed

to take the land on these terms. B had purchased the larger parcel from S, and had made a similar agreement with him, with which S had failed to comply; and it was at the instance of S that L had purchased the land, he paying B in Confederate currency, though the debt due from S to B was due before the war. This is not a Confederate contract; but S must pay to L the \$1,708.25, in good money.

The case is fully stated by Judge Moncure, in his opinion.

Blakey, for the appellant.

Duke, for the appellees.

MONCURE, P. This is an appeal from a decree of the Circuit court of Albemarle county, for the sale of land for the payment of a sum of money and interest, as a good money debt. The appellant contends that it is a Confederate money debt, which ought to have been scaled; and whether it is or not, is the question we now have to decide.

719 *By articles of agreement, made and entered into on the 19th day of December, 1862, between Andrew J. Long of the one part and William S. Shiflett of the other part, reciting that the said Long had that day purchased of James Beazley two parcels of land, one containing 100 acres, and the other containing 50 acres, adjoining each other, for which he gave \$1,708.25, the said Long, on his part, agreed, to let the said Shiflett have the use and possession of the said parcels of land for five years from said date, on condition that he, said Shiflett would pay unto him, said Long, the interest on the said purchase money punctually, at the end of each year; and, at the end of the said five years, if the said Shiflett should have paid up punctually the interest as aforesaid, and would then pay up the whole of the said principal sum, the said Long bound himself to make to said Shiflett a deed of conveyance in fee simple for said land, such as he, said Long, should get from said Beazley; and said Shiflett, on his part, agreed to take said parcels of land as set forth above, and to pay up the said interest annually, and to take good care of said lands, and keep them in as good repair as though they were his own lands.

By deed dated on the 14th day of January 1863, and afterwards duly recorded, the said James Beazley and his wife, in consideration of \$1,733 02 to them in hand paid by the said Andrew J. Long, conveyed to the said Long in fee simple, the said two parcels of land, with general warranty as to the said parcel of one hundred acres, and with special warranty as to the parcel of fifty acres.

In March 1868, the suit was instituted in which the decree aforesaid was rendered. It was brought by Margaret J. Long, in her own right and as administratrix of her late husband, the said Andrew J. Long, who had departed this life intestate; 720 and the said Shiflett *and the heirs

*See Cabell v. Cox, 27 Gratt. 182.

at law of her husband, who were his four infant children, were made defendants to the suit. In her bill, she charges that said Shiflett took possession of said land under said agreement, and paid the interest up to the year 1865, but had since paid nothing, and has never paid any part of the principal; that on the 18th day of December 1867, the five years during which he was to remain in possession of said land, expired; and that all his rights under said agreement have ceased and determined, and the said two parcels of land are now the property of herself and her four infant children; she having right of dower therein, and the residue belonging to her children. She further charges that said Shiflett will neither pay the principal and interest due on said contract on the 18th of December 1867, nor surrender said land. She says she is perfectly willing, for herself and her infant children, to take the land (which she says is worth fully \$1,708 and 25 cents in good money,) and discharge the said Shiflett from the payment of the principal, on condition that he will pay up the interest due from him for use and occupation of the said premises; and she therefore prays that said Shiflett be compelled, either to surrender the said land to her and her infant children, paying the interest now due for use and occupation, or to pay the complainant, as administratrix of her husband, the sum of \$1,708 and 25 cents with interest thereon from the 18th day of December, 1865; and for general relief.

In June 1868 the said Shiflett filed his answer to the said bill, in which he says that the "agreement between Andrew J. Long and your respondent, bearing date December 18th, 1862, by which he was to get title of said land from Beazley, so far from being any real purchase of Long from

721 Beazley, was, in reality, only an arrangement *between the parties mentioned, and your respondent to pay a debt due by this respondent to said Beazley for money advanced by the latter for and on account of your respondent; and the title was then vested, in appearance, in Beazley, for the sole purpose of securing the debt due him by respondent. James Beazley was desirous of getting this money; and upon this respondent entering into a negotiation with Long to get the money to pay Beazley, and when Beazley expressed his willingness to take Confederate treasury notes in discharge of said debt, then Long was willing to let your respondent have the money to pay off the said debt to Beazley, provided he should get the land conveyed to him in absolute form, as a security for the money so advanced. The agreement marked 'Exhibit C,' with complainant's bill, was then entered into, giving the time therein mentioned to repay the money so advanced for your respondent. The money advanced by Long was Confederate money; and there was no agreement that it should be repaid in any other kind of money; and this respondent is advised that this transaction was in reality only a mortgage to

Long to secure the payment of the money advanced by him for your respondent, though upon its face, it was an absolute conveyance. The amount of money advanced was \$1,708.25 in Confederate currency, which was then the universal currency of the country. This amount paid off this respondent's indebtedness to James Beazley, and also paid for the 50 acre tract mentioned in the bill, which tract was reckoned at \$250 at that time, and which respondent had agreed to buy, in the transaction with Beazley; Long furnishing him the money and the deed being made to him by Beazley to secure him as before described." "And when Long paid the debt to Beazley for your respondent, it was distinctly understood that he was merely

722 put in the "same position as Beazley then occupied, namely, holding title for security for his money. Your respondent, therefore, has for years been in possession of the land as the owner of it; has never rented from any one, but paid interest on money for which the land was bound. Your respondent remained in possession of this land when the agreement C was entered into, and paid interest on money to Long in the same way as before that time he had done to Beazley, and continued to pay the interest to Long or his representative up to 1865, punctually as it fell due. Before the interest fell due for 1866, your respondent applied to one Thomas Wood, a counsellor learned in the law, by whom he was advised that the principal of said debt to Long should be scaled, and he furnished your respondent with a statement showing the amount of the debt to be \$569.41, or at the utmost \$621.16, in United States treasury notes, on which the interest due for the year 1866, amounted to \$37.26," which interest, when it became due, respondent says, he tendered to complainant in legal tender notes of the United States, but she refused to receive the same. "On the 18th of December 1867, when the principal became due, your respondent," he further says, "in company with one of his neighbors went to the house of the complainant, and tendered payment of the principal (\$621.16) and the two years' interest on that amount (\$37.26 for each year), in the aggregate amounting to \$695.68, in legal tender treasury notes of the United States, which she then refused to take, and still refuses, though your respondent has at all times since been ready and willing to pay her that amount;" which, he contends, is all she is entitled to recover.

Four witnesses were examined by the plaintiff, and seven by the defendant 723 Shiflett. Those examined by *the plaintiff were James Beazley, Wyatt S. Beazley, Austin Gentry and Thornton W. Mooney. The first two were privy to the contract between Andrew J. Long and the defendant Shiflett, and were present when it was entered into, and are the only witnesses examined who were present on that occasion. The said defendant was of course present and offered himself as a wit-

ness in his own behalf, but he was not examined, because incompetent, as he certainly was; the other party to the contract being dead. The substance of so much of the testimony as seems to be material to be stated is as follows:

James Beazley, a witness for the plaintiff, testified that he owned the land in question. He bought the 50 acre tract at a sheriff's sale under a decree, and gave for it, according to the best of his recollection, \$100. The 100 acre tract he bought of the defendant Shiflett, who bought it of Roberts, who bought it of Crawford. Witness thought that Shiflett gave \$1,200 for the 100 acre tract, not less than that: on reflection thought it was more; thought he gave too much for it. Witness advanced part of the money for him, became bound for another part, which he had to pay, and also paid some other debts for him. The amount thus paid by witness for Shiflett was the precise price allowed by the former to the latter for the 100 acre tract. Witness could not remember the amount, but said it was stated in the deed made to him by Shiflett. On his examination in chief he gave the following answers to the following questions:

4th question. When you purchased the land from Shiflett, were you put in possession of it by him?

Answer. No, sir, I sold it to him, and gave him five years to pay the money. He was to pay the interest on it annually.

724 *6th question. Did you ever take possession of said land and rent it out?

Answer. Yes sir. After Shiflett's time expired he gave it up to me, and I rented it out two years, I think.

7th question. What then became of the land?

Answer. I had agreed for Mr. Shiflett to move on it again, by paying me one-third of the crop. After this he was after me to buy it again from me. He proposed he should take Harden Shiflett to see the money paid; the money was to come through Harden Shiflett. They wished to pay a good part in bonds, which I would not take. Mr. Shiflett came to me again, and told me Andrew J. Long would buy the land and pay every dollar in cash, and then Long would let him have it if he could pay for it in five years. Mr. Shiflett brought Long down there, and I agreed to let him have it. He was to pay me all Mr. Shiflett owed me, and we made a calculation what it was, principal and interest, which Mr. Long paid me; that is, he paid me all that was due on the land; and before I made the deed, I required him to pay the balance due from Shiflett; which he did.

8th question. To whom did you sell the land, and to whom did you make the deed?

Answer. I considered the land sold to Andrew J. Long, and made the deed to him. Afterwards, when I executed the deed, I offered him \$500 to let me stand in his shoes.

On his cross examination, he gave the following answers to the following questions:

5th question. Please state distinctly, for what purpose the land was conveyed to you by Shiflett?

Answer. The purpose was a bona fide right in me, if he could not pay the money in five years.

6th question. What money do you refer to?

725 *Answer. Money that I had paid for the land, what it cost me.

13th question. State whether you desired to hold the land, or whether the reason for your taking a deed from Shiflett was to secure the payment of the money you had advanced for him, with interest?

Answer. I did not wish to hold the land, but merely wanted my money back. There was no time at which I would not have conveyed the land to any one that Mr. Shiflett would have asked me, upon the payment of the money paid and advanced by me for Shiflett.

14th question. You speak in answer to a former question, of taking rent for the place. Did you receive that rent in satisfaction of the interest on the money that Shiflett owed you?

Answer. No. The land was mine and the rent was mine. Mr. Shiflett had moved off the land and given it up.

15th question. When you let Mr. Shiflett move on the land again, did he pay you part of the crop for rent, and also pay interest on money; or did you take the rent in payment of the interest?

Answer. He was to pay me one-third of crop in rent, but in a short time I sold to Long, and there was no division of crop.

16th question. How much did Andrew J. Long pay you? When, and in what kind of money?

Answer. He paid me \$1,732.02. It was paid at the date of the contract between Long and Shiflett, all in Confederate money.

17th question. What is the value of the 100 acre tract of land now, if placed in market?

Answer. I think it worth \$1,200. I was willing at that time to go a little over \$1,200 in paying debts for him. When the thing wound up he owed me \$1,732.

726 *18th question. When A. J. Long paid you \$1,732.02 was that the exact sum, principal and interest, that was due you by Shiflett?

Answer. Yes sir; if we made the right kind of calculation.

19th question. Was there not included in that sum the value of the 50 acre tract, bought by you from Rippetoe?

Answer. Certainly.

20th question. At what price was this tract put down in the trade with A. J. Long?

Answer. At \$250, if I am not mistaken. On his re-examination by the plaintiff, he gave the following answers to the following questions:

1st question. Was the money due from Shiflett to you Confederate money or good money?

Answer. It was good money I let him have before the war.

2d question. Did you sell the land to Long, and convey it to him with the knowledge and consent of Shiflett?

Answer. Certainly, at the request of Mr. Shiflett.

Wyatt S. Beazley, another witness for the plaintiff, testified that he was the draughtsman of the contract between Long and Shiflett, of the 18th of December, 1862, and witnessed it: that the said contract conveys the true agreement between the parties: that the one hundred acre tract was, in his opinion, worth fifteen dollars per acre in good money, in 1860; and he supposed that on the 10th of August, 1868, when he gave his testimony, it would have sold for \$12 per acre, on the terms of one-third cash, and the balance in two equal annual instalments.

Austin Gentry, another witness for plaintiff, testified that in 1863 Shiflett told him Long had bought the land *of Beazley, with the understanding that he, Shiflett, was to have the privilege to pay interest on the money which Long had paid to Beazley promptly for five years; and at the end of five years he was to pay punctually the principal, and Mr. Long was to make him a deed for the land. He said he was to pay in such currency as was in circulation when the debt fell due. Witness thought the hundred acre tract worth fifteen dollars an acre, and the fifty acre tract worth \$200; and it was his impression, though he was not positive, that Shiflett gave Roberts \$1,700 for the one hundred acre tract.

Thornton W. Mooney, the remaining witness for the plaintiff, testified that he had long known the land in controversy, and considered the one hundred acre tract worth \$15 an acre, and the fifty acre tract worth \$250. \$1,700 was the price which Shiflett agreed to pay Roberts for the one hundred acre tract. Shiflett acknowledged to witness, since this suit was brought, that the debt claimed by the plaintiff was a just debt, and that he would have paid it but for his being persuaded by Mr. Powell that it could be scaled. The plaintiff is a daughter of this witness, and the testimony of one of the defendant's witnesses, B. F. Powell, supposing it to be competent, tends to impeach the veracity of this witness.

B. F. Powell, a witness for the defendant, appears to be interested in the result of the suit, being a sub-purchaser from Shiflett of a portion of the land in controversy; and his testimony was excepted to by the plaintiff on that ground. It is very long, and not being competent testimony, will not be stated; though if it were competent, it would not be very material.

Edward Powell, another witness for defendant, testified that on the 10th day of December 1867 he and Samuel Shiflett, at the request of the defendant, W. S. Shiflett

and B. F. Powell, carried from them to the *plaintiff, Mrs. Long, \$695.68 in gold and greenbacks, being the scaled value, as ascertained by Mr. Wood, of the debt due by the defendant to the plaintiff, supposing it to be payable in Confederate money, and tendered the money to her; but she declined to take it, unless the full amount was paid. He considered the present value of the one hundred acre tract to be \$10 per acre in its then condition, and that of the fifty acre tract to be \$125. The river has done the one hundred and fifty acre tract a great deal of damage; and the house and fifty-five pannels of fencing have been burnt on the Stephen Shiflett place within the last two years.

Samuel Shiflett, another witness for defendant, testified that he considered the fifty acre tract to be worth \$100, and the one hundred acre tract \$10 per acre.

James Early Shiflett, another witness for defendant, gave the same testimony as the last witness in regard to the present value of the land. He also testified that he heard a conversation in the spring of 1863, between Long and Harden Shiflett, in which Long said, in answer to questions of Harden Shiflett, that if Confederate money was current when the money became due from the defendant to Long for the land it could be paid in Confederate money; and if Confederate money was not then current, he, Long, reckoned he would have to take such money as the sheriff took for taxes.

Harden Shiflett, another witness for defendant, detailed a long conversation which he said he had with Andrew J. Long, in the spring of 1863, in regard to the latter's contract with the defendant, in which Long made similar remarks to those stated by James E. Shiflett, in regard to the currency in which the debt due by the defendant to Long would be payable, and many other statements. He thought the one hundred tract to be worth 800 dollars. It had been a good deal damaged *by water.

He thought \$100 to be a fair price for the 50 acre tract, but he did not know this land very well. This witness appears, from his testimony, to be extremely illiterate; he is a brother-in-law of the defendant; and the testimony of B. F. Powell, supposing it to be competent, tends to impeach the character of this witness for veracity.

Several other witnesses were examined in behalf of the defendant, but it is not necessary to state their testimony.

On the 27th day of October, 1868, the cause came on to be heard on the bill, exhibits, answer, replication thereto and depositions, when a decree was made, referring it to a commissioner of the court, to enquire whether the contract between A. J. Long and W. S. Shiflett, of the 18th day of December, 1862, was intended as a sale, either absolute or conditional, from Long to Shiflett, of the land therein mentioned; or, taken in connection with the deed from Beazley and wife to Long, dated January 14th, 1863, was designed as a mortgage to

secure the repayment to Long of money advanced by Long to Beazley for said Shiflett; and assuming the same to have been intended as a mortgage, further to enquire what amount was so advanced, and what was the true understanding and agreement between the parties, as to the kind of currency in which the same was to be repaid, and what balance thereof remained unpaid. And the commissioner, whatever conclusion he might arrive at as to the first enquiry submitted to him, was directed to make a statement based upon the idea that the transaction was intended as a sale from Long to Shiflett; and showing what, in his opinion, was the true understanding and agreement between the parties as to the kind of currency in which the purchase money mentioned in the contract was to be paid, and what amount thereof now

730 remains unpaid. The commissioner was also directed to take an account of the fair value of the land in the proceedings mentioned at the date of the contract of the 18th of December 1862, as well as at the time of executing said decree; and he was directed to report his proceedings to the court.

It does not appear that any thing was ever done in execution of the said decree; but on the 27th day of October, 1869, by consent of parties by counsel, the said decree was set aside. And the cause coming on, by such consent, to be further heard upon the papers formerly read, and the depositions, (since taken,) on consideration thereof, the court being of opinion that whether the conveyance from Shiflett and wife to Beazley, and by Beazley and wife to Long, was a conditional sale or a mortgage, the defendant, Shiflett, is not entitled to have the debt scaled as a debt to be discharged in Confederate money. If said conveyance was a conditional sale, the plaintiff has the right to have the land sold to discharge the vendor's lien for the purchase money. If, on the other hand, it was a mortgage, the plaintiff has the right to have the mortgage foreclosed. The court, therefore, decreed, that unless the defendant, Shiflett, should, within six months from the date of the decree, pay to the plaintiff, the administratrix of said Long, the sum of \$1,708.25, with interest thereon from January 1st, 1865, till paid, a public sale should be made of the land in the proceedings mentioned, on the terms in said decree mentioned, by commissioners therein named, after advertising, and giving notice of the time, place, and terms of sale as therein mentioned.

From the last mentioned decree the defendant applied to a judge of this court for an appeal; which was accordingly allowed.

The debt due by the defendant Shiflett to Beazley, *which was paid by Long at Shiflett's request, if debt it could be called, was a good money debt, created before the war. This fact is expressly proved, and is not controverted. Beazley was invested with the legal title to the land in controversy. He had fully paid

for it, and received a deed for it; and though he had given Shiflett the privilege of paying him the same amount of money with interest in five years, and then receiving the legal title to the land, yet Shiflett had made default in such payment; had forfeited all legal or equitable title to the land; was occupying it merely as tenant of Beazley, and was dependent entirely upon the will and pleasure of Beazley to sell and convey him the land, upon payment of the money which he had so long failed to pay, and forfeited all right of paying. Still Beazley was willing to convey the land as he, Shiflett, might request, upon his making such payments; and Shiflett was extremely anxious to make an arrangement with somebody for such payment, in order that another opportunity might thus be afforded him to make the property his own at some future day. He was then, it seems, wholly without means to make the payment himself; and he had failed to obtain the means by the use of the property during the five years which Beazley had given him for the purpose; but he no doubt thought that if he could find a friend who would buy the property of Beazley, and give him, Shiflett, five years more, he could, in that time, make the money, and pay for the land himself. He would, gladly, have obtained this extension of time from Beazley; but Beazley, it seems, was unwilling to indulge him with this privilege any longer, and required that the money should be paid to him at once, as the condition of his parting with the title to the land. The defendant then tried to make an arrangement

732 through his brother-in-law, Harden Shiflett, who proposed to pay *the debt, or the greater part of it, in bonds; but Beazley was unwilling to receive bonds in payment. He was willing, however, to receive Confederate money, which was then (in December 1862,) comparatively not much depreciated in value as compared with gold; and which could be used as good money and without any loss, in the payment of specie debts and in the purchase of real estate and other property. Accordingly, the arrangement was made with Long, which was carried into effect by his agreement with Shiflett, of the 18th of December 1862; and the deed to him from Beazley and wife, of the 14th of January 1863, in the proceedings mentioned. By that arrangement, Shiflett secured all the benefit he would have obtained by a further indulgence from Beazley; and not only that, he secured to himself five years more time to prepare for the payment of the money; and thus to make the property his own. He was placed in precisely the same situation in which he stood under his first arrangement with Beazley. He obtained all the advantages which he could reasonably ask for or expect. In obtaining five years more time for the payment of his debt, he obtained a great benefit which cost him nothing. He had no reason to ask or expect, in addition to that, a reduction of the debt; a change of its character from a

specie to a Confederate money debt. If he had, himself, paid the debt with Confederate money, he would thus have become entitled to the benefit which accrued therefrom; but he had not a dollar of Confederate money, any more than of specie; and he could not therefore pay the debt or any part of it, in Confederate money any more than in specie. He had to invoke the friendly aid of Long, who paid the debt in Confederate money, and thereby conferred a great service on him in securing to him a long extension of time for the purchase of the property, on terms which

733 *had long before been agreed upon.

The benefit thus conferred on him was just as great, and indeed precisely the same, as if Long had paid every dollar of the debt in specie. While Shiflett was not at all entitled to any benefit from the character of the fund in which the payment was made, Long, who made it, was fully entitled to such benefit, in reason, justice and law. The money paid might have been laid out at par value by Long in the purchase of other land, or in the payment of any other specie debt. It was applied, at the request, and for the benefit and accommodation of Shiflett, to the payment of the debt to Beazley and the purchase of the land in controversy. And it would be unjust, in the last degree now, after Shiflett has for more than ten years enjoyed the use of the land, without having paid any part of the principal of the debt, or any rent or interest for the last seven years, to compel Long to receive payment of the scaled value of the debt, according to the gold standard, in full discharge of it; that is, the sum of \$621.16 in discharge of the principal sum of \$1,708.25. Certainly Long never bargained for, and never expected, any such unjust result. Shiflett does not pretend that he ever did. He does not pretend that there was ever any agreement or understanding between himself and Long that he might make payment of the debt to Long in Confederate money.

All that he contends for is, that nothing was said upon the subject of the currency in which the payment was to be made; and he pretends to infer an implied agreement to receive payment in Confederate money from the fact that payment was made by Long to Beazley in Confederate money. Such an inference is a gross and glaring non sequitur. It ignores the all important facts that payment was made by Long to

734 Beazley in 1862, when Confederate money was little depreciated *in value, even in comparison with gold, and not at all in reference to land and the payment of ante-war debts; that it was rapidly depreciating; and that payment of the money by Shiflett to Long was not to be made until the 18th day of December 1867. All the benefit that Long expected from the arrangement; (and that he certainly had a good right to expect,) was, that the land or debt which he bought would be his. He paid the full market value of either; and might have made at least as

good an investment of his money in the purchase of other lands or other debts. Suppose that Beazley had held Shiflett's bond for the amount, and Long had obtained an assignment of it without recourse, as he might have done, by paying the amount to Beazley in Confederate money; can any body doubt that he could forthwith have enforced payment of the debt as a specie debt for his own benefit? Where is the difference between that case and this; except that five years more time was given to Shiflett in this case for the payment of the debt? Surely that difference ought not to give Shiflett the advantage in this case of being able to discharge his debt, after so long an indulgence, by paying only one-third of its amount. But Beazley did not hold the bond of Shiflett for the money, and therefore could not make such an assignment. He, however, held the legal title to the land, and indeed owned it in equity as well as at law; and he conveyed that title to Long; which gave him at least as great an advantage as an assignment of a bond in the case supposed, would have given him. It cannot be presumed that Long would have agreed to wait five years for the payment of the money and then to receive it in Confederate money or any thing but good money. The only motive he could have had for making the

735 arrangement, looking to his own interest in the matter, *was, that by making such an investment of a depreciating fund, he would secure the payment of the amount in good money after the end of the war, or else acquire property which might then be worth the amount in good money. There was no difficulty in making such an arrangement at that time; and in making this particular arrangement, no injury whatever was done to Shiflett; but, on the contrary, a benefit. The loss that was sustained by receiving the Confederate money of Long, was sustained by Beazley only; and he consented to sustain it. Shiflett sustained none, and has no cause whatever of complaint.

The cases of Barnett v. Cecil, 21 Gratt. 93; and Walker per rep. v. Pierce, id. 722, cited by the counsel for the appellees, have a strong bearing on this case, and tend strongly to sustain the foregoing opinion.

In every view of the case, therefore, I think there is no error in the decree appealed from, and that it ought to be affirmed; except that there seems to be a mistake in the decree, arising no doubt from an oversight, in making the interest run from the 1st of January 1865, instead of the 18th of December 1865, the day from which interest is claimed in the bill; but this mistake can be corrected by amending and affirming the decree which I think should be done accordingly.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that there is no error in the decree appealed from, except that there appears to be a mistake, which no doubt arose from an

oversight, in making the interest on the principal sum of \$1,708.25, therein mentioned, run from the 1st day of January 1865, instead of the 18th of December, 1865, the day from which interest is claimed 736 in the bill; which mistake *can be corrected by amending and affirming the decree. Therefore, it is decreed and ordered that the said decree be amended as aforesaid, and that thus amended, it be affirmed, and that the appellant pay to the appellees thirty dollars (\$30) damages and their costs by them about their defence in this behalf expended.

Decree amended and affirmed.

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*Harris v. Harris' Ex'or.

September Term, 1878, Staunton.

1. **Debt on Bond—Special Plea.**—In debt on bonds by the executor of H against G, G tenders a special plea: That at the time of the execution of said bonds he owed nothing to G, and the consideration of said bonds was as follows: In 1866, four suits at law were pending against him in the county, naming plaintiffs, to recover damages for trespass during the civil war in impressing horses, &c. by him, under orders of the Confederate government, he being an officer of the army under that government. He did not regard these claims as debts or just liabilities on his part, but owing to the unfavourable and unjust constitution of courts and juries at that time, he feared they might be enforced against his property. He was informed by his counsel that the result was uncertain, that judgment had been given in similar cases in Berkeley county. That he conferred with his father, who warmly advised him to secure his property against these claims. The plan adopted was for him to execute to his father the bonds sued on, ante-dated, with the distinct understanding that they were only to be used and treated as obligations to claim priority over the plaintiffs in case of necessity, and if unnecessary, were to be handed back to the defendant; said bonds were executed under this understanding, and upon no other consideration. Wherefore said G and his executor were bound to re-deliver said bonds to defendant, because said suits had been dismissed in 1867, before the death of G, and the bonds were therefore null and void, and to be surrendered. Therefore he has sustained damages, &c. On the motion of the plaintiff the plea was rejected. **Held:**

1. **Same—Same—No Issue Possible.**—The plea was properly rejected, because no issue, either by general or special replication, could be made up upon it.
2. **Same—Same—Statute of Equitable Defences—Inapplicable.**—It was not good as a plea under the statute, for failure of consideration. The statute only applies to cases where the 738 *consideration was originally valuable, and not where there was no consideration.
3. **Same—Same—Improper Defence to Specialty.**—Such a defence cannot be made to a specialty either at common law or under the statute. The seal imports a consideration, and a party cannot avoid it upon the ground of a want of consideration.

4. **Same—Same—No Grounds for Equitable Relief.**—The plea is not good on the ground that the facts stated would entitle him to relief in equity; because his ground of relief is his own fraud.

5. **Same—Same—Fear of Injustice by Courts.**—The averment of his fears that the courts and juries would not do him justice, could not avail him, as the court must presume that no injustice would be perpetrated in regular legal proceedings had in the forum where such proceedings were pending.

6. **Same—Same—Improper at Common Law.**—It is not a good plea at common law; because it is emphatically of the class of cases in which the maxim, "*Nemo allegans suam turpitudinem audiendus est*," applies with full force.

7. **Application of Maxims—"In Pari Delicto."**—The case does not come within the maxim, *In pari delicto potior est conditio defendentis*.

8. **Contracts Void Ab Initio—Contracts Void as to Third Persons.**—There is a marked distinction between contracts which are void *ab initio*, and contracts which are void as to third persons, but are valid between the parties.

9. **Contracts—Void Ab Initio—No Relief.**—Where the contract is void *ab initio*, when it appears either by the allegations of the plaintiff or by a proper plea of the defendant, that the contract is so void, the court will not lend its aid either to enforce it on the one hand, or give relief on the other.

10. **Same—Void as to Creditors—Valid between Parties.**—Though the bonds are void as to creditors, they are valid between the parties, and therefore they will be enforced by the courts.

11. **Application of Maxims—"Potior est Conditio"—What Must Be Considered.**—In order to apply correctly the rule, *potior est conditio defendentis*, it is necessary to consider, not who is plaintiff or who is defendant, but by whom the fraud is alleged, or sought to be made a ground of defence or recovery.

***Application of Maxims—"In Pari Delicto."**—In *Smith v. Elliott*, 1 Patt. & H. 307, the court said: "In the application of the maxim, *in pari delicto melior est conditio defendentis*, a court of equity will not consider and nicely weigh the relative guilt of the parties depending upon the strength of their understandings, but in order to entitle either party to relief, it must be shown that there was some undue influence or fraud, so that the party did not exercise a free and intelligent will in assenting to the contract."

†**Contract—Void as to Creditors—Valid between the Parties.**—See *Starke v. Littlepage*, 4 Rand. 308; *James v. Bird*, 8 Leigh 510; *Owen v. Sharp*, 12 Leigh 429; *Laws v. Law*, 76 Va. 533, which hold—as does the principal case—that a fraudulent conveyance, though void as to creditors, is valid as between the parties.

In *Burners v. Keran*, 24 Gratt. 70, the court said: "In the case of *Harris v. Harris*, decided at the last Staunton term, 23 Gratt. 737, this court held that a bond executed by a debtor in fraud of his creditors, though void as to them, is nevertheless valid between the parties; and that the debtor will not be permitted to set up his own fraud in avoidance of the bond. The whole question is fully considered in that case, and all the authorities carefully examined by JUDGE CHRISTIAN. The same principle applies to a grantor executing a deed in fraud of a

12. Executed and Executory Contract—Fraud.—Upon the question whether a fraudulent contract shall or shall not be enforced, there is no distinction between an executed and an executory contract.

739 *13. A Party Claiming Damages as Creditor.—A party claiming damages for the acts of another, must be regarded in law as much the creditor of that other, as one holding his bonds or other promises to pay.

2. Pleadings—Non Est Factum.—A special plea of *non est factum* which admits the execution and delivery of the bonds sued on, but avers that they were to be redelivered to defendant when he should request it, is not a good plea.

This was an action of debt in the Circuit court of Frederick county, brought in September 1869, by the executor of Gabriel C. Harris against George C. Harris, to recover the amount of three bonds executed by George C. Harris to his father Gabriel C. Harris. The defendant appeared and filed the plea of payment; and he tendered a special plea of equitable offset; which being objected to by the plaintiff's counsel,

previous purchaser from him. The deed from the defendants to the plaintiff, with all its covenants, is valid between the parties. Whatever fraud the plaintiff meditated they were privy to and participated in; and they cannot now rely upon their own turpitude to defeat the covenants contained in their deed."

In *Martin v. Lewis*, 30 Gratt. 687, the court said: "As was said in *Harris v. Harris*, 23 Gratt. 737, 740, we cannot allow a defendant to be heard in a court of equity to say that his own act is to be avoided by his own fraud. By a stern but proper policy of the law, the party who alleges his participation in a fraud is excluded from the proof which would show it. See *Harris v. Harris*, 23 Gratt. 737, and cases there cited."

In *Persinger v. Chapman*, 93 Va. 353, 25 S. E. Rep. 5, the court said: "Equity will not extend its aid to one who has been guilty of culpable negligence. It requires that the party who asks relief on the ground of mutual mistake shall have exercised at least the degree of diligence which may be fairly expected from a reasonable person. And it has been repeatedly decided that equity will not relieve against mistake when the party complaining had within his reach the means of ascertaining the true state of facts, and, without being induced thereto by the other party, neglected to avail himself of his opportunities of information. *Beech on Mod. Eq. Jur.*, pp. 53-4; *Foster v. Rison*, *supra* (17 Gratt. 240); *Towner v. Lucas*, 13 Gratt. 705, 722; *Harris v. Harris*, 23 Gratt. 737; *White v. Campbell*, 80 Va. 181; *Chapman v. Persinger*, 87 Va. 581, 18 S. E. Rep. 549; *Grymes v. Sanders*, 93 U. S. 55."

In *Williamson v. Cline*, 40 W. Va. 205, 20 S. E. Rep. 921, the court said: "Illegality of consideration in a sealed document may be shown at law, but not want of consideration, or failure of consideration, according to common-law principles. The statute (section 5, ch. 126, Code), changes the rule by allowing failure of consideration to be pleaded at law, but, not mentioning want of consideration, leaves that as at common law: so that neither at common law nor under section 5, ch. 126, Code, can want of consideration be pleaded or shown at law. *Harris v. Harris*, 23 Gratt. 737."

was rejected by the court; and Harris excepted. He then offered a special plea of *non est factum*, which was also rejected; and he again excepted. He then withdrew the plea of payment, and there was judgment in favour of the plaintiff for the sum of \$5,100, the amount of the three bonds, with interest. And Harris thereupon applied to a judge of this court for a writ of error, which was awarded. The facts are stated, and the special pleas are set out, in the opinion of Judge Christian.

Conrad and son for the appellant, after referring to the maxim "*nemo allegans suam turpitudinem est audiendus*," upon which the court below had rejected the first special plea, insisted that the doctrine embodied in this maxim had no application to this case. That the statements in the plea do not necessarily show to the court that the transaction between the father and the son, in the execution of the bonds sued on, was with any unjust or illegal intent, or that they were intended to be so used. And they referred to the condition of the country under a military despotism, when

740 a military despot appointed judges, justices and other civil officers, and removed them at pleasure; and the manner in which judgments were rendered against parties in such cases as those mentioned in the plea; and insisted that so far from being obnoxious to the imputation of *dolus malus*, the appellant's whole conduct in the matter was *dolus bonus*; as used in the Roman and civil law, in contradistinction to the former, viz: an artifice he might lawfully employ to protect his own property from what was threatened; and that was under the circumstances a mere robbery. *Mackelday Civ. Law* 165; *Bell's Dig. of Scotch Law* 319 d; *Brisson ad verb.* "Dolus;" *Taylor's Civ. Law*, 4 ed. 118, cited from *Brown's Legal Maxims*, 4th ed. (1854) 464 top, 573 marg.; *Wilson v. Spencer*, 1 Rand. 776; 3 Rand. 214, where relief in equity was given against a gaming bond.

2. The doctrine does not apply to our defence, because whatever may have been the prospective intent, it never was carried out into act; no human being was ever deceived, wronged, or in any way affected by it. These bonds were mere executory contracts. Why then do not these contracts, unexecuted, stand upon the same footing with any other executory contract; liable to be cancelled or avoided, in equity, by showing that no such debts ever existed. It is not even like a gift or conveyance of a debtor's property to defraud creditors. These have an inchoate lien upon the property of the debtor, and the act may be characterized as a fraud; but here no fraud was committed or intended by the act of giving the bond. It may have been intended to use these bonds at a future time, if necessary, for the purpose of deceit; but only then would the act have been done which the law reprobates.

The counsel referred to the cases of *Starke's ex'ors v. Littlepage*, 4 Rand. 368; *James v. Bird's adm'r*, 8 Leigh,

741 *510; and *Terrell v. Imboden*, 10 Leigh 321; and distinguished them from the case at bar.

3. If these bonds were given to defraud creditors, and therefore void under the statute of frauds, then does not the maxim, in equali delicto potior est conditio defendentis, apply in letter and spirit to the case. Here the plaintiff, the holder of the bonds, invokes the action of the court; both (upon the hypothesis) are parties to the fraudulent contract, and in pari delicto; the unlawfulness of the transaction is shown to the court by the defendant, in order, simply, to prevent a judgment against him; and the whole plea is admitted to be true in fact. In giving judgment for the plaintiff, the court is not only lending its aid to the party who admits and alleges this fraud, but enables him to commit a much more atrocious fraud upon his confederate.

The counsel then, after referring to Webster and Bouvier to show that a bond was an executory contract, proceeded: We take it then to be clear that this suit is brought to enforce the performance of an executory contract; that if the contract was fraudulent both obligor and obligee were in pari delicto; that the appellant was defendant in form and in fact in the court below; that every deed and every contract made in violation of law are equally void ab initio; and the court will not be made the instrument of sanctioning or promoting such designs in favor of either of the parties to the fraud. *Aubert v. Maze*, 2 Bos. & Pul. R. 370; *Watts v. Brooks*, 3 Ves. R. 612; *Bank of U. S. v. Owens*, 2 Peters U. S. R. 527; 4 Hill's R. 424; *Case v. Gerrish*, 15 Pick. R. 49; *Hazard v. Irwin*, 18 Pick. R. 95; *Collins v. Blanton*, 2 Wils. R. 341, 1 Smith's Lead. Cas. 667 top, 489 marg., opinion of Wilmot, Ch. J.

It remains to enquire whether the 742 invalidity of the *bonds were properly shown to the court in this case by the special plea.

1. We submit that at common law it was competent to plead the facts in this plea, supposing that they show it was tainted with fraud ab initio. The plea does not relate only to the consideration, as in the case of *Wynche v. Macklin*, 2 Rand. 426; but alleges a fraud upon creditors contrary to the statute of frauds and violating public policy. If rendered void by a positive public law we can see no reason why it is not pleadable, because under seal. A fraud which vitiates the transaction may be pleaded, and constitutes a good defence at law. *Hazard v. Irwin*, 18 Pick. R. 95, 108; *Stubbs v. King*, 14 Serg. & Rawle's R. 206; *Blass v. Thompson*, 4 Mass. R. 488; *Boyn-ton v. Hubbard*, 7 Mass. R. 112; *Somes v. Skinner*, 2 Pick. R. 52; *Somes v. Skinner*, 16 Mass. R. 348; *Tuck v. Tooke*, 9 Barn. & Cres. R. 437, 1 Mood. & Rob. R. 460; *Canham v. Barry*, 80 Eng. C. L. R. 597.

2. But since our act admitting equitable pleas without limit, in suits at law upon specialties, it cannot be doubted that the whole matter was properly shown to the

court: whether that rule of particeps criminis renders the plea bad in the mouth of the defendant, is another question, to be determined in the face of the whole truth, and not by the exclusion of the truth: it is not a case of estoppel but of equity.

The question is, is there any rule of law or equity, whereby a participant in a fraud, intended upon third parties, in a suit upon an executory contract made to carry out that fraud, instituted by the other part to the fraud, is prohibited from making that defence? On this question see 2 Rob. Pr. p. 32, and cases there referred to, and 5 Rob. Pr. p. 542. In these references will be found all the cases; and his deduction from *them is, that "as a general rule courts leave the parties to such a fraud in the attitude in which they have placed themselves without relief to either." And he quotes from a decision of Mellon, Ch. J., of Maine in 1833: "There is a marked distinction between executory and executed contracts of a fraudulent or illegal character:" what the parties have done the court will not disturb; but when they have contracted, the court "will not compel the contractor to execute."

743 Chitty states the rule thus: "Fraud avoids a contract ab initio, both at law and in equity, whether such frauds were committed by one of the contracting parties upon the other, or by both upon persons not parties thereto; for the law will not sanction dishonest views and practises by enabling an individual to acquire any right or interest by means thereof. Chitty on Cont. 590; *Gaslight & Coke Co. v. Turner*, 5 Bing. N. S. 666, 35 Eng. C. L. R. 264, see Ch. J. Tindal's opinion; *Fisher v. Bridges*, 2 Ell. & Black. R. 118; 3 Id. 642; 75 Eng. C. L. R. 118; 77 Id. 642; 25 Eng. Law & Eq. R. 207. And to the same effect are all the decisions in the United States and State courts. See the cases referred to 2 Rob. Pr. 33.

The only question therefore is, whether the case still rests in contract or whether the property has passed. See as to chattels: *Bowes v. Foster*, 2 Hurl. & Nor. R. 779; 27 Law Jour. Exch. 262; 3 Rand. 214.

3. The court erred in rejecting the second plea offered by the defendant; the plea of non est factum.

1. If a bond when executed was void ab initio the defendant may say non est factum generally. *Thompson v. Rock*, 4 Mau. & Sel. R. 338; *Harmer v. Rowe*, 2 Chit. R. 334; 18 Eng. C. L. R. 358; *Phelps v. Decker*, 10 Mass. R. 267. Upon this issue a defendant may prove that the deed was delivered and still remains as an escrow;

744 *may show that it was originally void, or made void by subsequent matter; that it was obtained by fraud, or that it never was delivered at all. *Greenl. Ev. part 4, s. 300*, and authorities cited in notes.

It is true that the possession of the instrument by the payee is evidence of delivery; but not conclusive, merely prima facie evidence. *Union Bank of Maryland v.*

Ridgely, 1 Har. & Gill R. 324. It is still competent to show that the delivery was conditional or imperfect, or never legally made. Acceptance by the obligee is equally necessary to constitute a good delivery; and in this case it never was accepted by Gabriel C. Harris. *Whelpsdale's case*, 5 Coke's R. 118 b.

2. Supposing this plea to contain matter not proper under non est factum; the mere conclusion and form being immaterial, as the case stands, we submit that as a collateral parol agreement, binding the plaintiff, it constitutes a good defence. This parol agreement would be a good ground for an action on the case at law, if the money was paid; and a fortiori is a good defence in this suit. *Brent v. Richards*, 2 Gratt. 539; *Collins v. Blantern* and notes, 1 Smith's Lead. Cas. 489 marg. 667 top.

Andrew Hunter and Ranson, for the appellee. 1st. The first special plea details circumstances, evidently amounting, in the pleader's opinion, to a failure in the consideration of the bonds, though it does not claim that those circumstances would entitle defendant to relief in equity against the obligation. But if true the allegations of the plea show that the bonds were originally without consideration; a defence inadmissible to a specialty at common law or under the statute. *Dorr v. Munsell*, 13 John. R. 430; Code ch. 172, § 7.

2d. Does the plea allege "any such matter existing before the execution of the 745 bonds, or any such mistake *therein, or in the execution thereof, as would entitle the defendant to recover in equity against the obligation of these contracts?"

Take these allegations; and we submit that the statute applies to no such case: that the pre-existing matter intended is matter of misrepresentation or imposition between the parties in the negotiation of the contract; and that the fact that a bond was knowingly executed (for any purpose) without a valuable consideration, is no defence under the statute.

But it is insisted that no court of equity would extend relief to the obligor on the case made in the plea. He asserts that he executed and delivered the bonds for the purpose of hindering the execution of legal process; for the purpose of defeating suitors in the very court in which the plea was tendered. It will not do to say that the courts and juries were "unfavourably constituted." They were the courts and juries of the land; and the court was bound to presume that no injustice would have been perpetrated in regular proceedings in that forum. In legal contemplation, (as in fact), the courts of the Commonwealth were courts of justice, and any scheme to interfere with their administration of justice so as to defeat the claims of suitors was in the eye of the law a fraud upon those suitors. Nor can the fraudulent intent be confined to any particular class of the appellant's creditors. If fraudulent as to any, it was fraudulent as to all of his creditors to set up fictitious debts for priority, and the

morality or validity of the transaction is not to be determined by reference to these claims alone. And such being the case we submit with confidence, that equity in view of the demerit of the obligor, would not interpose in his behalf between the alleged participants in the fraud; but would leave them as it found them, abstaining 746 from the slightest interference. *At best he was in *pari delicto*, and no public policy would be promoted by extending aid to him.

3d. The plea was unquestionably bad at common law, unless it showed the defendant's obligations to have been void ab initio. Appellant's counsel have referred to *Collins v. Blantern*. In that case the Chief Justice, Wilmot, held the bond was void ab initio at common law. Fraud perpetrated by the obligee upon the obligor vitiated the bond at common law, and he might show the circumstances of fraud under a special plea of non est factum. But the common law has never excused the obligor from the consequences of his act, because intended by him in fraud of others.

We do not admit the deduction drawn by appellant's counsel from 5 Rob. Pr. 542. The result of these authorities is, that recoveries on specialties are not to be prevented by the plea, that they were without consideration, and were given to defraud creditors; that "by a stern, but proper policy of the law the party who alleges his participation in a fraud, is excluded from the proof which should show it," and left to the consequences of his own misconduct.

Our statute of frauds has been construed in *Terrell v. Imboden*, 10 Leigh 329; and there is no question now that though the fraudulent instrument is void as to creditors; it is binding between the parties. As between the parties, then these bonds are not rendered "void by public law," and their enforcement is not contrary to, but promotive of public policy; wherefore the plea, had it been liable to no other objection, did not bar the action.

The principle is too firmly settled by decisions of this court to call for argument. The counsel referred to and commented on *Starke's ex'ors v. Littlepage*, 4 Rand. 368;

James v. Bird's adm'r, 8 Leigh 510;

747 *Terrell v. *Imboden*, 10 Leigh 321;

Owen v. Sharp & wife, 12 Leigh 427;

and *Haws v. Leader*, Cro. Jac. 270. And they insisted that the facts stated as to the constitution of the courts and the character of the juries, certainly had no existence in 1866, and a part of 1867, when these bonds were executed, as Judge Parker was then the judge of that Circuit, and the juries were formed in the same manner and of the same materials, as before the war.

2. The objection to the second special plea is its utter incongruity. In no sense can it be termed a plea of non est factum, because it avers that the instrument was "executed" and "delivered" by the appellant to the appellee's testator not even as an escrow, even if this was admissible, which it was not; and then proceeds to aver, in

effect, that it was by the terms of the contract to be redelivered to the appellant whenever requested. That is, that it was a deed subject to the abrogation of the maker at his pleasure. They referred to 2 Thomas Coke 36 a; Williams v. Green, Cro. Eliz. 884; Moss v. Riddle & Co., 5 Cranch's R. 351.

CHRISTIAN, J. This case is before us upon a writ of error to a judgment of the Circuit court of Frederick county.

The suit was an action of debt upon three bonds executed by George C. Harris, the plaintiff in error, to Gabriel C. Harris, the testator of the defendant in error; one for the sum of \$2,500, payable one day after date, and bearing date the 10th day of April 1858; one for the sum of \$1,100, dated the 30th October 1858, payable one day after date; and the third for the sum of \$1,500, payable one day after date, and dated the 26th day of August 1859.

At the November term of said court, 748 in the year 1869, *the defendant set aside the office judgment by a plea of payment; which was afterwards withdrawn; and leave was given to the defendant to file special pleas within sixty days; and the case was continued. Under the leave aforesaid to file special pleas within sixty days, the defendant filed the following plea; which he denominates a "special equitable plea of offsets."

"And the said defendant saith, that before and at the time of the execution of the single bills in the plaintiff's declaration, he, the said defendant, did not owe any money to the said Gabriel C. Harris, and the sole consideration for the execution of the same was as follows: About the day of —, in the year 1866, four suits at law were depending and undetermined in this county against this defendant—two by Henry B. Pitzer, as plaintiff, for damages \$500, in one case, and \$2,000 in another; both were actions of trespass for acts done by defendant during the civil war, in impressing horses and arresting conscripts under special orders to defendant from the proper military authorities of the Confederate army, in which defendant was regularly enrolled and commissioned as lieutenant: the other two cases were similar, brought by Daniel Walker and David Miller respectively, for impressments, and claiming heavy damages. Defendant did not regard these claims, or either of them, or any part thereof, as constituting debts or just liabilities on his part; but owing to the unfavorable and unjust constitution of courts and juries at that time, he had good reason to apprehend that they might be enforced under the form of law upon his property; defendant was in fact informed by his counsel that the result was uncertain; that judgment had been given for plaintiffs in similar cases in Berkeley county, and might be given here. Defendant, about the 749 date above mentioned, *conferred with his father, the said Gabriel C. Harris, upon the situation; who advised

defendant warmly, to secure his property against these claims. The plan adopted with this view, was for the defendant to execute to his father the three notes in the plaintiff's declaration mentioned, antedated, and in the terms as they now appear, with the understanding distinctly, that they were only to be used and treated as obligations in order to claim priority over said plaintiffs, in case of necessity; and if unnecessary, were to be handed back to defendant. Said notes were executed and delivered accordingly, and with said understanding between the parties. And said defendant solemnly avers that no other or further inducement existed for the giving of said notes; and that the plaintiff had full notice of the above stated facts before the institution of this suit. Wherefore, defendant avers that the said Gabriel C. Harris, in his life time, and said plaintiff since his death, were bound to redeliver said note to defendant, because (as he avers,) that afterwards to wit on the — day of — 1867, these suits for damages as aforesaid were all dismissed, and came to nothing before the death of the said Gabriel C. Harris; and according to the understanding aforesaid, they were null and void, not to be used at all and surrendered. And defendant avers that by reason of the failure aforesaid to treat said notes as agreed and understood, he, the defendant, hath sustained damages to a large amount, to wit, the sum of \$10,000, a sum over and above the amount of said notes and interest, and this he is ready to verify, &c."

The plaintiff moved to reject the plea, which motion was sustained by the court; and one of the questions, and the main question, presented by the writ of error, is whether the court erred in rejecting this plea.

750 *I am of opinion that the plea was properly rejected. In the first place it is difficult to conceive how an issue either by general or special replication could be made up, on such a plea; such are the multifarious averments in the plea, detailing his acts and doings as an officer in the Confederate army, and his apprehensions growing out of claims for damages arising out of his acts as such, and the unjust and unfavorable constitution of the courts and juries, and detailing what his counsel and his father had advised him to do under the circumstances. I say it is impossible upon such a plea, that there could be presented a certain, direct and single issue for the jury to try; and if there was no other ground, the form of the plea, presenting as it did, several distinct issues of fact, would have justified the court in rejecting it.

It is insisted by the learned counsel for the appellant, that the plea is a good one, under the statute commonly called the statute of equitable defences; that the plea alleged a total "failure of consideration," and also "such matter existing before the execution of the bonds sued on, as would entitle the defendant to relief in equity." The 5th section of chap. 172, relied upon

for the introduction of the plea is in these words: "In action on a contract, the defendant may file a plea alleging any such failure in the consideration of the contract, or fraud in its procurement, &c. * * as would entitle him to recover damages at law from the plaintiff, or the person under whom the plaintiff claims, or to relief in equity, in whole or in part, against the obligation of the contract; or if the contract be by deed, alleging any such matter existing before its execution, or any such mistake therein, or in the execution thereof, as would entitle him to such relief in equity," &c.

Now, the plea nowhere alleges
751 "fraud in the procurement;" *but it is insisted, it in substance alleges "failure in the consideration."

It has been repeatedly held by this court that the words "failure in the consideration" as used in the statute, refer to contracts originally founded on a valuable consideration, and not to contracts without consideration. *Cunningham v. Smith*, 10 Gratt. 255; *Watkins v. Hopkins*, ex'or, 13 Gratt. 743.

The allegations of the plea, if true, show that the bonds sued upon were originally without consideration. Such a defence cannot be made to a specialty either at common law or under the statute. The seal imports a consideration, and a party cannot avoid his solemn obligation under seal upon the ground of a want of consideration. That enquiry is precluded by the very nature of the instrument. A seal (as is well said in 1 *Smith's Lead. Cases*, p. 636,) properly speaking, renders a consideration superfluous, and binds the parties by force of the natural presumption that an instrument executed with so much deliberation and solemnity is founded upon some sufficient cause. Nor can such defence be made under the statute.

The substance of the averments in the plea, is that these bonds were merely voluntary; and the 7th section of ch. 172, declares that "nothing in this chapter shall impair or affect the obligation of a bond or other deed deemed voluntary in law, upon any party thereto or his representative."

But it is insisted that the plea is a good plea under the statute, because it alleges "such matter existing before the execution of the bonds as would entitle him to relief in equity against the obligation of these contracts." Can this proposition be maintained upon principle or authority? The

able argument of the learned counsel
752 for the appellee on this point is *conclusive and unanswerable, and the authorities with one voice, sustain his views of this branch of the case.

Suppose the defendant had filed his bill in equity containing the same allegations which this plea sets up; and asking the court to interfere and decree a cancellation and delivery up of these bonds: would he be entertained for a moment in that forum? He would have to come before that court with the averment in substance, that he

voluntarily entered into these obligations for the express purpose of defeating certain claimants who had sued him for damages; that he had ante-dated these bonds, which he executed and delivered to his father, for the purpose of giving him a priority over these claimants; and that no other consideration or inducement existed for giving them. His own statement would close the doors of a court of equity against him. He would in effect be asking the court to interfere, and by its decree relieve him from the consequences of his own fraud. This a court of equity will never do. The authorities speak with one voice on this subject. Even the cases relied upon by the learned counsel for the appellant, settle the doctrine (which he relies upon with much ingenuity and force to sustain another branch of his argument,) that courts of equity will not relieve parties from the consequences of their own fraud; (See 5 *Rob. Pract.* pp. 542, 543, where numerous cases are cited,) but will leave them where they have placed themselves, by their fraudulent contracts.

Nor would the other averments in his plea, if made in a bill in equity, aid him in the slightest degree, in securing the interposition of a court of equity. The fact that he apprehended that injustice would be done him, in the suits then pending against him for damages, because, in his

opinion, the courts and juries were
753 unfavorably *and unjustly constituted," ought not and could not have influenced a court of equity in any manner whatever. That court would be bound to presume that no injustice would be perpetrated in regular legal proceedings had in the forum where such suits are pending. Indeed they were pending before the same tribunal, (the Circuit court of Frederick,) to which he tendered his plea. In point of fact, the courts and juries were not in his language "unjustly and unfavorably constituted." The judge who then, and for more than a year afterwards, presided in the tribunal in which the defendant was sued, was Judge Richard Parker, who, for years before the war, and before the constitution of a military government, had been the honoured and trusted judge of that Circuit, and whose long judicial career had been illustrated by a purity of character and unquestioned ability and learning, securing to him a judicial record of which any judge in this State might well be proud. As to the juries, they were constituted as they had always been and are now. His case was to be tried by an impartial jury of his own countrymen, and there was no warrant for his apprehension that injustice would be done him, either by the court or juries as then constituted. Such an allegation could not be tolerated for a moment, as an additional aid to the interposition of a court of equity. It would be mischievous to the last degree. The result would be, that a party against whom suits were pending for the recovery of debts or of damages, might justify himself for assailing away his property, so as to put it

beyond the reach of his creditors or claimants for damages, upon the ground that he apprehended or had suspicion that the judge or the juries, as constituted, might do him injustice. I repeat that such an allegation could add no force to his claim for the interposition of a court of equity, 754 because that court would be "bound to presume that no injustice would be perpetrated in regular legal proceedings had against him in a court of law.

I think, therefore, it is clear that if the defendant had come into a court of equity, making the same allegations in his bill as he has made in his plea, his own statement of his case would have effectually closed against him the doors of a court of equity. And it follows that he has not alleged "such matter existing before the execution" of the bonds sued upon "as would entitle him to relief in equity against the obligation of these contracts." I am, therefore, clearly of opinion that the plea tendered, is not a good plea under the statute.

Is it a good plea at common law? I think not. I think this is emphatically one of the class of cases in which the maxim of the common law, "*nemo allegans suam turpitudinem est audiendus*," applies with full force.

The learned counsel for the appellant, in an argument of great ingenuity, seeks to avoid the force of this maxim of the common law, by bringing the case within the operation of that other maxim, "*In pari delicto potior est conditio defendentis*;" and in an able and learned discussion of the subject, insists, that the rule to be applied to this case is, that courts will not lend their aid to one who was particeps fraudis, either to enforce a fraudulent contract or to relieve from its effects after it is executed. He further insists that this is an executory contract, and the plaintiff is here seeking the aid of the court in compelling its execution, though fraudulent. When applied to a certain class of illegal contracts, the argument of the learned counsel, and the authorities upon which he relies, are conclusive.

There is, however, a marked distinction between contracts which are void ab 755 initio, and those which are void "as to third parties, but which the law upon grounds of public policy, makes valid between the parties.

A contract like that in the leading case of *Collins v. Blantern*, so much relied upon, was one void ab initio; because, in the language of Ch. Justice Wilmot, "it was an agreement to stifle a prosecution for wilful and corrupt perjury; a crime most detrimental to the Commonwealth;" and "the wicked consideration alleged in the plea undoubtedly rendered the bond void ab initio, at the common law, being a contract to tempt a man to commit a crime." And so all the cases relied upon by the learned counsel for the appellee, are cases where the contracts were void ab initio, as contracts against public policy, or contracts against public morals, or some positive

law, common law or statute law. And it is upon such contracts that the Supreme court of the United States found their decision in the recent case of *Hanaver v. Doane*, 12 Wall. U. S. R. 342. And in such cases, it is undoubtedly sound law, that where the court, either by the allegations of the plaintiff or by a proper plea of the defendant, is informed that the contract sought to be enforced is one which is void, because illegal, it will not lend its aid either to enforce on the one hand or give relief on the other. But in the case before us, the contract was one, which though void as to third parties, is, by the express terms of the statute, (as construed by this court so often that it is impossible now that its meaning can be questioned,) binding and valid between the parties. This statute (Code, p. 565, ch. 118, § 1) declares that "every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers or other persons of or from what they are or may be lawfully entitled to, shall as to such creditors, purchasers or other persons, their representatives or assigns, be void." But such a contract as 756 between the parties has uniformly and by unvarying "decisions of this court, been held binding and valid.

So that in such a contract as the case before us, it cannot be said that the contract was void ab initio, but it is one which is valid between the parties; and if valid, of course one which the courts will enforce as between the parties, though void as to third parties.

Whatever may be the conflict of authorities in other States, (and I think there is none when the proper distinction is borne in mind between contracts void ab initio and contracts void as to third parties, but valid between the parties,) in Virginia the question must be conceded as *res adjudicata*.

This case must be ruled by the cases of *Starke's ex'ors v. Littlepage*, 4 Rand. 368; *James v. Bird's adm'r*, 8 Leigh 510; *Terrill v. Imboden*, 10 Leigh 321; and *Sharp & wife v. Owen*, 12 Leigh 429. It is impossible to distinguish these cases, in principle, from the case at bar; and if ever there was a case in which the doctrine of "*stare decisis*" applies in full force, it is in the case before us.

The case of *Starke v. Littlepage*, 4 Rand. 368, was an action of detinue brought by the executors of *Starke* against *Littlepage* to recover certain slaves in his possession. The verdict and judgment was for the defendant, on a plea of non detinet. The court below admitted evidence to show that *Starke's* purchase of certain slaves under execution, was not a real and bona fide purchase, but one made for the defendant, and with his money, and was intended by both as a cover to protect defendant's property from executions of other creditors. This court reversed the judgment of the court below, on the ground that such evidence was inadmissible; and although the slaves had been in possession of the defendant for twenty years, he was compelled to

deliver them to the plaintiff, under his contract; and the defendant was not permitted to show that the purchase by Starke, 757 *at the sheriff's sale, was not a real and bona fide purchase, and was made with the money of Littlepage, for the purpose of defeating other execution creditors. And the maxim *nemo allegans suam turpitudinem est audiendus* was declared to be applicable to the case. Judge Green, delivering the opinion of the majority of the court, says: "In the case of *Hawes v. Leader*, Cro. James 270, this point has been decided at law, and has never since been questioned, but uniformly recognized as good law. In that case the intestate of the defendant granted by deed to the plaintiff all his goods embraced in a schedule, and covenanted to deliver them quietly to the plaintiff. After the death of the grantor, the grantee brought an action of debt against his administrator for the goods mentioned in the schedule. The defendant pleaded that his intestate was largely indebted, specifying the debts, and that the deed was made by fraud and covin between his intestate and the plaintiff, to deceive those creditors; and that his intestate, notwithstanding the deed, used and occupied the goods during his life time. To this plea the plaintiff demurred, and had judgment upon the merits." This case of *Hawes v. Leader* has been repeatedly approved by this court, especially in the last case on the subject, (*Owen v. Sharp & wife*, 12 Leigh 427,) in which Judge Allen, delivering the unanimous opinion of this court, recognizes it as "founded on sound principles of law and policy."

Judge Green further says, (and I quote from his opinion again, because his reasoning applies with great force to this case,) it is a general rule that, "*in pari delicto potior est conditio defendentis*," and this was the principle of the civil law. But this rule operates only in cases where the refusal of the courts to aid either party, frustrates the object of the transaction and takes away the temptation to engage 758 in contracts *contra bonos mores*, or violating the policy of the law. If it be necessary in order to discountenance such transactions, to enforce such a contract at law, or to relieve against it in equity, it will be done though both the parties are in *pari delicto*. The party is not allowed to allege his own turpitude in such cases, when defendant at law, or prevented from alleging it when plaintiff in equity, whenever the refusal to execute the contract at law, or the refusal to relieve against it in equity, would give effect to the original purpose, and encourage the parties engaging in such transactions." After citing several cases to sustain his position, he concludes: "To allow a fraudulent debtor conveying his property to another with intent to defraud his creditors to allege that fraud, for the purpose of avoiding the transfer, would be using the maxim of the law to frustrate the policy of that maxim, by giving full effect to the fraudu-

lent contrivance of the parties according to their intent; and indeed rather to enforce than to frustrate the fraudulent contract; and debtors might with perfect impunity practice frauds upon their creditors."

The next case decided by this court was that of *James v. Bird's adm'r*, 8 Leigh 510. The case was briefly this: Bird, with a view to hinder and defraud his creditors, conveyed his slaves to James, and took his bond for the sum of \$8,000 as the price of them. He filed a bill for the rescission of the contract, upon the ground that it was not a bona fide sale. The proofs were full as to the fraudulent intent. The court held that the bill ought to have been dismissed. Judge Parker, (with whom all the judges concurred,) said, referring to the case of *Starke's ex'ors v. Littlepage*, "If James had sued at law to recover the slaves included in the deed, Bird would not have been allowed to defeat his claim by proving the fraud; and so too, if Bird brings

759 his action (on the \$8,000 bond,) *to recover the purchase money to which there seems to be no impediment, the fraudulent grantee would not be permitted to impeach the transaction, and could set up no other than a strictly legal defence." The case before us is brought exactly within the principles of this decision. Bird might have sued at law upon his bond, to which Judge Parker said, "there was no impediment," and James could not have pleaded that the transaction was not bona fide, but entered into to defraud other creditors. So here there is "no impediment" to the plaintiff's suing upon the bonds, and the defendant cannot be permitted to set up the defence that the bonds were given for the purpose of protecting himself against other claimants suing him in the same court. See also *Terrell v. Imboden*, 10 Leigh 321; Judge Parker's opinion, approving *Starke v. Littlepage*, and *James v. Bird's adm'r*, supra, and reiterating the view always entertained by this court, that such a contract as the one under consideration, though void as to creditors, is valid and binding between the parties.

The last case decided by this court, in which the questions we are now considering are discussed, was the case of *Owen v. Sharp & wife*, 12 Leigh 427. The case was this: Waddy Thompson being at the time much embarrassed with debt, executed a bill of sale of a female slave, absolute on its face, in order to protect the property from his creditors; but with a secret trust that the grantee should hold the property for the benefit of the grantor's daughters. Sharp having married one of the daughters, Sharp and wife filed their bill, setting up the secret trust; and that being proved, the Circuit court decreed the slaves and their increase to the daughters of Thompson. That decree was reversed by this court. Judge Allen delivered the opinion of the court; and the first sentences of that opinion show that he considered 760 *the questions raised in the case be-

fore us as res adjudicata; and that however harshly the decision must operate upon the appellees in that case, the court was bound by the rule of stare decisis. He says: "With every disposition to deprive the fraudulent donee of the fruits of his iniquity, it seems to me that the repeated decisions of this court, and considerations of public policy, preclude us from giving relief in this case. A fraudulent conveyance, though void as to creditors, is good between the parties. Being valid between the parties, it follows that the fraudulent grantor cannot be permitted to allege his fraud to avoid his deed. After approving the case of *Hawes v. Leader*, and the Virginia cases above referred to, he uses the following language, in commenting upon the case of *Ward v. Webber*, 1 Wash. 274, which had been relied on by the counsel for the appellees in that case: "They (the plaintiffs in that case,) had an absolute conveyance, and no proof of fraud came from them. It was offered by the defendant. To have received such evidence, would have been to have permitted the party committing the fraud, to have relied on it in his own defence. * * * * In this case, (*Owen v. Sharp*), it seems to me the proof of fraud comes, and of necessity must come, from the plaintiffs. The defendant has his deed absolute upon its face, and made apparently for a full and valuable consideration. The plaintiffs are driven to the necessity of showing by parol evidence, that this recital was false, that no consideration passed; and in doing so, they prove that the money ostensibly paid by the defendant was in fact the money of the grantor; and that this device was resorted to for the purpose of securing the property from his creditors. The deed being absolute, the plaintiffs attempt to execute a secret trust, and in doing so, show the intent with 761 which it was created. If *the facts were reversed, if the trust had been expressed on the face of the deed, and the grantee had refused to execute it on the ground of fraud, he would then be compelled to allege his own fraud to protect himself, and could not be heard." In the conclusion of this able opinion, Judge Allen adds, (showing how firmly the principles announced have been settled), "The conduct of *Owen* in this transaction has been marked with the most heartless perfidy towards his confiding father-in-law and his children, and the grossest fraud. But standing in the position he does, it seems to me that the law protects him."

I have quoted thus largely from the opinion of Judge Allen, because its reasoning and the principles announced, apply with peculiar force to the case under consideration. In this case the very language of Judge Allen, (substituting the word bond for deed), may be used. The bonds were absolute upon their face. The seals imported a valuable consideration. No proof of fraud came from or was necessary to come from the plaintiff. It was offered by the defendant. To have received such evi-

dence would have permitted the party committing the fraud to rely on it in his own defence. The plaintiff holds the bonds absolute upon their face, and apparently for a full and valuable consideration. The defendant is driven to the necessity of showing, by parol evidence, that no consideration passed; and in doing so he must allege and prove that it was a scheme or device resorted to for the express purpose of securing his property from claimants who had brought their suits for damages in the same court in which he offered his plea. In this case the proof of fraud comes, and of necessity must come, from the defendant. The bonds held by the executor being absolute upon their face, for the payment of a sum of money due the testator, "for value received of him," as expressed 762 on the face of the bonds, *the defendant attempts to establish a secret trust; and in doing so must show the intent with which it was created; and so must rely upon his fraud, in his own defence.

I think it is clear that upon the decisions of this court, the plea tendered by the defendant, presents no legal defence to the plaintiff's action on the bonds, and that the court below did not err in ejecting the plea. Nor are the decisions of this court at all in contravention of the best considered cases in the other States of the Union, or of the English cases.

In a very learned note of Messrs. Hare and Wallace in Smith's *Leading Cases*, Vol. 1st, pt. 1st, ed. of 1866, to the *Leading Case of Collins v. Blantern*, much relied on by the counsel for the appellee, and where all the authorities, English and American, are carefully collected, it is said, p. 637, "In order, however, to apply the rule potior est conditio defendentis, correctly, it is necessary to consider, not who is plaintiff and who defendant, but by whom the fraud is alleged, or sought to be made a ground of defence or recovery. For although it is no doubt true in general, that the law will not lend its aid to enforce a fraudulent or illegal contract, still if the plaintiff can make out his case without disclosing the fraud, the defendant will not be allowed to show that he is equally guilty with the plaintiff, as a reason why the latter should not recover. An action of debt or ejectment consequently cannot be defeated by proof, that the instrument which constitutes the foundation of the plaintiff's claim, was executed with a secret and fraudulent understanding that it should be subject to a trust for the benefit of the defendant, and surrendered whenever he thought proper to demand it." And for this doctrine the authors cite many cases, English and American.

These doctrines must now be considered as settled too firmly to be shaken.

763 There is but a single case which *can be said to be in opposition to the views herein expressed, and that when properly understood, has no application to the case. That is the case of "*Austin's adm'x v. Winston's ex'x*," 1 Hen. and Mun.

33. In the first place it may be said that this case has never been followed. It was a decision of two judges; and its authority has been seriously questioned. In *James v. Bird's adm'r*, 8 Leigh 510, already referred to, Judge Parker says: "There is no case in equity where relief has been given to a fraudulent grantor of property, the conveyance being made to protect it against his creditors, except that of Austin's adm'r v. Winston's ex'r, decided by a divided court, and perhaps under the circumstances, properly decided." Mr. Conway Robinson, in his admirable work, in reference to the same case, says: "Notwithstanding Austin's adm'r v. Winston's ex'r, the case of *Hawes v. Leader*, was approved in *Stark's ex'ors v. Littlepage*, and such is the general course of decisions;" and in a note to the text he refers to *James v. Bird's adm'r*, *Terrell v. Imboden* and *Owen v. Sharp and wife*; in all of which and especially the last, *Hawes v. Leader* was approved as unquestioned law. 5 Rob. Pract. 543. But conceding that Austin's adm'r v. Winston's ex'r is sound law and its authority unquestioned; still the case before us cannot be brought within the principles of that case. The relief given in that case was founded upon the fact that the grantee, a creditor, (the debtor being in distressed circumstances,) had availed himself of his power over him to induce the debtor to unite in the fraud; the creditor having proposed and urged the execution of the scheme which was adopted for that purpose. No circumstances of that sort are even suggested in the case before us.

It is further argued that there is a distinction between executory and executed contracts; and this being an executory contract, the court ought to refuse its aid in granting relief to the plaintiff. It is sufficient to say in answer to this position, that no such distinction is recognized in the uniform decisions of this court. But, on the contrary, *Hawes v. Leader*, so often approved, was a case of executory contract; and in *James v. Bird's adm'r* it was distinctly said by Judge Parker, that if the suit in that case had been brought on the bond of \$8,000 executed as the price of the slaves, James could not have defeated the action by alleging that the bond was not in fact given for the purchase money, but was only intended to defeat the claims of other creditors; in other words, he "would not be allowed to impeach the transaction, and could set up no other than a strictly legal defence."

It is, however, urged with much ingenuity and force, that this case does not come within the operation of the statute of frauds; because these bonds were not given to hinder and delay creditors, but only to protect the defendant against the assertion of unjust demands, which he apprehended might be recovered against him because of the "unfavorable and unjust constitution of courts and juries at that time;" that there was no fraudulent intent to secure his prop-

erty against the claims of creditors; but the scheme resorted to was one intended for protection against unjust claimants. Now, it must be conceded that a party claiming damages for the acts of another, must be regarded in law as much the creditor of that other, as one holding his bonds or other promises to pay. Every person having a legal demand against another, is his creditor, whether that demand is one sounding in damages, or one that comes under a contract. This is a proposition too plain for argument. And it is to my mind equally plain, that the question, whether the demand asserted is a just and legal

one, and whether the courts and juries will be likely to enforce an illegal and unjust claim, is not one for the party himself to decide. Nor will another court, passing upon his transactions, in transferring his property to another to protect himself against such demands made in regular legal proceedings, enquire whether his apprehensions were justified, or whether the suits pending against him were proper suits. All these must necessarily be questions which another court cannot enquire into, and which certainly the party cannot be allowed to decide for himself. Much has been said about the abnormal condition of affairs after the close of the late war, and the uncertainty of the administration of justice, growing out of the fact that the State was subjected to a military government which had the power to remove all State officers. But all this, (if it could be taken cognizance of at all in a court of law, upon a plea to an action of debt,) applies to a later period. When these suits were pending against the appellant for damages, in the Circuit court of Frederick, during the year 1866 and part of the year 1867, when they were dismissed, that court was presided over by an able and upright judge, who was not removed till the year 1869; and I think all must admit that during that period there was certainly an honest and impartial administration of justice in this Commonwealth. So that there was nothing in the extraordinary circumstances of the times which can take this case out of the operation of the well settled rules of law.

I am also of opinion, that there was no error in rejecting the special plea of non est factum. That plea admits the execution and delivery of the bonds by the appellant to the appellee's testator, but avers that they were "so executed and delivered without any consideration in money or other value, or any debt then due and owing between the parties; but was so made and delivered solely for the use and benefit, and under the control of the said defendant, and to be redelivered to said defendant, by the agreement of the parties at the time, whenever the said defendant should request it. Wherefore, the said defendant says the said writing obligatory is not his deed," &c.

This cannot be received as a plea of non est factum, because the plea in terms ad-

mits the execution and delivery of the bonds, the very thing which the plea of non est factum always puts in issue. Nor is the objection one of form only. The matter averred could not be pleaded in any form. It avers in effect that the bonds were delivered to the obligee, to be redelivered to the obligor whenever he demanded it. A deed executed and delivered, subject to the abrogation of the maker at his pleasure, is something unknown to the law. However much disposed I might be to relieve the appellant under the circumstances, from a harsh judgment, I am compelled to say, in the language of Judge Allen, in *Owen v. Sharp*, "He has placed himself in a position where the courts cannot relieve him."

Upon the whole case, I am of opinion that, upon well settled principles of law, established by the uniform decisions of this court, there was no error in the judgment of the Circuit court; and that it ought to be affirmed.

ANDERSON, J. Broom says: It is "a general rule that an agreement cannot be made the subject of an action, if it can be impeached on the grounds of dishonesty, or as being opposed to public policy; if it be either contra bonos mores, or forbidden by the law." Broom's *Legal Maxims*, p. 349, side. *Ex dolo malo non oritur actio*, has been recognized as a maxim of law,

wherever organized society has existed. The same writer says, "those who come into a court of justice for redress, must come with clean hands, and must disclose a transaction warranted by law. *'Ex maleficio non oritur contractus*. And this defence may be made by a defendant who is *pari delicto*. Although it is an indisputable proposition; as against an innocent party, that no man shall set up his own iniquity as a defence, any more than as a cause of action; and that is what C. J. Mansfield meant in *Montefiori v. Montefiori*, 1 W. Black. R. 363; yet, where a contract or deed is made for an illegal purpose, whatever may be stated in it, a defendant against whom it is sought to be enforced, may show the turpitude of both himself and the plaintiff; and a court of justice will not give its aid to enforce a contract springing from such a source. In *Holeman v. Johnson*, Cowp. R. 341, 343, C. J. Mansfield said, "the principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his action upon an immoral or illegal act. If from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or a transgression of a positive law of this country, then the court says, he has no right to be assisted."

* * * So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*. In support of this principle, authorities might be cited almost without limit; but I deem it unnecessary. It cannot be controverted

successfully without overturning the oldest and best established maxims of the law.

But it is contended, that the acts prohibited by the statute of frauds, to hinder, delay or defraud creditors, &c., do not fall within this principle. Are they not *dolo malo*? Are they not against *mores bonos*?

Are they not dishonest? Do not con-

768 tracts or conveyances *which are made to hinder, delay and defraud creditors, or other persons of their just and legal demands, arise *ex maleficio*? The statute declares that such acts "as to such creditors, purchasers or other persons, their representatives or assigns, shall be void."

It does not say that they shall or shall not be void, or valid as between the parties themselves. The statute only makes them void as to the parties who were designed to be injured; and as between the parties themselves does not provide how they shall be treated or regarded. The law on this subject is not declared by the statute; and if such acts were valid and binding as between the parties themselves, at common law, they would still be so after the statute. But were they? I cannot but think that it was as dishonest and immoral for a man to dispose of his property with a secret trust for his own benefit, to defraud his creditors or other persons, of their just and legal demands, before the statute, as since. And I think the better opinion is, that the statute is only declaratory of the common law. Coke Litt. 290 b. Lord Coke so held. And Lord Mansfield said that the principles of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statute of Elizabeth c. 5. But the courts have held that such contracts are binding between the parties themselves. But I am not aware that it has ever been held that the party who was *pari delicto*, and who was out of possession, could maintain an action to enforce the contract, or to acquire the fruits of his fraudulent contrivance, unless it is so held in *Starke's ex'ors v. Littlepage*, 4 Rand. 368. That case was decided by a minority of the whole court, by two judges in a court of three. I have found no other case in which this court has

769 decided that a fraudulent grantee, who was *pari delicto* *in the fraud, would be aided, either by a court of law or equity, to possess himself of the fruits of his fraudulent contract, or that the fraud might not be shown by the defendant.

The case of *Austin's adm'x v. Winston's ex'x*, 1 Hen. & Mun. 33, was a bill by the executor of the grantor, against the fraudulent grantee, to redeem the slaves which he had obtained from the grantor, under a fraudulent contrivance to shield them from the grantor's creditors, with a secret trust that they were to be restored to the grantor. Relief was given in that case, to the representative of the grantor, upon the ground that he was not *pari delicto* in the fraud. J. Tucker was of opinion that he was *pari delicto*, and that his bill ought to be dis-

missed. He says: "It is a maxim at law that when the parties are equally culpable or criminal, the defendant must prevail: and in equity, that he that has done iniquity shall not have equity; that is, that he shall not have the aid of the court where he is plaintiff; which brings both maxims to the same point." And he further says, "that had Austin been the plaintiff, and Winston the defendant, I should have held him as little entitled to the aid of a court, as I now think Winston." His opinion is put upon the ground that they were equally in fault, and that in such case *potior est conditio defendantis*. He clearly negatives the idea that by virtue of the statute of frauds, the contract is binding between the fraudulent parties themselves, in the sense that it will be enforced in courts of justice, as between the parties, at the instance of a *particeps fraudis*. The other judges were for enforcing it, in favor of the fraudulent grantor, but upon the ground that he was not *pari delicto*, but that there were circumstances palliating and excusing the fraud on the part of the grantor. And,

in that case the majority of the court 770 held that the ostensible *contract was not binding between the parties under the circumstances, and enforced the secret trust in favour of the grantor, but upon the ground that he was not *pari delicto*. The majority of the court concurred with J. Tucker in the principles of law, as laid down by him, but different from him in their application to that case.

In the case before us, I may here remark, if the plaintiff in error had been plaintiff below, and had exhibited his bill in equity against his father's executor, to compel him to surrender his bonds, in compliance with his father's agreement, the circumstances, I think, would have presented a much stronger case for relief, than in the case of Austin's adm'r v. Winston's ex'r. But, in this case, the plaintiff in error was defendant; and it was a plain case for the application of the principles, as laid down by J. Tucker in Austin v. Winston, and concurred in by all the judges, and controverted by no other decision of this court, that I am aware of, except in Starke's ex'ors v. Littlepage, supra. The subsequent cases of James v. Bird's adm'r; Terrell v. Imboden & others; and Owen v. Sharp & wife; cited and relied on by the counsel for defendant, are not in conflict with the principles declared in the commencement of this opinion, and as laid down by J. Tucker in Austin v. Winston, and concurred in by the whole court. In all of those cases relief was denied the plaintiff, who sought relief from the contract made to defraud creditors, and for the enforcement of the secret trust in his favor. If the contract is binding between the parties themselves, the courts will leave them where they have placed themselves, and will not open its doors for either of them to enter, to obtain its aid to carry out the fraudulent contract. The antien-principle of equity, that a court of equity will not

stain its escutcheon by aiding a party 771 in carrying out a fraud; *or that other great legal maxim that in *pari delicto potior est conditio defendantis*, has not been overturned or assailed by either of those decisions. And the case of Starke's ex'ors v. Littlepage, decided by a minority of the whole court, and therefore not authority, has not been followed in subsequent cases; and whether right or wrong in principle, has not been established as authority. And if the transaction in this case was fraudulent, the father was at least in *pari delicto* with the son; and the judgment of the court below, in repudiating the long established maxim, that a right of action cannot arise out of fraud; and also that other equally well established maxim, that when the plaintiff and defendant are in *pari delicto*, the defendant should prevail, is erroneous.

In this view I am fully sustained by the Supreme court of Kentucky, in Norris v. Norris' adm'r, 9 Dana, R. 317. That was an action of covenant. The opinion of the court was delivered by the able and distinguished Chief J. Robinson, and maintains that "when the parties to an illegal or fraudulent contract are in *pari delicto*, neither a court of equity nor a court of law will aid either of them in forcing the execution of that which may be executory, or in revoking or rescinding that which may be executed. In such a case, the law will not be the instrument of its own subversion. And to every invocation of its assistance, replies, in *pari delicto*, *potior est conditio defendantis*." Again: "Our statute against frauds, which declares that all conveyances, bonds, etc., made for the illegal purpose of defrauding bona fide creditors or purchasers, shall be void only as to any such creditor or purchaser, has never been construed as having been intended to change the conservative principle just defined. * * *

And, therefore, a party 772 to an executory agreement made to defraud creditors or *purchasers, has no more right to maintain a suit for coercing the execution of it, than a party to an executed contract for the same illegal end would have to prosecute a suit for restoration or rescission." The same distinction is maintained in Mason & wife v. Baker, 1 A. K. Marsh. R. 208, marg. p. 153, top. Chief J. Boyle, delivering the opinion of the court, says: "It is true that the bill of sale, though fraudulent as to creditors and purchasers, is nevertheless binding in law upon the parties to it; and that a court of equity would not interfere in behalf of Baker (the grantor) to set it aside. But it is equally true, that a court of equity cannot, according to the principles by which it is invariably governed, lend its aid to give effect to the bill of sale. For Hamlett, (the grantee), as well as Baker, is *particeps criminis*, and equally guilty of the fraud. And the rule is, that in respect to the parties to the fraud, in *pari delicto potior est conditio defendantis*." Fargo v. Ladd, 6 Wis. R. 106, is in accord.

The principle of these cases is, that al-

though the statute is construed to avoid the contract only as to those whom it was designed to defraud, and to consider it binding between the parties themselves, the courts will not interfere to set it aside, or to enforce it, but will leave the parties where they have placed themselves. There is nothing in the opinion of J. Allen, in *Owen v. Sharp & al.*, supra, in conflict with this principle. He holds, indeed, under the established judicial construction of the statute, the contract is binding between the parties themselves, and that the court could not entertain the plaintiffs, who claimed under the fraudulent grantor, to rescind it, although the perfidious and iniquitous conduct of the fraudulent grantee would strongly incline it to do so. Who can doubt that if the case had been reversed, and the

fraudulent grantee had been suing to enforce *the contract, that the court would, with alacrity, have dismissed him from its portals. The perusal of J. Allen's opinion can leave no question of this on the mind. And that is precisely the case here. The fraudulent obligee is seeking the assistance of the court to enforce his fraudulent contract against his son, in which he is more to blame than the son. For, doubtless, the son consented to the arrangement under his parental influence. The character of the transaction is made known to the court by the plea; the facts of which, on a motion to reject, as upon a demurrer, must be taken as true. And now this father invokes the assistance of the court, in violation of his faith to his son, (or his personal representative does it, which is the same thing,) to enforce this fraudulent contract in his behalf, and to help him to the fruits of his fraud, and thereby enable him to practice a most iniquitous fraud upon his son. To entertain him for such a purpose, it seems to me, would bring reproach upon the courts, and the administration of public justice. It cannot be the public policy requires that the equally culpable, in this case, the most culpable party, should be rewarded, by the direct instrumentality and agency of the courts of justice, with the fruits of his fraud, in order to punish the other party, and to deter others from such practices. This act most probably would never have been committed by the son except by the influence and advice of the father; and to reward him for it, would encourage its repetition, which is certainly against public policy.

But I rest my opinion in this case also upon another ground. The plaintiff in error was guilty of no fraud in the transaction as set out in his special plea, either at common law, or under the statute. His case does not fall within the purview of the statute of frauds. The language of the

1st section is (Code of 60, Chap. 118, 774 *p. 565,) "every gift, conveyance," &c., and "every bond or other writing, given, with intent to delay, hinder or defraud creditors, purchasers or other persons, of or from what they are, or may be lawfully entitled to, shall, as to such cred-

itors, purchasers or other persons, their representatives or assigns, be void." These bonds were not given to defraud any persons "of or from what they were lawfully entitled to." The facts as shown by the plea, are, that the plaintiff in error was an officer in the military service of the Confederate States in the late war, and that four suits had been instituted against him for heavy damages by parties claiming to have been loyal citizens of the United States, for acts done by him in his official character, in obedience to the orders of his superiors in command during the war. And that he was greatly alarmed, and seriously apprehended, that owing to the bitter hostility which swayed the then supreme power in the country, towards the class to which he belonged, that the plaintiffs would succeed, in the then unsettled condition of the country, without a constitutional and stable government, in recovering their unjust demands against him; which would overwhelm him with ruin. That he sought advice from his counsel, who gave him no ground for hope or encouragement. That he then sought counsel from his father, who increased his alarm, and urged him to do something to protect him from the impending catastrophe; and as the result of that conference, he executed the bonds upon which this suit was brought, and placed them in the hands of his father, to have the force of bonds, only in the event that the plaintiffs recovered against him, in said suits; and that if they did not recover, then the said bonds were to have no force or effect; but were to be delivered up to him by his father. And he avers that said suits

were afterwards abandoned, and dismissed *by the plaintiffs, and his father died, without returning to him his said bonds, and they afterwards coming to the possession of his executor, the defendant in error, he instituted this suit upon them. It is evident from the pleadings, that the papers in controversy, were signed and sealed by the plaintiff in error, and handed to his father by his advice, for his protection, in the event there was a recovery against him, in the suits aforesaid. It was designed, however vain and ineffectual the device, to screen his property from any recovery that might be had against him in those suits, and for no other purpose whatever. It was not intended to protect his property from the claims of creditors or other persons, of what they were or might be lawfully entitled to, because the bonds were handed to his father, with the express condition, that they were to be returned to him in the event that there was no recovery against him in those suits. If there was any intent to delay, hinder or defraud any body, it was only the plaintiffs in those suits.

Was the execution of these bonds, for the purpose of rendering a recovery in these suits unavailing, fraudulent in intent? They clearly had no lawful or just claim against him for damages for the execution of the orders of his superiors. It was his duty to

obey their orders; and they had the power to enforce obedience. They had, therefore, no just or lawful demand against him. And a recovery against him, would be repulsive, not only to the well established principles of law, but to the plainest dictates of morality and justice, which they virtually acknowledged themselves, by abandoning and dismissing their suits. Yet, without any constitutional protection, and with a sense of the insecurity of all personal and civil rights, under military rule, and not knowing how the courts which would have the trial of those suits, might be constituted under the military bills,

776 *which had been enacted by Congress, which placed the civil authority under the foot of the military, he entered into this arrangement with his father, and by his advice, to save himself and family from destitution and ruin, should such an iniquity be perpetrated against him, as he apprehended, and had just cause to apprehend, might be done, in the then prevailing temper of those who wielded the power. There might have been no necessity for it, as the result showed there was not. But in that case, no harm would be done to any one; and no harm would have been done, if the father had kept his faith with his son, and returned him his bonds. Neither creditors nor purchasers, nor other persons including the plaintiffs in those suits, suffered any loss by this arrangement between the father and the son. Nor does it seem to me that it was fraudulent in intent, because designed to render any recovery in the suits which had been instituted against him, unavailing.

Actual fraud cannot exist where there was no fraudulent intent. And there can be no fraudulent intent unless injury is intended to the rights of others. And no injury can be done to other's rights, when none existed. Now the plaintiff in error, by this arrangement with his father, however unwise or injudicious, has done no injury to any body. The plaintiffs in those suits have acknowledged they had no rights, by abandoning them. And the execution of the bonds in question, has not affected them in any way; and could not have affected them unless they had succeeded by unlawful authority, by might and not by right, in recovering judgments against him. In that case the bonds, if they could have been made availing to the obligor, would only have protected his property against a wrongful invasion of his rights by lawless power. The act was not done to protect

777 his *property against a rightful and constitutional administration of the law; from that he had nothing to fear. But it was only designed to operate against an irregular and unconstitutional administration of the law. It is said that a pure and able judge presided in the court where those suits were brought; but what assurance was there that he would continue to preside there under the military bills enacted by Congress, until those suits were tried. He was then a judge only at suffer-

ance, and might be removed any day, as he was soon after, by the fiat of a shoulder strapped despot; an issue, which, I think, the plaintiff had cause to apprehend, in the circumstances which surrounded him. His apprehensions, though by no means groundless, were not realized, and the writings he executed were not to operate if they were not realized. His design was not to invade the rights of others, but only to protect his own. If his apprehensions were groundless, no harm was done; if they were real no wrong was done. It was only against apprehended wrong that he sought to protect himself, under circumstances most extraordinary and anomalous. It is true that in his attempt, he resorted to deception. How his conduct might be regarded in the code of morals, it is needless to inquire. But if there is such a thing as *dolus bonus*; if a person would be justified by finesse and deception to shield his property from a lawless robber, he, by this contrivance, is liable to no greater censure.

I know of no principle which would forbid the interference of a court of equity, if this suit had been brought by the father in his life time, to restrain him from perpetrating so great a wrong upon his son, in violation of the plainest principles of right and honesty. And what the father could not do, if he were alive, his personal representative cannot do, now that

778 *he is dead. To my mind, it is a case which calls loudly for the relief of a court of equity.

Believing that the first special plea of the defendant in the court below, substantially presents the ground of this defence; and that it is authorized by Sec. 5, Chap. 172, of the Code of 1860, I am of opinion that the court erred in rejecting the plea.

The special plea of non est factum is very inartificially drawn, and I am inclined to think that the special facts as therein set out, do not justify the conclusion that the said writing was not the defendant's deed. But it is by no means clear that the plea of non est factum would not be a good plea upon the facts as now fully disclosed in the first special plea. In *Ward & al. v. Churn*, 18 Gratt. 801, the court held that if the instrument was delivered to the obligee upon a condition, and the condition was known to the obligee, then the obligor is entitled to insist on said condition, and the obligee, if said condition has not been fulfilled, is not entitled to recover on the bond. In that case one of the obligors named in the bond had not subscribed his name; and a scroll was annexed to which no name was signed. But such indications of incompleteness in the instrument are only circumstances from which an inference may be drawn, that the instrument was delivered to the obligee, only upon condition: not equal in force to direct and positive evidence that it was so delivered. J. Joynes, in delivering the opinion of the court, said: "When the instrument is delivered directly to the obligee, the delivery cannot be regarded as

conditional in respect to the party who makes it; unless the condition is made known to the obligee." (p. 813.) And he cites *Hudson v. Revett*, 5 Bing. R. 368, (15 Eng. C. L. R. 467), in which C. J. Best characterized the old rule that a deed could not be delivered as an escrow to the grantee and obligee as a mere "technical subtlety; and quotes Comyn as good authority, and as saying: "If it be delivered to the party as an escrow, to be his deed on the performance of a condition, it is not his deed until the condition is performed, though the party happen to have it before the condition is performed." He also quotes J. Cabell in *Hicks v. Goode*, 12 Leigh 479, that the position that where the deed is delivered to the donee, it is not competent for the obligor to show that it was delivered as an escrow, or upon condition, rests on technical and unsatisfactory grounds. J. Joynes himself characterizes it as "strict and technical to the last degree;" and quotes from Preston in his edition to the Touchstone, to show that he did not regard it as the law in his day.

But it is unnecessary, and would protract this opinion, already too long, to say more on this point. I think it is clear from the record, that the plaintiff in error, has not had a fair trial of his case upon its merits, and that flagrant injustice has been done him by the judgment of the court below. Upon the whole, I am of opinion to reverse the judgment, and to remand the cause, &c.

MONCURE, P., and STAPLES and BOULDIN, Js., concurred in the opinion of Christian, J.

Judgment affirmed.

780 *Elliott & Wife & als. v. George & als.

September Term, 1872, Staunton.

Partition—Sale of Land—Payment of Debts.—In October 1865, T one of the heirs at law and the administrator of G, filed his bill against the other heirs, some of whom were infants, for the sale of the land of G, on the ground that partition could not be made of it. He said he had proceeded to administer the assets, and, so far as he knew, there was but one debt due from the estate, and the assets were sufficient to pay it. The court decreed a sale of the land and directed a commissioner to take an account of the outstanding debts of G, and of the available assets. The commissioner reported the debts between three and four thousand dollars, and assets nearly as much. The land was sold for \$12,741. one-third cash, and the balance in one, two and three years. The cash payment and the first credit payment were divided among the heirs. At the November term 1867, the court made a decree directing the second payment to be collected and distributed ratably among the creditors of G, according to the report of the commissioner. **HOLD:**

*Partition—Sale of Land.—See foot-note on "Partition" to *Howery v. Helms*, 20 Gratt. 1.

1. **Same—Same—Same—Personal Estate Primarily Liable.**—The court erred in charging the proceeds of the sale of the land with the debts of G, without first taking an account of the entire personal estate which came to the hands of the administrator, and directing its application in discharge of such debts.

2. **Stay Law—Effect on Debts against the Estate.**—So long as the debts due the estate were not collectable by reason of the operation of the stay law, the debts against the said estate could not be enforced for the same reason, against the land or the money resulting from its sale.

3. **Deficiency of Personal Assets—Proper Proceedings by the Court.**—If the Circuit court apprehended a deficiency of personal assets, or that the rights of creditors would be endangered by a distribution of the land fund among the heirs, it

781 *would have been proper to retain under its control so much of said fund as was necessary, until the amount of such deficiency was accurately ascertained, and then to supply the same by a resort to such land fund.

The case is sufficiently stated in the opinion of Judge Staples.

Blakey, for the appellants.

Gordon & Cochran, for the appellees.

STAPLES, J., delivered the opinion of the court.

This bill was filed without previous process, at the October term 1865, of the Circuit court of Albemarle county, by Tucker C. George, in his own right, and as administrator of Luther M. George, dec'd. Its object was to obtain a sale of a tract of land belonging to the estate of the intestate, upon the ground that partition was wholly impracticable, and that it would conduce to the interest of the heirs to sell the land and distribute the proceeds. The infant defendants answered by guardian ad litem, the adults in proper person; and at the same time a decree was rendered in conformity with the prayer of the bill. The court also directed one of its commissioners to take an account of the outstanding debts against the estate, and the available assets to meet them. Under this decree, the commissioner made a report of the claims against the estate, amounting to between three and four thousand dollars; and of those due the estate very nearly to the same amount. He stated, however, that the debts due the estate, were generally contracted during the war, and might not realize when collected, their numerical amounts.

The land was sold for twelve thousand seven hundred and forty-one 75-100 dollars; of which one-third was paid in hand, and the remainder was secured by bonds

*Payment of Decedent's Debts—Personal Estate Primarily Liable.—As authority for the proposition laid down in the principal case, that the personalty is primarily liable to pay the debts of the decedent, see *Foster v. Crenshaw*, 3 Munf. 514; *Elliott v. Carter*, 9 Gratt. 549; *Edmunds v. Scott*, 78 Va. 728; *Laidley v. Kline*, 8 W. Va. 218, 3 Min. Inst. (2d Ed.) 584.

782 *maturing in one, two and three years.

The cash payment was duly distributed among the heirs and those claiming under them. Various orders and decrees were entered from time to time during the years 1865 and 1866; but as they have no bearing upon the merits of this controversy, they need not be particularly mentioned.

It is not expressly stated, but it may be fairly inferred, that at the May term, 1866, a decree or order was asked for, appropriating a part of the proceeds of the land to the claims of creditors; but the court declined to do so; expressing the opinion that the personal estate was the natural and primary fund for the payment of debt; and whilst there might be a deficiency of personal assets, it was as certain as any human calculation could be, that with the addition of the second and third instalments of the purchase money for the land, the security for the creditors is most ample; and as they are debarred the privilege of collecting payment of their debts at law, no reason is perceived why a court of equity should compel such payment at this time. This was the view taken by the circuit judge at the May term, 1866. At the November term, 1867, however, he appears to have reached a very different conclusion. By his decree then entered, he directed the second instalment of the purchase money to be collected, and the proceeds to be paid ratably to the creditors of the intestate, according to the report of the commissioner; and he further expressed the opinion "that the creditors have an absolute right according to every principle of equity, to the satisfaction of their claims now."

It is into the correctness of this decision, we are called on to enquire, upon an appeal to this court by the infant and adult heirs.

As before stated, the bill was filed by 783 Tucker C. *George, who was not only an heir, but the administrator of Luther M. George, the intestate. It stated that complainant had proceeded with all diligence in the administration of the estate, and had nearly completed it; and so far as he was informed there was but one debt due from the estate, and the assets in his hands would be sufficient to pay that. This statement and the report of the commissioner showing the debts to and against the estate, constituted all the information possessed by the Circuit court, touching the administration of the estate. There was nothing to show the amount and value of the assets which originally came into the hands of the administrator; or what disposition had been made of them.

It may be that his accounts were regularly settled before the proper court, and the assets duly and properly administered; but the record fails to show the fact, and we are not at liberty to presume it.

It is well settled—a rule of the equity courts almost universally recognized—that the personal estate of the deceased is the natural and primary fund for the payment of the debts; and the lands will not be charged without first taking an account

of such personal estate, and directing it to be applied to that object. The decree of the Circuit court was therefore erroneous in decreeing the land fund to the creditors without first requiring such account to be taken. 2 Rob. Prac. 86; Foster and wife v. Crenshaw's ex'or, 3 Munf. 514.

In the second place, the collection of the debts against the estate, as well as those due it, was at the time of this decree suspended by operation of the stay law. If that law be deemed constitutional, while it continued in force it was not in the power of a court of equity to decree their payment. If it was to be deemed unconstitutional,

it was the duty of the court to direct 784 the collection of the *debts due the estate, and the application of the proceeds to the claims of creditors, before subjecting the land fund. The land was sold, not to pay debts, but because partition could not be conveniently made. The court was not authorized to decree a sale or payment at the instance of creditors. The language of the statute is express. By the 1st section of the act of March 2d, 1866, amended by the act of March 2, 1867, it is provided that "while this act continues in force no execution, venditioni exponas, attachment upon a decree, or order for the payment of money, or the sale of property, shall be issued, or if heretofore issued, shall be proceeded with." The decree of the Circuit court is in plain contravention of this statute. It was also unjust to the heirs in appropriating their property to the demands of creditors without first exhausting the personal estate, the natural and primary fund for the payment of debts. If the Circuit court apprehended a deficiency of assets, or that the rights of creditors might be endangered by a distribution among the heirs, the obvious course was to retain so much of the land fund as was necessary, under the control of the court, until the amount of the deficiency was ascertained, and then to supply it by a resort to the proceeds of the sale so under its control. Ample time having elapsed since the expiration of the stay law to ascertain the available assets in the hands of the administrator, the court in all probability, may at once render a decree adjudicating and settling the rights of the parties. But the decree in question, being clearly erroneous at the time it was entered, for the reason already stated, it must be reversed and the cause remanded, to be proceeded with in accordance with the principles herein announced.

The decree was as follows:

785 *This day came again the parties by counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the Circuit court erred in charging the proceeds of sale of the land in the bill and proceedings mentioned, with the debts of the intestate, without first taking an account of the entire personal estate which came into the hands of the personal representative,

and directing its application in discharge of such debts. So long as the debts due the estate were not collectible, by reason of the operation of the stay law, the debts against said estate could not be enforced, for the same reason, against the land, or the money resulting from its sale. If the Circuit court apprehended a deficiency of personal assets, or that the rights of creditors would be endangered by a distribution of the land fund among the heirs, it would have been proper to retain under its control so much of said fund as was necessary, until the amount of such deficiency was accurately ascertained, and then to supply the same by a resort to such land fund.

Therefore, it is ordered and decreed, that for the errors aforesaid, the decree of the Circuit court be reversed and annulled. And it appearing to the court that the creditors in whose behalf said decree was rendered, are not formally before this court as parties, and that the only appellees are persons not benefited by or claiming under said decree, this court cannot now render a decree for costs against said appellees or any of the creditors aforesaid: Wherefore, it is decreed and ordered, that the appellants be allowed their costs incurred in the prosecution of their appeal here, out of the fund in said Circuit court applicable to the claims of said creditors, and as a credit against the same.

786 *It is further decreed and ordered, that this cause be remanded to the said Circuit court, to be further proceeded in, according to the principles of this decree.

Decree reversed.

787 *Winchester Building Association v. Gilbert & als.

September Term, 1872, Staunton.

1. **Building Fund Associations—Redemption of Shares.***—When the shares of a building fund association are redeemed, it is not a security for the sum advanced for their redemption, but it is an absolute sale to the association, whereby the association acquires an absolute right of property in the shares redeemed, and they are sunk and extinguished.

2. **Same—Same—Lien under Deed of Trust.**—The sum advanced for the redemption of the shares is no part of the debt of the stockholder whose shares are redeemed to the association. The only debt from him which is a lien under his deed of trust, is the monthly dues, and interest upon the money advanced, to be paid monthly, and continuing until the unredeemed shareholders have received the amount the articles of the association provide for.

3. **Same—Same—Election.**—H. whose shares were redeemed, gives another deed to secure a debt to G upon the property conveyed to secure the association; and he ceases to pay his dues and interest,

*See monographic note on "Building & Loan Associations" appended to White v. Mech. Building Fund Association, 22 Gratt. 238; also, foot-note to same case.

and his property is sold by the trustees of the association. H and G may elect to have the proceeds of the sale invested, and the unpaid monthly dues and interest paid monthly out of the interest and as much of the principal as may be necessary, or to have the present value of these monthly dues and interest ascertained, and paid out of the proceeds of the sale to the association.

The Winchester Building Association was organized under the acts of Assembly of Virginia in relation to such associations, in November 1867, and went into operation in January 1868. The constitution of the association was similar to that of the Mechanics Building Fund Association of Lexington, which is set out in the report of the case of White against that association, *reported in 22 Grattan 233. The number of shares was limited to one thousand, and the par value of the share was fixed at two hundred dollars.

In November 1868 George H. Haines, was the owner of ten shares of the association; to which the dues, amounting to eleven dollars a share, had been paid; and he then obtained an advance on his shares of \$880, or \$88 a share; and he executed his bond, by which he bound himself to the Winchester Building Association in the sum of ten dollars a month as dues, and the further sum of four dollars and forty cents a month as interest on \$880, advanced by said association on ten shares of stock of said association held by him, the payment whereof to the Secretary of the association he promised, &c.

The condition of the bond was that Haines should pay to the Secretary of the Association the sum of fourteen dollars and forty cents on or before the first Friday night of every month, beginning on Friday the 4th of December 1868; the payment to continue until each member of the association shall have received the sum of \$200 on each of his or her unredeemed shares of stock, over and above all losses and expenses of the association.

At the same time Haines and wife conveyed to the trustees of the association a house and lot in Winchester, in trust, to secure the payment of the sums mentioned in the bond, at and for the times mentioned in the same, and with power to sell upon his failure for three months to pay all or any of his dues to the association.

Haines paid all dues up to October 1869; but he ceased to pay them after that time; and in December 1869, he and his wife conveyed the same house and lot to J. H. Shields, in trust to secure first, a debt due to Wm. T. Gilbert of \$500, and then

789 two other debts *mentioned in the deed. In this deed the previous deed to secure the Winchester Building Association is recognized.

In March 1869 the trustees in the deed to secure the Winchester Building Association, proceeded to sell the house and lot under the deed to them, when it was purchased by Gilbert at the price of \$1,050, upon the terms of one-third cash, and the balance upon a credit of one and two years, with interest at ten per cent. per an-

num. And he made the cash payment, and gave two bonds each for \$350, and a deed of trust upon the property to secure them.

In stating the amount due from Haines to the association, he is charged with the amount advanced on the ten shares, \$880, and the dues, interest and fines since October 1869, \$89, and additional interest on \$880, from March 5th to March 25th, of \$3.08, the whole amounting to \$972.08.

In May 1870, Wm. T. Gilbert presented to the judge of the Circuit court of Frederick county, his bill for an injunction to restrain the trustees from delivering to the Winchester Building Association the bonds he had executed for the deferred payments of the purchase money of the house and lot he had purchased at their sale. After setting out the foregoing facts, he insisted that the claim of the association for \$972 was unwarranted by the bond and deed of trust, and could not be sustained by the articles of association; and that there was no provision in the deed of trust for the repayment of the \$880, or any part thereof, in any event; and that no such claim could be sustained by the constitution and by-laws of the association. He insists that when the shares of the association are redeemed, it is not understood that the sum advanced shall be paid any further than the

same may be paid by monthly payments of one dollar on each share redeemed; that the advance is made in consideration of the assignment of the shares to the association, and the promise to pay interest on the advance; the shareholder undertaking to make his shares good by continuing his monthly payment of dues until the unredeemed shares are worth \$200 each; and to pay these dues and interest the bond and deed of trust were given by Haines. And making the Winchester Building Association, the trustees in both deeds, and the creditors in the last deed, parties, he prayed for an injunction; that the funds might be brought into court; that the purchase money might be distributed under the direction of the court; and for general relief. The injunction was granted.

The Winchester Building Association answered the bill; and insisted that it was clearly the purpose of the articles, and is the clear effect of the said bond and deed of trust, to secure the punctual payment of the monthly dues and interest so long as the association should continue to exist, (which was until it could pay to each unredeemed stockholder \$200 on each of his shares); that if, however, there should be a failure for three consecutive months or more, to make such payments, then the property conveyed in trust should be sold, and after the expenses of sale, its proceeds applied to repay all moneys that might be owing from such former stockholder to the association, whether the same should have matured and become payable at the time of such sale or not, and whether owing for advances made, for monthly dues or interest.

In August 1870, the cause came on to be

heard, when the court referred it to a commissioner, to take an account of the sale of the real estate in the proceedings mentioned, and of the liens thereon, their amount and priorities; and he was directed also to state an account of the charges under the second section of article 13, of the articles of the association, upon the stock of the said Haines. (This section provides that all shares on which no payment has been made for six months shall be forfeited to and sold by the association, and the surplus of proceeds, after deducting therefrom the dues, fines, &c., owing to the association, shall be paid over to the delinquent member.) And he was further directed to ascertain the rate at which the shares of the stock of the association were being redeemed at the date of the sale under the deed of trust.

The commissioner made his report. He does not state the amount due under the deed to secure the association, except by an extract from the deed expressing what it was intended to secure. The charges against Haines for dues, interest, fines, and interest on fines, up to March 29, 1869, the date of the sale, he reports at eighty-nine dollars, and up to the first Friday in April 1870 at \$108.60. The sale of shares on the 4th of March 1870 was \$100 per share, and on the 1st of April following \$99.50 and \$98.

The cause came on to be finally heard on the 4th of July 1871, when the court taking the amount advanced to Haines, \$880, with interest charged monthly to the day of the sale of the property, and deducting therefrom the dues and interest paid by him up to October 1869, \$115.50, leaving \$767.21, made a decree that the trustees should collect the purchase money due upon the bonds of Gilbert, and should pay to the Winchester Building Association the sum of \$767.21, with six per cent. per annum interest thereon, from October 1st, 1869 until paid, to be credited by \$288 as of March 26th 1870; that being the net amount of the cash payment for the property, which had been paid over at the time to the association; and the balance of the purchase

money was directed to be paid to Gilbert the preferred creditor in the deed to Shields.

And holding that the ten shares of stock which had been redeemed, was liable under the second section of Article 13, of the articles of association to be sold, for the payment of the dues which had been credited upon the sum advanced, and also for dues and interest which should have been paid up to the day of sale, decreed further, that the trustees should sell the said stock, and out of the proceeds pay to the association the sum of \$294.20, and also the monthly dues, exclusive of interest and fines, accruing since the first Friday night in March 1870; and the balance, if any, pay to said Haines or his assigns.

From this decree the Winchester Building Association applied to a judge of this court for an appeal; which was allowed.

Parker, for the appellant.

Barton & Boyd, for the appellees.

BOULDIN, J., delivered the opinion of the court.

A preliminary motion has been made in this case by the appellee, to dismiss the appeal as improvidently awarded, on the ground that the amount in controversy is below the jurisdiction of the court. It is certainly a matter of no small difficulty to ascertain what is the exact pecuniary sum in controversy between the parties: but in the view taken of the case by the court it will be unnecessary to decide that question; for in addition to that, the title to the ten shares of stock which were redeemed by the association is also involved. These ten shares were ordered to be sold as the property of Haines to satisfy his debt to the association, whilst they were claimed by the latter as belonging absolutely to 793 it. The value of these shares shortly before the date of the sale of Haines' property, to wit: on the 4th of March 1870, appears by a commissioner's report in the cause to have been \$100 each, and from 50 cents to \$1.50 a share less, a month or two afterwards. Either value would be far above the sum required to give this court jurisdiction, independently of the uncertain pecuniary demand. The motion is therefore overruled; and we come to the merits of the appeal.

Since the cause was heard and decided in the Circuit court, this court in the case of *White v. The Mechanics Building Fund Association of Lexington*, 22 Gratt. 233, has had under consideration the operation and effect of the acts of Assembly authorizing the organization of Building Fund Associations, and has settled some principles which, had they been established before the decision of this cause in the court below, would have rendered the labors of that court, and of counsel, far less arduous.

The articles of association in the two cases are substantially, indeed in most respects identically, the same; and in construing the effect of the redemption of shares, this court, in the case in 22 Gratt. (consisting of four judges) held unanimously "that the Building Fund Association, by the redemption of the appellant's shares of stock, acquired the right of property therein; and that the assignment of them to the association by the appellants for the price he received, was not an hypothecation for a loan, but an absolute surrender of them to the association, whereby they were sunk and extinguished." See decree of the court, *ibid.* p. 251.

The contract of redemption in the case before us, is in all respects the same in effect with that before this court in the case referred to. The shares redeemed, like those in that case, became the absolute property of the association; "they were "sunk and extinguished" for value received; and consequently, they could in no respect be treated as a security

for a loan. The Circuit court erred, therefore, in so treating them. If they continued in existence for any purpose whatever, they could only so continue as the absolute property of the association, and of course could not be sold for a debt due to it.

Such being now the established law in such cases, the only remaining question is, what was the debt of Haines to the association, secured by his bond and deed of trust, and what is now due thereon in cash? The \$880 "advanced to him by the association for the redemption of his stock does not constitute the debt or any portion of it. That sum was merely the consideration paid to him by the association for the shares of stock assigned by him to the association, and for his undertaking to make certain monthly payments secured by bond and deed of trust on property. The bond and deed of trust to secure it show what these payments are. They are \$14 40-100, monthly, until the association shall be able to divide \$200 to each unredeemed share. That covers his entire indebtedness secured by the deed; for fines to accrue are not included therein; and as the deed provides that the whole debt secured, due, and to become due, shall be paid out of the proceeds of the property conveyed in trust, the difficult question is presented: what is the present value of the debt thus secured? What is the present value of \$14.40, payable monthly, until the association shall be able to divide \$200 to each unredeemed share. As that time, unless it has occurred during the pendency of the appeal, is necessarily uncertain, any calculation to fix it must be of necessity conjectural and approximate only. There can in such cases be no mathematical certainty. If the sum must be worked out, it can only be done

by resorting to some approximate estimate, "analogous to the valuation of life estates, annuities for life, &c., &c. We think it probable that in this case an estimate sufficiently certain for all practical purposes may be made by the Circuit court through its commissioner, when the case goes back. The association appears to have been in operation between five and six years. The exact date of its organization does not appear; but as Haines' first monthly payment appears to have occurred in January 1868, we suppose the organization of the company took place about that date. If so, the shares rose to the value of \$100 in two years and three months; for on the 4th of March 1870, they are proved by a commissioner's report, to have been worth that sum. Three years and six months have elapsed since that time; and at the same rate of advance the shares would already have reached the par value. Whether that be so or not, the Circuit court can have before it the present value of the shares, and their value at the end of each year from the organization of the association; and with this material, it is presumed that an approximate estimate of the debt, sufficiently accurate, can be made.

But, as it is very probable, indeed almost

certain, that the claim of the association and that of the appellee, Gilbert, the next incumbrancer, will consume the entire trust fund, the court is of opinion that unless the present value of the appellant's claim can be agreed on between the appellant, the appellee Gilbert, and Haines the debtor, then the said Gilbert and Haines shall have the option of requiring the net proceeds of the trust, after satisfying dues actually accrued (not including fines) to be invested at interest, under an order of the court; and that the monthly dues shall, from time to time, be paid out of the accruing interest, and so much of the principal as may be required to meet them, until

796 *the unredeemed shares shall reach the par value of \$200, should the fund be sufficient for that purpose. But, should said Gilbert and Haines prefer that the debt to the association shall be at once discharged at its present value, then the Circuit court will proceed, as nearly as it can, to estimate that value. This court not having sufficient data before it, will not attempt to prescribe a formula to govern the Circuit court. It is presumed, however, that such facts will be accessible to that court as will enable it to make an approximate estimate which will be just and satisfactory.

The decrees complained of must be reversed, with costs to the appellant, and the cause remanded to the Circuit court, to be proceeded in according to the principles above declared.

The decree was as follows:

The court having maturely considered the motion made by the appellee at the last term, to dismiss the cause for want of jurisdiction, doth overrule the same: and having maturely considered the transcript of the record of the decree aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the Circuit court erred in treating the redemption by the appellant, of the ten shares of stock in the proceedings mentioned at the price of \$880, as a loan at that sum, with a transfer of the shares as a security for its payment, instead of treating it as an absolute sale and transfer of these shares to the association, whereby the association acquired an absolute right of property therein, and the same were "sunk and extinguished."

The court is further of opinion, that the sum of \$880, advanced for the shares, was the price thereof, and constituted no part of the debt of Haines to the association; *that the only debt from him 797 which constituted a lien on the property conveyed to Shields, trustee, is the debt mentioned in the bond of Haines to the association and the deed of trust given to secure it, viz: the sum of \$14 40 cents, for dues and interest, not including fines, to be paid monthly, beginning on the 4th day of December 1868, and continuing until the association shall be able to divide \$200 to each unredeemed share, credited by such monthly payments as have been heretofore

made. The balance of the accrued instalments, and the present value of those yet to fall due, constitute the entire debt of Haines, secured by his bond and deed of trust; and unless the appellant, the appellee Gilbert, and Haines, the debtor, can agree among themselves as to the present value of the future instalments, the said Gilbert and Haines shall have the option of requiring the net proceeds of the trust property, after discharging the dues aforesaid actually accrued, exclusive of fines, which are not charged on the trust fund, to be invested under an order of the Circuit court, and the accruing interest and so much of the principal as may be necessary to be applied, from time to time, to the payment of the monthly dues and interest aforesaid, as they may accrue, until the debt shall be discharged, should the fund be sufficient; and the residue, if any, to Gilbert's debt.

But should said Gilbert and Haines elect to have the unaccrued quotas reduced to their present value and paid in cash, then the Circuit court will proceed to ascertain, as nearly as practicable, that present value. The time when the association will be able to divide the requisite amount (unless it has arrived already) being wholly uncertain, any calculation which may be resorted to to fix it, must, like cases of life estates, annuities for life, &c., be approximate and conjectural merely. There can be, from

798 the nature of the case, no mathematical *certainty. But the Circuit court can have before it the value of the shares at the end of each year from the organization of the association, showing their progressive advance in value for a series of years; and with such materials, that court can, with a reasonable approximation to accuracy, ascertain the period of final distribution. The sum will then be simple. Some such calculation as that suggested should have been made by the Circuit court, instead of treating the price of the shares as a loan, and proceeding on that basis.

It is, therefore, decreed and ordered, that the decrees complained of, so far as they are in conflict with this decree, be reversed and annulled; and that the appellee Gilbert do pay to the appellant, its costs in this court expended. It is further ordered, that the cause be remanded to the Circuit court, to be further proceeded in according to the principles above declared; which is ordered to be certified to the said Circuit court of Frederick county.

Decree reversed.

799 *Tyson's Ex'ors v. Glaize & als.

September Term, 1873, Staunton.

1. Circuit Court—Authority to Make Decrees in Vacation.*—A Circuit court has no authority to make a decree or render a judgment in a cause in vacation: except such decrees and orders as are authorized by statute: and the consent of the parties cannot give the jurisdiction.

*See principal case sustained in *Chase v. Miller*, 88 Va. 796, 14 S. E. Rep. 546.

This was a bill filed in January 1871 in the circuit court of Clark county, by the executors of Isaac Tyson, jr., deceased, against L. A. Glaize and others, to set aside a judgment which had been recovered against Isaac Tyson, jr., and to enjoin the sale of real estate under an attachment issued in said suit. The defendants appeared and demurred to the bill. And at the June term of the Circuit court, the cause came on to be heard, when by consent of counsel, it was ordered by the court, that the cause be submitted to the court to decide on the demurrer, the order of the court to be entered in vacation as of the last day of this term.

And afterwards, to wit: on the 4th of August 1871, a decree was entered of record in vacation, by order of the judge of said court. After referring to the order made by consent at the previous term; and bringing on the cause as on the 20th day of July, the court sustained the demurrer, dissolved the injunction which had been granted to the plaintiffs, and dismissed the bill with costs. And thereupon the plaintiffs applied to a judge of this court for an appeal; which was allowed.

800 *Williams & Williams and Robertson, for the appellants.

Parker, for the appellee.

ANDERSON, J., delivered the opinion of the court.

The final decree in this cause was made and entered in vacation, and we are met at the threshold with the question, is it valid and binding?

The court is unanimously of opinion that the Circuit courts, and not the judges thereof, are invested with jurisdiction to try causes, and pronounce decrees therein; and that the judges have no jurisdiction to perform any judicial function in vacation, except where the power is expressly conferred, as to grant injunctions and appeals, to hear motions to dissolve injunctions, to direct accounts, and to perform such other functions as are expressly authorized by law. And no power being conferred by statute, when the decree in this cause was entered, to pronounce and enter decrees in vacation, and consent of parties or their counsel not giving jurisdiction, the court is of opinion that the order made in the cause, directing the decree to be made and entered in vacation, was erroneous; and that the supposed final decree made and entered in pursuance of such order, is not the decree of the court. The court is therefore of opinion, without deciding any other question in the cause, that the said order must be set aside, and the decree entered in vacation in pursuance thereof must be reversed and annulled; and that the cause be remanded to the Circuit court of Clark county, for further proceedings to be had therein.

The decree was as follows:

The court having maturely considered the transcript of the record of the decree

aforesaid, and the arguments of counsel, without deciding the other questions 801 in this *cause, is of opinion, for reasons stated in writing and filed with the record, that the decree of the 9th of June 1871, whereby it was in effect ordered, by consent of counsel, that the cause should be heard in vacation, and the order or decree of the court to be entered in vacation as the decree of the court, is erroneous; and that the decree made in pursuance of said order, and directed to be entered of record in vacation, to have the effect of a decree of the last term of said court, not having been afterwards confirmed or recognized as its decree, by any subsequent action of said court, is null and void. It is therefore considered by the court, that the said decree and order of the 9th day of June 1871 be reversed and annulled; that the said order or decree entered in vacation as of the last term of the court, be rescinded and annulled; that the cause be remanded to the Circuit court of Clarke county, for further proceedings to be had therein; and that the appellee, Louisa A. Glaize, pay to the appellants their costs by them expended in the prosecution of their appeal here: Which is ordered to be certified to the said Circuit court of Clarke county.

Decree reversed.

802 *Childress & als. v. Morris.

September Term, 1873, Staunton.

1. **Equity Jurisdiction—Discovery—Immaterial—Demurrer.**—Where the attempt is to enforce a legal demand in a court of equity, and the need of a discovery is the alleged ground of equity jurisdiction, and there is no averment in the bill that the discovery is material or necessary, the bill is demurrable.
2. **Same—Same—Same—Bill Dismissed.**—Where it appears at the hearing that the discovery was not necessary, the bill will be dismissed.
3. **Administrator—Sale of Bank Stock.**—C as administrator of B, sells ten shares of bank stock to M, upon which B had borrowed money from the bank, and had given his notes; and M pays the full price of the stock to C, on C's undertaking, as administrator of B, to pay the notes. C pays one note but does not pay the other, and the bank retains the amount out of the dividends on the shares. **Held:** Same—Same—Liabilities of Sureties.—Neither the

***Equity Jurisdiction—Bill for Discovery.**—The proposition laid down in the principal case, that a bill is demurrable when it attempts to enforce in equity a legal demand on the ground of need of discovery, where there is no averment in the bill of the materiality or necessity of the discovery, seems well settled in Virginia. See *Hall v. Smith*, 25 Gratt. 76; *Collins v. Sutton*, 94 Va. 129, 26 S. E. Rep. 415; *Jones v. Bradshaw*, 16 Gratt. 300; *Hale v. Clarkson*, 23 Gratt. 42; *Hardin v. Hardin*, 2 Leigh 572. See also, *Bart. Ch. Pr.* (2d Ed.) §24, §25.

Same—Remedy at Law.—See *foot-note* to *Goolsby v. St. John*, 25 Gratt. 146, for a collection of authorities for the proposition that where there is an adequate remedy at law, equity will refuse relief.

estate of B. nor the official sureties of C as administrator, are responsible for the failure of C to perform his undertaking.

In January 1868 Marcellus M. Morris instituted a suit in equity in the Circuit court of Albemarle county against James C. Childress, adm'r of James Brady, deceased, and James W. Mason and Daniel J. Hartsook, his sureties in his official bond, to recover the amount of a note of Brady, which the plaintiff alleged Childress had promised to pay. Childress and Hartsook appeared, and each demurred and answered separately.

On the 15th of October 1870 the cause came on to be heard, when the court made a decree overruling the demurrers, and decreeing in favour of the plaintiff
803 *against Childress and his sureties for \$450, the amount of the note, with interest from the 13th of May 1857 until paid, and his costs. And thereupon Childress and Hartsook applied to this court for an appeal; which was allowed. The case is sufficiently stated by Judge Bouldin in his opinion.

Blakey, for the appellants.

Robertson & Southall, for the appellee.

BOULDIN, J., delivered the opinion of the court.

In this case there was a general demurrer to the bill by Childress, and a demurrer by Hartsook also, setting forth special cause of demurrer; and the same parties filed also separate answers. The plaintiff below replied generally to the answers, and joined in the demurrers.

On the hearing the court below overruled the demurrers, and entered a joint decree against the defendants, James C. Childress, James W. Mason, and Daniel J. Hartsook, for the debt claimed in the bill, viz: Four hundred and fifty dollars, with six per cent. interest from the 1st day of July 1862, subject to a credit of thirty-three dollars and eighty-five cents, with interest from May 13, 1857.

From this decree Hartsook and Childress have appealed to this court; and the first question which presents itself, although not argued by counsel on either side, is, were the demurrers properly overruled?

The demurrers were, as we have seen, separately filed; and as Childress is charged as principal defendant we will consider the case only as to him; for it is only through him that the others can be charged, they being his sureties. His demurrer was general, and necessarily raises the question, whether the matters stated in the bill, as therein set forth, make a case for the
804 interposition *of a court of equity.

Does it set forth an equitable demand?

Let us briefly state it, in the words of the bill, which, after stating that Childress had qualified as administrator of Brady, with Hartsook and Mason as his sureties,

sets forth the claim of the plaintiff below as follows: "The said Childress, as such administrator, sold your orator ten shares of the stock of the bank of Scottsville, for the sum of one thousand one hundred and two dollars and fifty cents; said sale having been made in May 1857. At the time of said sale, the bank stock was subject to the payment of two stock notes given said bank by James Brady, each for four hundred dollars, one due 12 and 15 March, 1857, and the other due 9 and 12 June 1857. Mr. Childress, the administrator, assured your orator, that if he would pay the full amount of the purchase money for said ten shares of stock, that he (the said Childress) would, as administrator, pay off the said two stock notes. Accordingly, your orator relying upon this express promise and agreement of Mr. Childress, as administrator as aforesaid, settled with Mr. Childress as such administrator, the full amount of the purchase money aforesaid, to wit: \$1,102.50, as will more fully appear by reference to the receipt given to your orator, by said administrator Childress, herewith exhibited, marked (A). Mr. Childress did, in pursuance of his promise, pay off the first stock note and a portion of the second; but the balance of the second stock note was paid off to the bank of Scottsville, by the application of the following dividends on the said ten shares of stock," (giving a list of dividends amounting to \$450). "Mr. Childress suffered these dividends to be so applied, notwithstanding these dividends having accrued after your orator's purchase as aforesaid, belonged to your
805 orator, *and notwithstanding his promise to pay both of the stock notes out of the assets of the testator's estate." Such, in the words of the bill, is the character of plaintiff's claim; and conceding for the present, that the contract set forth is one which it was entirely lawful and proper for the administrator as such to enter into, (which, however, we are far from admitting,) the question arises, does the contract as thus set forth confer on the plaintiff below equitable rights only, or is the demand a purely legal one, not cognizable in a court of equity? It is based on a contract by which the administrator, in consideration of a payment to him, by Morris, of a sum of money, the larger portion of which both Morris and the administrator knew belonged in effect to the bank of Scottsville, expressly promised and agreed with Morris to pay the bank what was thus due to it. And the bill goes on to allege, "that notwithstanding his promise to pay" the stock notes aforesaid, he did not do so, but allowed a portion thereof to fall on the plaintiff Morris. The words used in the bill are the same in effect, and in part are identically the same which would have been used in a declaration in assumpsit against Childress on the contract set out; and in the striking language of Judge Baldwin in the case of *Armstrong v. Huntons*, 1 Rob. R. p. 323, altered only to suit the facts of this case, we say, "If

this be not an action of" (assumpsit) "brought in a court of chancery, it must be, because the plaintiff has asserted his demand by a bill instead of a declaration." The demand, if lawful, is plainly cognizable by a court of law in an action of assumpsit against Childress. It is true that in this case there is a colorable prayer for a discovery, but with no allegations showing its "materiality or necessity," and the facts show that it was wholly unnecessary. The proof of every fact as to which a discovery was asked, as the record 806 shows, was *easily attainable in a court of law. The prayer, therefore, was merely colorable. In the case of *Armstrong v. Huntons*, Judge Baldwin, with the concurrence of all the judges, said, "it is perfectly clear as a general rule, that in a bill to substitute an equitable for a legal forum, a prayer for a discovery, without any averment, showing its materiality or necessity, is naught. If this court has tolerated a departure from this rule in regard to slave property, (*Gregory's adm'r v. Marks' adm'r*, 1 Rand. 355,) it has been where the necessity for a discovery has been supposed to be incidental, at least prima facie, to the nature of the demand, or where the suit is to recover a stock of slaves after a considerable lapse of time, and there has been such an increase as would raise a fair presumption, that the plaintiff is ignorant of their names, ages and residence. But even under such circumstances, if it may be inferred from the statements in the bill, or the evidence in the cause, that no such difficulty in point of fact exists, a court of equity will not take cognizance of the cause, unless there be some ground for the exercise of its equitable jurisdiction."

The whole case is singularly apposite to that before us. The facts of the case show that no necessity for a discovery of the proofs called for "in point of fact exists;" and in the absence of these, it may fairly be inferred from the bill itself, (in which there is no averment of its materiality or necessity,) that such necessity does not exist. We conclude with the concluding sentence of the learned judge in the case cited, altered only to suit the facts of this case, that "to entertain jurisdiction of the cause before us would be to obliterate the lien of demarcation between the two tribunals," so far as parol contracts are concerned, "and to permit actions of" assumpsit, "to be prosecuted indifferently in a court of law and a court of equity at the election 807 *of the plaintiff." We are of opinion, therefore, conceding the contract to be binding on the administrator as such, that a court of equity had no jurisdiction of the claim; and the demurrer should have been sustained.

As this conclusion must necessarily result in a reversal of the decree and the dismissal of the bill, it is perhaps unnecessary to consider any other question in the cause. But to save further litigation it may be proper to add, that were the case proper for the jurisdiction of a court of equity, our

decision would be the same, because, we are of opinion, that as Morris and Childress the adm'r both knew that the one was paying and the other receiving a fund not properly payable to the administrator, it was not competent for the administrator to make any agreement with Morris in relation to that fund, which would cast a burden on the estate of Brady, or on his own sureties in his administration bond. He could bind himself personally but not his sureties. On both grounds the demurrer should have been sustained, and the bill dismissed. The decree of the Circuit court must be reversed, and a decree entered sustaining the demurrers and dismissing the bill with costs to the appellants in both courts.

The decree was as follows.

The court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the Circuit court erred in overruling, instead of sustaining, the demurrers to the bill: 1st, because the claim asserted thereby as therein set forth, presented a case exclusively cognizable in a court of law, of which a court of 808 equity had no jurisdiction. *2d, because the agreement set forth in the bill was not one that the administrator Childress had authority to make, as administrator, so as to bind the assets of his testator's estate. It is therefore decreed and ordered that the decree of the Circuit court of the 15th day of October 1870, be reversed and annulled, and that the appellee Morris do pay to the appellants their costs by them expended in the prosecution of their appeal in this court.

And this court proceeding to enter such decree as should have been entered in the Circuit court, doth further decree and order, that the demurrers of the defendants in that court, Childress and Hartsook, be sustained and the bill dismissed; and that the plaintiff Morris do pay to the defendants in the Circuit court, their costs about their defence in that behalf expended.

Decree reversed.

809

*Tams v. Brannaman.

September Term, 1878, Staunton.

1. *Sale of Land—Bonds—Payable in "Bankable Currency."*—In October 1862, B sold to T land, for \$2,800, about what he had given for it in 1854; cash \$1,000 and the balance in one, two and three years. The article of agreement says nothing of the kind of money to be paid, but the bonds, which were written by T and sent to B, are made payable "in bankable currency." B expecting to use the \$1,000 in another purchase, at his instance, T gives him his bond for it, payable on demand, and holds the money ready to pay it at any time; but no demand is made until after the war, and in 1865 and 1866, T makes two payments to B, each of \$300. T says his understanding of the contract was that he was to pay in Confederate money. B says his under-

standing was it was to be paid in good money. B was a plain farmer. HELD:

1. Same—Same—Same—Confederate Contract.*—

There is no evidence to show that this was a contract according to the true understanding and agreement of the parties, to be performed in Confederate money or with reference to Confederate money as the standard of value, and as the price was not more than the land was worth in good money, it was not a Confederate contract.

2. Same—Same—Same—Measure of Recovery.

—If it is a Confederate contract, the value of the land at the time of the contract is the most just measure of recovery.

3. Same—Same—Same—Scaling.—The \$1,000

having been retained by T at the instance of B, it is to be considered a borrowing by T from B, of \$1,000, of Confederate currency, and to be scaled.

In April 1854 Samuel Brannaman purchased from Thomas J. Michie, trustee, a tract of land in Augusta county, containing about ninety-eight acres, for which

810 *he paid to Michie \$2,456.25. He went to live upon the land, and built a barn and corn-crib upon it. In October 1862 Brannaman sold this land to Wm. H. Tams. The article of agreement for the sale is dated the 1st of October 1862, though it was probably ante-dated a few days. By it Brannaman sells the land to Tams "for the sum of twenty-eight hundred dollars, to be paid by the said Tams in the following manner, to wit: One thousand dollars cash in hand, and the remainder in three equal annual payments of six hundred dollars each." A deed with general warranty reserving a lien, to be made upon the payment of the one thousand dollars.

It appears that Brannaman wishing to use the purchase money to buy another farm, at his instance, Tams, instead of paying the one thousand dollars, the cash payment for the land, executed his bond to Brannaman for this sum, payable on demand; and he executed his three bonds of \$600 each for the deferred payments. All the four bonds are made payable in "bankable currency."

Michie not having conveyed the land to Brannaman, he joined with Brannaman and wife in a deed bearing date the 24th of November 1862, by which they conveyed the land to Tams, according to the contract. This deed was taken by a notary to the farm where Brannaman lived, who took the acknowledgment of Brannaman and wife; and at the same time he delivered to Brannaman the bonds which had been executed and prepared by Tams.

Tams seems to have kept the one thousand dollars on hand in Confederate money, ready to be paid whenever called for; but Brannaman not having bought another farm, and being in the Confederate service at one time and a prisoner afterwards, no demand was made for it during the war. After the war, viz: In November 1865

*See principal case cited in Cabel v. Cox, 27 Gratt. 180.

811 *and April 1866, Tams made two payments to Brannaman, each of three hundred dollars.

In May 1869 Brannaman instituted a suit in equity in the Circuit court of Augusta county against Tams, and in his bill, after setting out the sale of the land as before stated, and the execution of the bonds, he insisted that the sale was for good money: that the price he was to get was not greater than the land was worth before the war, or than he had given for it, taking into account the improvements he had put upon it; that the term "bankable funds" was not in the contract, and that he, a plain farmer, supposed they meant good money. And he asked that he might have a decree for the amount due him in good money, and that the lien reserved on the deed might be enforced for the payment of the money.

Tams answered the bill, averring that he understood, that he was to pay for the land in current money of the country, then circulating, which was Confederate money; and if he had not so understood it he certainly would not have made the purchase. That he prepared the bonds in accordance with what he believed to be the complainant's understanding of the contract; and they were sent by the notary who went to take the acknowledgment of the deed, and were accepted by the complainant in execution of the complainant's contract with him.

The plaintiff and defendant gave their testimony in the cause: Brannaman declaring that he understood the contract to be for the payment of the price of the land in good money; Tams equally positive as to his understanding that it was to be paid in Confederate money. Neither of them say that anything was said at the time as to the money in which the land was to be paid for.

812 *The evidence was very conclusive, that the land was worth in good money, both before and after the war, the amount which Tams contracted to pay for it.

The cause came on to be heard on the 10th of November 1871, when the court held that the bond for \$1,000 should be scaled as of its date, but the other three bonds should not be scaled, because if made with reference to Confederate States Treasury notes as the kind of currency in which the parties were contracting, the value of the land was the most just and equitable measure for determining the amount fairly due on the said bonds; and if they are made payable in good money as they fall due, after scaling the bond for \$1,000 the defendant would not pay more than the fair value of the land at the date of the purchase. And giving him credit for the payments he had made, it was decreed that Tams should pay to the plaintiff the sum of seventeen hundred and sixty-eight dollars and seventy-one cents, with interest thereon from the 26th of April 1866, till paid. And unless the money was paid within four months, commissioners were appointed to sell the land, &c. And thereupon Tams applied to this court for an appeal; which was allowed.

Michie & Michie and Sheffy & Bumbardner, for the appellant.

Baldwin & Cochran, for the appellee.

CHRISTIAN, J. The scale of depreciation authorized by the statute, whether the "gold standard" or the "property standard" be adopted, is applied only where, according to the true understanding and agreement of the parties, the contract is to be fulfilled and performed in Confederate States treasury notes, or was entered into with reference to such notes as a standard of value.

813 *In the case before us, there is nothing in the contract of sale, which is in writing, to indicate the kind of currency in which it was to be fulfilled or performed.

The contract of Tams was to pay for the tract of land sold by Brannaman, "the sum of twenty-eight hundred dollars to be paid by Tams in the following manner: One thousand dollars cash in hand, and the remainder in three annual payments of six hundred dollars each." Both Tams and Brannaman are examined as witnesses. Tams, both in his answer and deposition, declares that he regarded the sale as one for Confederate money, and expected to discharge it in that currency. Brannaman, on the other hand, is very emphatic in his declarations, that he sold his land for good money; that it had cost him more before the war than the price at which he sold it to Tams. Nor does any evidence in the cause, outside of the contract of sale, throw any light upon the subject.

It cannot be said, therefore, that it appears, in this case, that it was the true understanding and agreement of the parties, (i. e. of both parties,) that the contract was to be fulfilled or performed in Confederate treasury notes, or was entered into with reference to such notes as a standard of value. It is only in such case that the scale of depreciation can be applied.

When the contract of the parties sheds no light upon the question as to the kind of currency in which it is to be performed or fulfilled, the price for which the land is sold is a most important element to be considered in determining the character of the contract. In *Meredith v. Salmon*, 21 Gratt. 762, great stress is laid upon the fact, in the able opinion of Judge Staples, in which the whole court concurred, that while the real value of the land was only six thousand dollars, the agreed value or contract price was thirty thousand dollars.

814 *In *Morgan's adm'x v. Otey*, 21 Gratt. 619, the price for which the property sold was also considered a most important element in determining the character of the contract. In that case this court said: "The property was worth at least \$1,200 in gold at the day of sale. It was sold for \$3,700; while \$1,200 in gold was worth on the day of sale \$14,000 in Confederate currency. It is impossible to conclude, except upon the most explicit

evidence, that any man of common discretion would sell his land for \$3,700 in Confederate money when it was worth upwards of \$14,000 in that currency."

In the case before us the conclusive and overwhelming testimony is, that the land was sold for no more than its value in gold. In fact, Brannaman paid in 1854 the sum of \$25 per acre, and put upon it valuable improvements, amply sufficient to bring it up to the price which Tams agreed to pay, to wit: \$28 per acre.

The form of the bonds, which were written by Tams and accepted by Brannaman, does not in any manner affect my conclusions. The fact that the bonds of the three deferred annual payments are made payable in "bankable currency," does not furnish, as against the predominating evidence in the cause, any key to the "true understanding and agreement of the parties." These words were not used in the contract of sale; they were put in the bonds by Tams.

In point of fact, gold and silver, Virginia treasury notes, Virginia bank notes, and the notes of the banks of other States, as well as Confederate States treasury notes, may all be regarded as "bankable currency; that is currency that would have been received at the banks on deposit, or for the payment of debts due to the banks."

In my view of the case, the price for which the land sold, and the weight of the evidence, shows, that the contract

815 *was not one to be fulfilled or performed in Confederate treasury notes, but was a sale for a sound currency. But if it can be regarded as a Confederate contract, then I think it is clear that in this case the "most just measure of recovery" is the value of the land; which the evidence conclusively shows to be certainly not less than the contract price. As to the cash payment of \$1,000, inasmuch as the appellant had the privilege of paying that amount in Confederate currency, and held it at the request of the appellee, he must be regarded to that extent as a borrower of that amount of Confederate money, and that amount ought to be scaled at its gold value.

Upon the whole case, I am of opinion that there is no error in the decree of the Circuit court, and that it ought to be affirmed.

MONCURE, P. and STAPLES, J., concurred in the opinion of Christian, J.

ANDERSON and BOULDIN, Js., dissented.

Decree affirmed.

816 **Lincoln's Adm'rs v. Stern & Wife.*

September Term, 1873, Richmond.

Guardian and Ward—Case at Bar.—Bill by S and J his wife against W and A administrators with the will annexed of L, stating L was a guardian of J, and asking for account of L's guardianship. W in his answer, says he acted as guardian of J. and settled his account as such in 1860, and paid over

*See monographic note on "Guardian and Ward."

the balance found due to S. Asks, if L is to be held to have been guardian, he may have the benefit of that settlement. There is no record evidence of L's qualification as guardian of J, and he never acted as such. He died in 1863. Comm'r's report shows the money certainly received, paid by W to S; but there were two claims due to J, which W says were not collected by L, and there was a third claim upon the estate of M, who died in July 1863. These three claims amounted to \$976.00. There was no proof of the condition of the two first debtors at any time, and whilst the comm'r reports the claims and their amount, he does not report L as liable for them. The court decrees that S and wife do recover of the adm'r's of L viz: W and A, the sum of \$976.00 as of the date of April 1st 1863, with interest on the principal; and that they pay the plaintiff's costs. **Held:**

1. **Same—Appointment and Qualification of Guardian.**—The court erred in treating L as guardian of J, without proof of his legal appointment and due qualification as such.

2. **Same—Liability of Guardian.**—In holding the estate of L responsible for said outstanding claims reported to be due J, under the circumstances of this case, without first having directed an enquiry into the present and past condition thereof; whether the same were collected or collectible by said L; and if they or any of them have been lost, whether the loss has occurred through the default or neglect of L.

817 *3. **Account Ordered before Personal Decree against Administrators.**—The decree is a personal decree against W and A the administrators of L; and it was error to enter a personal decree against them without having first ordered an account of their testator's estate.

This was a suit in equity in the Circuit court of Rockingham county, brought in May 1867, by John W. Stern and Josephine, his wife, against Jacob Lincoln and Abraham Lincoln, as administrators of B. F. Lincoln, deceased, to have a settlement of the account of B. F. Lincoln, who the plaintiffs alleged had been guardian of the plaintiff, Josephine, who before her marriage was Josephine Lincoln, the daughter of Preston Lincoln, deceased. The case is stated by Judge Bouldin in his opinion. The court having on the 30th day of October 1868, made a decree in favour of the plaintiffs for the sum of nine hundred and seventy-six dollars and sixty cents, with interest, the defendants obtained an appeal to the District court of appeals at Staunton; from whence it was transferred to this court.

Woodson, Liggett and Hays, for the appellants.

C. A. Yancey, for the appellees.

BOULDIN, J., delivered the opinion of the court.

It is charged in the bill in this case, that the testator of the appellants had qualified as the guardian of the female appellee, then Josephine Lincoln, as far back as the year 1848; yet he appears never to have acted in that capacity; nor is any order of court, or

guardian's bond, exhibited with the bill or filed among the papers. The administrators of B. F. Lincoln say in their answer, that he never acted as such guardian; and Jacob Lincoln, one of them, says that he himself always acted as the guardian of Josephine Lincoln, and so regarded himself; that he was accepted and acknowledged

818 as such *by the ward and her husband, and in that character that he, in the year 1860, actually settled his account as her guardian before commissioner Wartman, and had paid to her husband through his attorney, the amount reported to be then due, by executing negotiable notes therefor at short dates.

In that settlement before commissioner Wartman, the commissioner reported that there were two claims due to the ward not included in the settlement; not from the guardian, however, but from the estates of James Hopkins and D. Lincoln, respectively; but what was the then condition of those claims—whether then collectible or not; and if collectible, whether solvent or not, does not appear to have been reported on that settlement.

The settlement was made on the 16th of October 1860, and the payment of the balance reported by the commissioner, was made on the 16th of November 1860, very promptly after the settlement. For cause satisfactory to the commissioner, the claims against Hopkins' estate and D. Lincoln's estate were not at that time considered properly chargeable to the guardian. Very soon thereafter the late war between the United States and the Confederate States of America broke out, and in April 1861, by an ordinance of the Virginia Convention, the stay law was enacted. It was amended and re-enacted by the Virginia Legislature in 1866, and continued in force until January 1, 1869, when it expired by limitation. B. F. Lincoln died in 1863, in the very midst of the war, without having ever acted as guardian of the female plaintiff; and this suit was brought against his administrators with the will annexed, by Stern and wife, in April 1867, the stay law being then in full operation; and then it seems, for the first time, was the claim preferred

that B. F. Lincoln had been the guardian *of Josephine, and that his administrators were bound to render his account as such.

Jacob Lincoln, one of the administrators, in his answer to the bill, expresses his surprise at the character of the suit; does not acknowledge that the said B. F. Lincoln was ever the guardian of the female plaintiff; claims to have been himself the guardian, and to have been accepted as such by the ward, and subsequently by her husband; and sets out the facts and settlement above referred to. And he adds that if his brother should appear by order of court, and by giving a bond, although without acting, to have been in law the true guardian, he claims for him the settlement aforesaid, made by himself. Abraham Lincoln, the other administrator, filed a separate an-

swer, in which he says that he has no knowledge that B. F. Lincoln ever was guardian of Josephine Lincoln; "that he has been informed and always understood that Jacob Lincoln was guardian;" and he insists that Jacob should still be treated as such, and the estate of B. F. Lincoln relieved. Exhibits were filed with Jacob Lincoln's answer to show his own acts as such guardian; but there is in the record no proof whatever that B. F. Lincoln ever was guardian, unless it be inferred from the following statement of commissioner Wartman, referring to the settlement of Jacob Lincoln's account of 1860. "Subsequent investigations disclosed the fact that Jacob Lincoln had been acting for the ward of his brother B. F. Lincoln and vice versa." The Circuit court, on the bill, answers and exhibits, ordered that the administrators aforesaid settle before a commissioner of the court an account of the transactions of their testator B. F. Lincoln, as guardian of Josephine Lincoln; and commissioner Wartman, under that order, reported as the account of B. F. Lincoln, the account of Jacob Lincoln settled in 1860, accompanied by the statement *above quoted, in relation to the mistake made by the two guardians.

He then reported as still due to the female plaintiff the two claims mentioned in his former report, viz: A claim on the estate of James Hopkins, dec'd, as one of the sureties of Samuel Bare, who was executor of Christian Hoffman, dec'd, . . . \$398 95
A claim against the estate of D. Lincoln, dec'd, . . . 694 07

Amounting together to the sum of . . . \$1,093 02

These two claims, as we have already said, are the same mentioned in the report of 1860, but not included in the settlement. The commissioner further reports as due from the estate of Mary C. Lincoln, dec'd, to Josephine Stern, on the first of July 1863, with interest included from that date, the sum of . . . 143 30

Making an aggregate of . . . \$1,236 32
From which he deducts a credit of . . . 259 72

Leaving an aggregate balance of \$976 60 due to Josephine Stern.

The commissioner did not decide, and evidently did not intend to decide, nor did he report, that the above balance of \$976.60 was chargeable to and due from the estate of B. F. Lincoln, dec'd. On the contrary, he reports expressly in relation to the Hopkins claim, that he had not discovered, and was unable to say, whether that claim had ever been received by B. F. Lincoln or not; and he says nothing about the past condition of the claim, or its condition at the date of his report. There was but one witness examined, Jacob Lincoln, and he stated on oath that B. F. Lin-

coln had not collected that claim. In relation to the claim on D. Lincoln's 821 estate, *the commissioner reports that "it is or was in the hands of Smith Lofland, a former receiver of that fund;" that is to say, that it is or was under the control of a court of justice; and Jacob Lincoln swears that it had never been paid to B. F. Lincoln. The fund due from the estate of Mary C. Lincoln is reported to have accrued July 1st, 1863. It bears interest from that date, and is reported to be, not in the hands of B. F. Lincoln, but "in the hands of Jacob Lincoln, guardian of the said Mary C. Lincoln." In all probability, and for all that appears to the contrary, B. F. Lincoln was dead when the right to that fund accrued. The exact date of his death does not appear; but it is alleged in the bill that he died in 1863; and the debt accrued in July of that year. The commissioner certainly could not have intended to charge B. F. Lincoln's estate with a debt which accrued to the ward in the middle of the year in which he died, and perhaps after his death; which he certainly had no opportunity in his lifetime to collect by course of law, and which the commissioner expressly reports to be at the date of his report still "in the hands of Jacob Lincoln, guardian of the said Mary C. Lincoln, dec'd." Yet this claim is reported by the commissioner precisely as the other claims are reported, and they are all aggregated into one balance of \$976.60, which he reports to be due to Josephine Stern, not from B. F. Lincoln, but from the persons and sources above mentioned. He says, "The true amount still due and unpaid to Josephine Lincoln, (now Stern,) from the sources and individuals hereinbefore named, as of date April 1st 1868, is \$976.60; of which sum \$895.25 is principal, and \$81.35 is interest," thus reporting the true state of the facts, and submitting the whole matter to the court on the facts reported. There was no exception and no ground of exception to the report; be- 822 cause, as we have seen, it *set forth, as far as it went, the real facts of the case; and the same was confirmed as a matter of course. The court then entered a decree, "that the plaintiffs, John W. Stern and wife" do recover of the administrators, with the will annexed, of B. F. Lincoln, to wit, Jacob Lincoln and Abraham Lincoln, the sum of \$976.60, as of date April 1st, 1868, of which amount \$895.25 is principal and \$81.35 is interest." And it was further decreed and ordered, that the same defendants pay the costs. This is a personal decree against those defendants. Humphrey's adm'rs v. West's adm'rs, 3 Rand. 516. So that the Circuit court not only held that B. F. Lincoln was guardian of the female appellee, but that his estate was bound for the entire amount reported as aforesaid to be due to Josephine Stern; and without any account of the assets of B. F. Lincoln's estate entered a personal decree against his administrators for that amount. The appeal is taken from this decree, and

the court is of opinion that the Circuit court erred:

1st. In proceeding against the estate of B. F. Lincoln, dec'd, without proof of his appointment and qualification as guardian; especially when it appeared, as it did, that he had not acted in that capacity.

2d. In holding his estate responsible, under the circumstances of this case, for the claims reported by the commissioner to be due to Josephine Stern, without first directing an enquiry into the condition and solvency of those claims; so as to ascertain clearly whether there had been negligence on the part of the guardian or not.

3d. In entering a personal decree against the appellants without first taking an account of the assets of their testator's estate.

823 *The court is therefore of opinion, that the final decree aforesaid of the Circuit court is erroneous and should be reversed and annulled, with costs to the appellants; and that the cause be remanded to the Circuit court to be further proceeded in, according to the principles above declared.

The decree was as follows:

The court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the Circuit court erred, 1st, in treating B. F. Lincoln, dec'd, as guardian of the appellee Josephine Stern, without proof of his legal appointment and due qualification as such.

2d. In holding the estate of said B. F. Lincoln, dec'd, responsible for the several outstanding claims reported to be due to the said Josephine Stern, under the circumstances of this case, without first having directed an enquiry into the present and past condition thereof; whether the same were collected or collectible by said B. F. Lincoln, dec'd; and if the said claims or any of them have been lost, whether that loss has occurred through the default or neglect of said B. F. Lincoln.

3d. In entering a personal decree against the appellants, without having first ordered an account of the assets of their testator's estate.

It is therefore decreed and ordered, that the said decree of the Circuit court of the 30th day of October 1868 be reversed and annulled, and that the appellees do pay to the appellants their costs by them about their appeal in this behalf expended.

It is further decreed and ordered, that this cause be remanded to the said Circuit court, to be further proceeded in according to the principles of this decree.

824 *All which is ordered to be certified to the said Circuit court of Rockingham county.

Decree reversed.

825 *Goss & als. v. Southall, Receiver.

September Term, 1873. Staunton.

1. Judgment on Official Bond.—By a decree of the Circuit court of A. made in a pending cause on the

22d of October 1860, G. the sheriff, is directed to collect certain bonds, and deposit the net proceeds in the A Insurance co. to the credit of the cause. In May 1866, G reports that he had collected the money on the 5th of May 1862, and had proposed to the A co. to deposit the net amount \$882.12, but the co. declined to receive it, and hence the money was not deposited as directed. In October 1866, by another decree in the cause, G was directed to pay this sum with six per cent. interest to S. who was appointed receiver in the cause. In January 1869, S. signing himself receiver in the cause, gave more than ten days' notice to G and his sureties, that he would move the Circuit court for a judgment against them for the penalty of G's bond, to be discharged by the payment of the said sum and interest. And the court gave judgment for \$882.12, with six per cent. interest, from, &c. HELD:

1. Same—Jurisdiction of Court—Statute.—The court had authority under § 40, of ch. 49, of the Code of 1860, to render the judgment in favour of S as receiver.

2. Scaling.—It was proper not to scale the money.

The case is fully stated in the opinion of Christian, J.

Watson, for the appellants.

I. The judgment was not authorized by the 40th Sec. of Chap. 49, of the Code.

1. Because the notice was not based on the sheriff's return of May 1866, but expressly on the decree of October 826 *1866, and was not sufficient as a notice under said section.

2. Because by the decree of October 1866, the sheriff's return was merged, and could not be made the foundation of another judgment.

3. Because the return of the sheriff was not made "upon any order, warrant or process;" and there is no evidence that any such order, warrant or process was in his hands. 1 Rev. C. 1819, sec. 48, ch. 134, *ibid.* p. 526-527; and sec. 27, chap. 49 of Code of 1860.

4. Because the return does not show that the appellee was entitled to recover money of the sheriff. *Tolson v. Elwes*, 1 Leigh, 436; Code sec. 3, chap. 187; *Stuart v. Hamilton*, 2 Hen. & Mun. 48; *Greenhow v. Barton*, 1 Munf. 590; *Mayor of Alexandria v. Hunter*, 2 Munf. 228.

5. Because the proceeding was obviously not under the section in question, and the judgment was not in pursuance of the terms thereof.

II. The judgment was not authorized by the 5th sec. of chap. 167 of the Code, because under that section, the County court alone had jurisdiction. Code § 2, ch. 49, § 8 of ch. 13, and § 1, ch. 157.

III. Nor by the 6th section of chap. 167. 1. Because the appellee was not, in the sense of this section, entitled to recover money by action on any contract. *Perkins, &c., v. Giles, Governor*, 9 Leigh, 397; 1 Story's Eq. sec. 833 and 833a; 3 Daniel's Ch. P. 1919.

2. Or, if he was, only two of the defendants had sixty days notice of the motion; and the notice was not returned to the

Clerk's office forty days before the motion was heard; which must be taken to have been on the 13th day of May 1869. See the first and last clauses of the order of the 22d May 1869.

IV. If it was proper to sustain the motion at all, the judgment should have been 827 for the scaled value of the "amount collected, as of May 1862. This is certainly true, if the judgment was founded on the return of May 1866; and if on the decree of October 1866, still I submit that the amount should have been scaled under the 3d section of the act of March 3, 1866, Sess. Acts 1865-6, p. 185; and because the sureties were not bound by the decree of October 1866. *Drew v. Anderson*, 1 Call, 53.

V. Finally, the plaintiff in this motion has obtained a judgment on the law side of the Circuit court, to which he had no right to resort. If the judgment was based on the 40th section of chapter 49, it is clearly wrong, for, by it, the power to render judgment is confined to "the court to which, or to the Clerk's office of which, such return is made," and it is not denied that the return in this case was, and ought to have been made to the chancery side of the court.

If the judgment was entered pursuant to the 6th section of chapter 167, it is none the less faulty, for the reason that the Chancery court having taken jurisdiction of the matter, it would not release its hold for a motion to be made before another tribunal.

Michie, Wm. Robertson and Southall, for the appellee.

I. The appellee had a right to recover, under the 40th section of chapter 49, of the Code of 1860. 1. The position taken by the appellants that nothing was due to the appellee at the time of the Sheriff's return, is purely hypercritical. Something was then due to those he afterwards represented, and for whom he sues, the substantial parties plaintiff.

Besides, taking the statute literally, it does not say that the motion shall be made by the person entitled to recover by action. It provides that the motion may be made "on behalf of such person"—and so in this case, the motion was made by the ap- 828 pellee "on behalf of" *those entitled to recover "at the time such return ought to have been made."

2. The statute just referred to, does not authorize a judgment for the penalty of the sheriff's bond: therefore, the judgment was properly given for the sum of \$842.13, with interest from the 5th May 1862, subject to the two small credits: that being "so much principal and interest as were recoverable by action at the time such return ought to have been made." It is true that the court gave only six per cent. interest upon the said sum of \$842.13, instead of fifteen per cent. interest, as it might have done under the law. But the appellee, and

not the appellants, was prejudiced by this low rate of interest.

The appellants were in no way misled by the notice calling for a judgment for the penalty of the bond to be discharged by the payment of the precise sum for which judgment actually went.

The judgments being on the law side of the Circuit court, would make no difference, for the statute already referred to, authorizes the court, to which the return is made, to give judgment; without in any way confining the authority to any particular side of the court.

The Circuit court of Albemarle is a unit. It is not two different courts—one a court of law and the other a court of equity; it is simply one court, with a twofold jurisdiction. It is usual to keep a law order book and a chancery order book; but under the law one order book for both law and chancery entries, is sufficient. (See sec. 5, chap. 161, page 685, Code of Va. of 1860.) But the fact is, that there is nothing in the proceedings to show on which side of the court the judgment was given, if we except the statement of the clerk making the transcript of the record.

829 *II. As to the 5th section of chapter

167: This section authorizes the motion to be made in the court, in whose clerk's office the bond "is required to be returned." We can find nothing in the law requiring the sheriff's bond to be filed in the clerk's office of the county, rather than the Circuit court.—(See sec. 24, chap. 8, of the Code, page 94; and sec. 8, chap. 13 of the Code, page 103; and see *Wheeling Acts 1861-2*, page 5.)

III. As to the 6th section of chapter 167: The bond of the sheriff and his sureties is a contract made by them with the Commonwealth for the benefit of all who may become interested. The appellee certainly had a right to bring an action on this bond in the name of the Commonwealth for his benefit. If so, he had an equal right to move in his own name for judgment on the same. The statute does not say that an action can be maintained only on a contract made between the plaintiff and defendant in the suit; though in the case of a sheriff's bond the contract is virtually made with the public through the Commonwealth.

As to the sixty and forty days: The defendants, E. Goss and Sam'l M. Teel, were served with a sixty days' notice, and it was returned certainly more than two years, much less forty days, "before the motion was heard." (See order of 22d May, 1869, and order of 27th May, 1871.) The idea that a motion must be made in the name of the Commonwealth, because an action if brought, must be prosecuted in the name of the Commonwealth, is certainly a novel one. Motions are always brought in the name of the party making them.

IV. The court did not err in refusing to scale the debt.

1. The sureties have no right to impeach

an unreversed decree rendered against their principal.

830 *2. The Sheriff was responsible for the full amount to be collected, because he acted under a decree which only authorized him to collect in good money.

3. The evidence shows that greenbacks, at the date of the decree against him, (October 1866,) were worth no more than Confederate money in May 1862, when Goss made the collection. See *Magill v. Manson*, 20 Gratt. 527.

4. There is no evidence to show that the collection was made in Confederate money. Goss should have been introduced to prove the fact, if it really existed. He does speak through his report, and that is silent as to the kind of currency received, leaving it to be inferred that he received such currency as he was authorized to receive, namely, good money.

The decree of the Court, so far from treating the collection as Confederate money, treated it as good money, and ordered the receiver, Southall, to collect from Goss accordingly.

CHRISTIAN, J., delivered the opinion of the court.

This is a supersedeas to a judgment of the Circuit court of Albemarle. That court, by its decree rendered on the 22d of October 1860, in a certain chancery cause therein pending, in the name and style of "Figgatt, guardian, v. McClun, directed John W. Goss, sheriff of Albemarle, to collect certain bonds filed in said cause, and deposit the net proceeds of such collections in the Albemarle Insurance Company's office, to the credit of the cause, until the further order of the court.

No report of his action under this order was made by Goss until the 14th of May 1866. On that day he reported that he had made collections under the order of October 22d, 1860, of the net sum, after deducting commissions and other charges, of eight hundred and forty-two dollars and thirteen cents; that this collection

831 was *made on the 5th of May 1862, and that, as he was required to do by said decree, he made application to the Albemarle Insurance Company to take the amount so collected on deposit, and issue their certificate of deposit therefor; which the said company, through their cashier, refused to do; and hence the money was not deposited as the decree aforesaid directed. At the October term 1866 the cause came on again to be heard upon the papers formerly read, and the report of John W. Goss, late sheriff of Albemarle, &c.; on consideration whereof the said court adjudged, ordered and decreed, that the said John W. Goss, as late sheriff of Albemarle, should pay to S. V. Southall, as receiver, thereby appointed by the court, the sum of eight hundred and forty-two dollars and thirty-eight cents, with interest thereon at the rate of six per centum per annum from the 5th day of May 1862 till paid.

On the 20th of January, 1869, S. V. Southall, signing his name as "receiver in Figgatt, guardian, v. McClun," prepared and signed a notice in writing, addressed to John W. Goss, sheriff of Albemarle, and his sureties, which notice, after reciting the execution of the sheriff's bond by Goss and his sureties, and after reciting the decree of the Circuit court of Albemarle, above referred to, and the fact that of the amount decreed to be paid to Southall, receiver, the sum of \$842.13 was collected by Goss during his term of office as sheriff, commencing on the 1st of January 1861 and ending on the 1st of January 1862, notified the said sheriff and his sureties, that on the 3d day of the next May term of the Circuit court of Albemarle, the said S. V. Southall, as receiver as aforesaid, would move the said court for judgment against them for the sum of ninety thousand dollars (the penalty of the sheriff's bond) to be discharged by the payment of \$842.13, 832 with six *per cent. interest thereon from the 6th of May 1862 till paid, subject to two credits—\$30 as of the 11th of December 1867, and \$20 as of the 18th of February 1868, and costs.

This notice was executed on the sheriff Goss and all his sureties except one. Two of the parties had sixty days notice before the day fixed for the motion; others more than thirty days; and all of them more than ten days. For some cause the motion was not finally heard, until the May term of the court in the year 1871, when a judgment was entered against the sheriff and his sureties (except Branham, upon whom no notice was served) for the sum of \$842.13, with six per cent. interest thereon from the 5th of May 1862 till paid, and costs, subject to a credit of \$30 paid 11th of December 1867 and \$20 paid 18th of February 1868. To this judgment a writ of error and supersedeas was applied for, and awarded by one of the judges of this court.

The court is of opinion that there is no error in this judgment.

The proceeding against the sheriff and his sureties was a proper one, and the judgment authorized, under the 40th section of ch. 49, Code of 1860, which is in these words: "Of judgments on certain motions against officers and their deputies:" § 40. "If any officer or his deputy shall make such return upon any order, warrant, or process, as entitles any person to recover money from such officer by action, the court to which, or to the clerk's office of which such return is made, may, on a motion on behalf of such person, give judgment against such officer and his sureties, and against his and their personal representatives, for so much principal and interest as would, at the time such return ought to have been made, recoverable 833 by such action, with interest *thereon at the rate of fifteen per centum per annum from that time until payment."

This section, by its very terms, covers the case before us. The decree of the Circuit court of Albemarle, entered on the 22d

of October 1860, was an "order" directing the sheriff, John W. Goss, to make certain collections, and deposit the net proceeds in the Albemarle Insurance Company's office, to the credit of the cause. The return which the sheriff made upon this "order," on the 14th of May 1866 was to the effect that he had collected the money in May 1862, but that the Albemarle Insurance Company refused to receive it on deposit, and that it was still in his hands. Whereupon, the court directed him to pay it over to S. V. Southall, receiver, appointed by the court in the same decree. Certainly the parties entitled to collect the fund could have recovered it by action against the sheriff and his sureties; and this section declares that "if any officer shall make such return upon any order as entitles any person to recover money from such officer by action, the court may, on behalf of such person, give judgment," &c. The motion was in this case properly made by the receiver, who was to receive and collect the fund on the behalf of the parties entitled to it. It was properly made, and the judgment authorized under the section referred to (§ 40, ch. 49, Code of 1860.) Under this section the service to the sheriff and his sureties was properly executed, as ten days notice is sufficient.

The court is further of opinion, that there was no error in giving judgment for the full amount collected by the sheriff, instead of its scaled value. The decree directing the collection of the bonds, filed in the suit of Figgatt, guardian, v. McClun," was entered in October 1860; so that the sheriff was only authorized to receive a sound currency. Nor does he claim that he

834 collected it in any "other currency. His report is silent as to the kind of currency he received; and the presumption is, he collected only such currency as the court authorized him to collect. But in point of fact Confederate currency, on the 5th of May 1862, the date of the collection by the sheriff, if such was collected, was of equal value to the present currency, on the day the decree was entered against him. (October 1866.)

Upon the whole case, the court is of opinion, that there was no error in the judgment of the Circuit court of Albemarle, and that the same should be affirmed.

Judgment affirmed.

835 *Crawford & als. v. Weller & als.

September Term, 1873, Staunton.

1. **Enforcement of Judgment Liens—Sale of Land.**—In a suit brought in 1858, by judgment creditors of W for the sale of his lands for the payment of their debts, he answers and consents to a sale before an account is taken of the priority of the debts, but an account is ordered at the same time the land is

***Enforcement of Liens on Real Property—Previous Accounting.**—For a collection of authorities sustaining the proposition that a decree for the sale of land to enforce liens, without first, by account taken,

decreed to be sold. The land is sold, and though W excepts because the price is inadequate, it is confirmed. The account is taken, showing debts much more than sufficient to absorb the fund; but the report is recommitted to enquire for other debts. W then removes to a distant county. Subsequently, by the death of a son, W becomes entitled to another tract of land, and in 1863 the plaintiffs file their petition, asking that this land may be sold for payment of their debts. Of this petition W had no actual notice, and does not then seem to have had counsel in the cause. The land is sold without giving W a day to pay the debts, and purchased by C, who pays the purchase money, and obtains a conveyance. W afterwards applies by petitions and cross-bill to have the sale set aside.

Held:

1. **Same—Same—Previous Account Dispensed with.**—

W having consented to the first sale, before an account of his debts and their priorities was taken, and not having withdrawn that consent, and the account taken, though not confirmed, showing that the proceeds of both sales are not sufficient to pay the debts of W, and he not in his petition showing errors in that report, or that he has been injured by the sale of the last tract sold, the failure to have an account of his debts and their priorities before that sale, is not good ground for setting it aside, as against the purchasers.

836 *2. **Same—Same—Time for Redemption.**†—It is not *per se* error to decree a sale of land to enforce judgment liens without giving the debtor time to redeem, as in the foreclosure of mortgages, though such a practice ought in general to be pursued, but as W does not show he

ascertaining the amounts and priorities of all encumbrances thereon, is premature and erroneous, see *Schultz v. Hansbrough*, 33 Gratt. 567, and *foot-note*; *Kendrick v. Whitney*, 28 Gratt. 646, and *foot-note*; *Simmons v. Lyles*, 27 Gratt. 923, and *foot-note*; *Horton v. Bond*, 28 Gratt. 815, and *foot-note*. See also, *Efinger v. Kenney*, 79 Va. 551; *Adkins v. Edwards*, 83 Va. 300, 2 S. E. Rep. 435; *Anderson v. Nagle*, 12 W. Va. 113; *McClaskey v. O'Brien*, 16 W. Va. 793; *Scott v. Ludington*, 14 W. Va. 387; *Hill v. Morehead*, 20 W. Va. 420; *Trimble v. Herold*, 20 W. Va. 602; *Rohrer v. Travers*, 11 W. Va. 147.

While the above laid down proposition is the general rule, the principal case is an exception to this rule as can be seen from reading the first sub-head-note.

†**Enforcement of Judgment Liens—Time for Redemption.**—In regard to giving the debtor a day to redeem upon a decree for the sale of land to enforce a lien, a distinction should be drawn between a judgment lien and a vendor's or mortgagor's lien.

The rule is well settled that, when there is a suit to foreclose a mortgage, in decreeing a sale of the land, it is necessary to give a day for redemption, and, as a general rule, it is error not to do so. 2 Min. Inst. (4th Ed.) 377. And this is also the case in a suit by the vendor to enforce his lien for the purchase money. *Kyles v. Tait*, 6 Gratt. 44; *Wade v. Greenwood*, 2 Rob. 474; *Yancey v. Mauck*, 15 Gratt. 312; *Gross v. Percy*, 2 Patt. & H. 483.

And, in such cases, it is error to give an indefinite time for redemption. *Turner v. Turner*, 3 Munf. 66. But, with the regard to suits to enforce judgment liens, as said in the principal case, it seems, in Virginia, that it is not error *per se* to decree a sale with-

has sustained any damage by the failure to do it. It is not ground for setting aside the sale.

3. Same—Same—Payment in Confederate Currency.—

It is no ground of complaint on the part of W that the court decreed a sale of the land for Confederate money. If the creditors were willing to receive such money in payment of debts due before the war, it was to the advantage of W, that it be so sold. And the creditors allowing the property to be sold for this money without objection, it is not for them afterwards to object to receive it in payment of their debts.

4. Party Served with Process Taken to Be Cognizant of Future Proceedings.—

W having been served with process and having answered, he continued to be a party in the cause during all the subsequent proceedings. The petition for the sale of the land and the sale were proceedings in the cause, and W must be taken to be cognizant of these proceedings. And there not being any error on the face of the proceedings, the purchasers are not to be affected by any irregularities not apparent on their face.

In March 1858, John Craun and others, creditors by judgment of Benjamin Weller, filed their bill in the Circuit court of Augusta county, against said Weller and his wife, Hugh W. Sheffey, trustee in a deed executed to him by Weller and wife, and the creditors secured by said deed, and others, in which, after setting out their judgments, and the said deed of trust, they state that their judgment liens have priority of the said deed; and they charge that it is fraudulent as to them; that all the personal property of said Weller had been sold under executions issued upon former judgments; and that the rents of his real estate

out giving time to redeem if the debtor does not show that he is damaged. See *Bart. Ch. Pr.* (2d Ed.) 1160.

But it seems that in West Virginia no distinction is made between judgment liens and vendors' or mortgagees' liens. The rule has been broadly laid down by that court, that it is an error to decree a sale of land without giving a day to redeem the property by paying the amount charged upon it. *Wiley v. Mahood*, 10 W. Va. 226. This case bases its decisions on *Pecks v. Chambers*, 8 W. Va. 216, which held that a decree for the sale of land to satisfy a judgment lien should give a day to the defendant to redeem the property by paying the amount charged upon it. The court, in *Pecks v. Chambers*, 8 W. Va. 216, giving *Kyles v. Tait*, 6 Gratt. 44 (a suit to enforce a vendors' lien) as authority for its decision, said: "If it is error in decreeing the sale of lands for the payment of purchase money which constitutes a lien thereon, to fail to give in the decree of sale a day to the defendant to redeem the property by paying up the amount charged upon it, I am unable to see why it is not error for the court in decreeing a sale of land to pay a judgment lien, to fail to give in the decree a day to the defendant to redeem the land by paying up the amount charged upon it. I am not disposed to controvert the correctness of the decision in 6 Gratt. 44, in this case; but feel disposed to apply and adopt it, as I think there should be uniformity in the practice, in this respect, in cases similar in principle." See also, *Rose v. Brown*, 11 W. Va. 123, and *King v. Burdett*, 44 W. Va. 561, 20 S. E. Rep. 1010,

would not pay off the judgments against him in five years. They, therefore, pray for a sale of the real estate of Weller, and the application of the proceeds of sale to the satisfaction of their debts, and for general relief.

837 *The process was served on Weller and the other defendants; and in June 1858, he filed his answer. He admitted the plaintiffs' claims, and that all his personal property had been sold by the sheriff. He admits that he is the owner of four hundred acres of valuable land, which he had conveyed to Sheffey in trust to secure his creditors, and among others, the plaintiffs. He says, what reasons the plaintiffs have for all their captious objections and criticism he is at a loss to conceive, when all they had to do was to say they disclaimed the provisions of the deed, and asked for the enforcement of their original liens; and if that be their position he might object to their bill for multifariousness. But waiving all technical objections, and being sincerely anxious that his property shall as soon as practicable, be made available to the payment of his debts, he will set up no objections to a decree for the prompt sale of his property, only asking that it may be sold on liberal terms as to credit, and that it may be sold all together or in two parcels as may be deemed most advisable.

The cause came on to be heard on the 19th of June 1858, when, with the consent of the defendant Weller, by his counsel, and of the trustee Sheffey, in person, the court made a decree appointing commissioners to sell the tract of four hundred acres of land, as a

holding it an error to make a decree for the sale of land to satisfy a judgment lien without giving the debtor a day for redemption.

Some cases would seem to indicate that the West Virginia courts extend this rule, i. e., that a day for redemption must be given, even to cases where there is a decree for the sale of land under a deed of trust. See *Rohrer v. Travers*, 11 W. Va. 146.

But, in *Watterson v. Miller*, 42 W. Va. 108, 24 S. E. Rep. 579, the court said: "One assignment of error by Watterson is that the decree does not give the debtor a day in which to redeem the land from sale. That is a technical rule which requires a court to give a day to redeem before sale, in addition to the time required for notice of sale. It ought not to be applied to sales under trust deeds, as a trust deed is essentially a contract, and it provides, or the law provides, for a sale on failure of payment, without day for redemption. The court has no right to give indulgence when the parties have provided against it, as it violates a contract. Can the court give half a year indulgence? That might greatly injure the creditor. The time he gave is out. Can you enforce further indulgence? You cannot fix terms of sale giving longer credit than the deed of trust gives, unless, perhaps, where older liens are involved in the decree. *Wood v. Krebs*, 33 Gratt. 685; *Bart. Ch. Pr.* 1065. The cases in this state were cases of sales for judgment or vendors' liens, except *Rohrer v. Travers*, 11 W. Va. 146, which involved a deed of trust, and also other liens."

whole or in parcels, as upon consultation with the parties interested, they might deem most advisable, upon the terms of cash for enough to cover expenses, and for the balance of the purchase money upon a credit of one, two and three years.

And in order that the cause might be ready, at as early a day as practicable, a commissioner of the court was directed to ascertain, state and report an account of the debts and their priorities chargeable on the proceeds of such sale. And he was authorized to proceed upon four weeks publication, &c.

838 *The commissioners made a report of the sale of the land, shewing the purchase money, after deducting the expenses of sale, amounted to \$12,200.27. And Weller filed a petition seeking to set the sale aside on the ground of inadequacy of price. But it was eventually confirmed; and two lots in Mount Sidney were directed to be sold.

In November 1859 commissioner Harrison returned his first report; and the debts reported by him as binding the fund, amounted with interest to the date of his report, to \$12,145.49. To this report there were two exceptions; and the court, without passing upon them recommitted the report to the commissioner to state and report on such other matters as might be pertinent to the case.

The commissioner made another report, which was recommitted for the purpose expressed in the previous order. And he then made a third report. This last report increases the amount of the liens, previous to the deed of trust to Sheffey, to \$16,531.56; and the whole available assets according to one statement are \$13,163.32, and according to another \$13,076.21.

There seems to have been no further proceedings in the cause until the 12th of June 1863, when the plaintiffs filed a petition, in which they state that Lemuel Weller, the son of Benjamin Weller, had died intestate owning a tract of land in Augusta county, and leaving a widow and two infant children; that these children had since died, under the age of twenty-one years, and that Benjamin Weller had thus become entitled to the land; and the same was liable to the lien of their judgments. That the widow of Lemuel Weller was entitled to dower in the land, and the wife of Benjamin Weller to a contingent right of dower. That the rent of the land would not pay the

839 debts in five years; and they *therefore ask that the said land may be sold; that if the said widow of Lemuel Weller will not consent that her dower may be sold, and she paid its commuted value, that her dower in kind may be laid off to her. And they ask that she may be summoned to show cause, if any she can, why the said prayer should not be granted.

The summons was issued, and Mrs. Lemuel Weller appeared and filed her answer, stating that she elected to have her dower in the land assigned to her.

The cause came on again to be heard on

the 15th of June 1863, when the court made a decree appointing commissioners to lay off Mrs. Lemuel Weller's dower, and appointing other commissioners to sell the land subject to her dower, upon a credit of one and two years; but with the privilege on the part of the purchaser, of paying the whole purchase money in cash, upon the confirmation of the sale by the court. And Mrs. Benjamin Weller was authorized to relinquish her contingent right of dower in the land, and to receive therefor its commuted value; which she did.

The commissioners to lay off the dower, and those to make the sale, made their reports. It appeared from the report of the latter that the land had been sold as prescribed in the decree, and that James W. Crawford became the purchaser of the land at the price of \$22,610; and elected to pay the whole purchase money in cash.

The commissioners appointed to sell two lots in Mount Sidney also reported, that they had sold the same for cash to Osborn D. Ross, for \$2,560.

The cause came on again to be heard on the 4th of November 1863, when the court made a decree confirming the reports and directing the purchasers, after paying the commissioners the costs and expenses of sale, to pay the whole of the purchase money due from them into the Central Bank of Virginia as the general receiver

840 *of the court, to the credit of the cause. And when the purchase money was fully paid the commissioners who sold the same, or any one of them, should convey the same to them respectively, or to such persons as they might direct, by proper deeds, with special warranty. And the court not at this time considering the reports made by master commissioner Harrison, and it being suggested that there were other liens not yet reported on, recommitted the same to him or some one of the commissioners of the court, with instructions to convene all persons in interest before him, by advertisement &c., and ascertain the amount of all liens on the property of the defendant Weller, whether created by mortgage, trust, judgment or otherwise, as also the commuted value of the contingent right of dower of Catharine Weller, wife of said Benjamin Weller, in the land sold, and report the same to the court.

Upon the confirmation of the reports of the sales to Crawford and Ross, they immediately paid to the general receiver the purchase money of the property purchased by them, and the commissioners executed deeds for the property; conveying the property purchased by Crawford to him, and F. M. Young, who was interested with him in the purchase. Crawford and Young in March 1866 sold and conveyed the land to A. P. Beirne for \$6,650, and in May 1866 Beirne sold and conveyed it to George K. and John G. Boag.

Nothing further seems to have been done in this suit until July 1866, when Benjamin Weller filed his petition in the cause, in which he represents himself as a citizen of

Barbour county in West Virginia. He states the execution of his deed of trust to Sheffey, the institution of the suit by Craun and others against him, the proceedings in the case, and his petition to have the first sale made set aside; and says 841 that from the time of the *confirmation of that sale in July 1859, he was without counsel to attend to his interest in the cause; and in the month of October 1859 he removed from the county of Augusta to Barbour county, in West Virginia, where he has resided ever since; and owing to the unsettled condition of the country and the impossibility of passing through the enemy's lines, could not know what progress, if any, was made in said cause. He states the death of his son Lemuel Weller in 1862, and shortly thereafter his children; and in the spring of 1864 his widow also departed this life. He refers to the decree for the sale of the land, and the sale, its confirmation by the court, the payment of the purchase money and the conveyance to the purchaser; and also the sale and the confirmation thereof, and the conveyance of the lots in Mount Sidney; and the failure of the court to act upon the report of master commissioner Harrison. And he insists that the decree directing the sale of the tract of land and the Mount Sidney property are erroneous; and as grounds of error assigns the following:

1st. An account should have been taken of the amounts of the debts against him, and of the fund arising from the sale of property; and it should appear by some action of the court, that the fund already created was insufficient to pay the debts.

2d. If it had been ascertained that a balance was still due from him, time should have been given him to redeem; and only upon his default should his property have been sold.

3d. There was no proof that the rents and profits of the land would not satisfy the judgments in five years.

4th. The property should not have been sold, and Confederate notes received in discharge of the purchase money.

5th. The decree for the sale of the 842 land cannot stand. *The petitioner was living in West Virginia, cut off by the war from all communications by mail or otherwise; he had no knowledge of any proceeding against said land, or that there had been a decree for a sale or a sale thereof, until the fall of 1864. He was no party to the proceedings by which it was sold. It descended to him long after the bill was filed, and of course was not put in issue by it; and he was not made a party by the petition filed against the widow of his son Lemuel. No supplemental bill was filed against him; no order of publication, and no notice served upon him. Having been no party to the record, so far as it sought to subject said land to sale, he cannot be bound by the decree.

For these and other reasons that may occur to the court, he prays that the said decree may be reversed, and that the

sales of the land and the Mount Sidney lots may be set aside and annulled. And if the court should be of opinion that a bill of review is the proper mode of proceeding, he asks that his petition may be so treated, and that he may be permitted to amend it and make all proper parties, and have all and every relief to which he might be entitled under any form of pleading.

In December 1866 the court gave Weller leave to file a cross bill in the cause; and upon his motion it was ordered that his petition be taken as such, and that James W. Crawford and F. M. Young, and the plaintiffs, be made parties to it.

Crawford and Young answered, averring their ignorance of any thing which could injuriously affect their rights under their purchase; that they had, in pursuance of the decree confirming the sale, paid the purchase money, and obtained a conveyance of the land; had been put in possession of it, and held it until about the 1st of March,

1866, when it was sold and conveyed 843 by *them to Beirne for \$6,650; who had since sold it to George K. and John G. Boag. And they insist that as they have been in no default and have been guilty of no impropriety or even of any irregularity, they are entitled to be protected, whoever else may suffer.

In March 1868 the cause was removed to the Circuit court of Rockingham county, and came on to be finally heard in the following June, when the court held that there was error in the decree for the sale of the tract of land in the proceedings mentioned, and that the error was apparent on the face of the record of the cause, and decreed that the decree of the 15th of June, 1863, directing a sale of said land, and so much of the decree of the 4th of November 1863 as confirms the sale and directs a deed to be executed for the same, be set aside and annulled. And a commissioner was directed to take the account directed by the decree of November 4th, 1863. From this decree Crawford and Young obtained an appeal to this court.

Baldwin, Cochran and Phillips, for the appellants.

Fultz, for the appellee.

The decree rendered on the 18th of June 1868, setting aside the sale of the 133 acres of land, is clearly right.

1. Benjamin Weller was not a party, nor had he an opportunity of becoming a party, to the proceedings so hurriedly rushed through the court.

None are bound by a decree, who are not parties to the suit. Story's Eq. Pl. § 72, 73, 75 and 76. Baylor's lessee v. Dejarnette, 13 Gratt. 152; Hudgin v. Hudgin's ex'or, 6 Gratt. 320.

2. But it was error to decree a sale of the land, and order the proceeds to be brought into court, before the liens and their priorities were ascertained. Cole's administrator *v. McRae, 6 Rand. 644; Buchanan v. Clark, 10 Gratt. 164; Laege v. Boissieux, 15 Gratt. 83.

3. Caveat emptor, applies to all judicial sales; there is no warranty expressed or implied. *The Monte Allegre*, 9 Wheat. R. 616—5 Cond. U. S. 709; *Young v. McClung*, 9 Gratt. 336. In the last case the court said, it is the duty of the purchaser at a judicial sale, to see that all who have an interest in the property are made parties to the suit, and thereby concluded by the decree under which he buys. This doctrine is approved in *Faulkner, &c. v. Davis, &c.*, 18 Gratt. 651.

4. The appellants, Crawford and Young, cannot claim the protection afforded purchasers, by the § 8, ch. 178 of the Code. Six months not having elapsed from the rendition of the decree for sale, 15 June 1863, to the sale, 30 July 1863, there must be restitution of possession of the land to the appellee, Weller. *Cooper v. Hepburn*, 15 Gratt. 551; *Dixon, &c. v. McCue, &c.*, 21 Gratt. 373.

5. But if the decree of the 15 June 1863, were right in all other respects, it was erroneous in not giving to the appellee a day to redeem.

The great haste and eagerness manifested by the parties, and tolerated by the court to have the land sold for worthless currency, were wholly incompatible with the principles of equity, and cannot be approved of and sanctioned by this court.

ANDERSON, J. James W. Crawford, on the 30th of June 1863, became the purchaser of a tract of one hundred and thirty-three acres of land in the county of Augusta, of which Lemuel Weller died seized, and which descended to his two infant children, and by their death, to his father Benjamin Weller, subject to the dower of Margaret Weller, the widow of Lemuel. The land

was sold subject to the widow's dower, 845 which had been laid 'off to her by metes and bounds. It was sold by commissioners of the Circuit court of Augusta county, under a decree of said court, in a suit therein depending between Craun and others, against Benjamin Weller, and was sold at public auction to the highest bidder, and brought twenty-two thousand six hundred and ten dollars, in Confederate currency. The sale was reported to the court, and confirmed, and the whole of the purchase money paid down, as the purchaser had the right to do under the decree of sale; and a deed of conveyance was made by the commissioners to the purchasers, upon the payment of the purchase money, in obedience to the decree. The same tract of land on the 1st day of March 1866, was sold and conveyed, free from incumbrance, (the widow of Lemuel Weller having died in the meantime,) by the said Crawford, and F. M. Young, R. H. Phillips and H. M. Bell, who it seems, were jointly interested with Crawford in the purchase, to A. Plunkett Beirne, for \$6,650; and by him sold again and conveyed, on the 24th of May following, to George K. and John G. Boag.

On the 17th day of July 1866, Benjamin Weller, by leave of the court, filed a petition in the said suit of Craun and others against

him, which was still depending, praying a rehearing of the decree under which this tract of land was sold, and of the decree confirming 'his sale, and also a sale of a house and lots in Mount Sidney, made by commissioners H. W. Sheffey and N. K. Trout, under a previous decree in the same cause; at which sale Osborn D. Ross, being the highest bidder, became the purchaser, at the price of \$2,560 cash; and praying that both sales may be set aside and annulled. The court awarded rules against James W. Crawford and F. M. Young to appear and show cause why the sale to them

should not be set aside, and the deed 846 conveying 'the land to them should not be set aside and annulled. And at a subsequent term, on the 4th of December, on motion of Benjamin Weller, leave was given him to file a cross bill; and it was ordered that his petition should be taken, received and treated as a cross bill, and that the purchasers of the one hundred and thirty-three acre tract, James W. Crawford and F. M. Young, and the plaintiffs, judgment creditors of said Benjamin Weller, the executors of John Craun, dec'd, and others, be made defendants to the said cross bill, and be compelled to answer the same; and summons was awarded against them. No rule or summons seems to have been awarded against Ross, the purchaser of the Mt. Sidney property.

Several grounds are assigned in the petition for setting aside these sales, and the conveyances made in pursuance thereof, under the authority of the decrees of the court. The first is, that an account should have been taken of the amounts of the debts against the petitioner, and of the fund arising from the sale of property; and it should appear from some action of the court; that the fund already created was insufficient to pay the debts. It has been held by this court, that it is error to decree a sale of real estate to satisfy debts, before the amount of the debts and their priorities are ascertained. The object of the rule is to secure a good sale of the property by promoting competition at the sale. But the debtor may waive this right.

This suit was brought by judgment creditors to enforce their judgment liens, there being no personal estate, and to remove impediments to their enforcement; and the debtor, in his answer, which is sworn to by him, says, "Waiving all technical objections," "being sincerely anxious that his property shall as soon as practicable be made available to the payment of his debts,

(he) will set up no objections to a 847 decree for the prompt sale 'of his property, only asking that it may be sold on liberal terms as to credit, and that it may be sold altogether, or in two parcels, as may be deemed most advisable." Accordingly, responsive to the wishes of the defendant, thus expressed in his answer, the court being of opinion that a sale of the defendant's real estate was manifestly for the advantage of all parties, and the defendant Weller by his counsel, and his

trustee Hugh W. Sheffey in proper person, consenting, without undertaking first to adjust and settle the respective rights and priorities of the trust and judgment creditors, decreed the sale of the defendant's real estate, his home-place and the Mount Sidney property; saying that all such matters as to the respective rights and priorities of the parties, &c., "will hereafter be adjusted upon the bringing in of the report hereinafter directed." "And in order that this cause may be ready at as early a day as practicable to be promptly disposed of," the decree further directed, an account to be taken by a master commissioner, showing the amounts and priorities of the debts chargeable on the proceeds of said sale, whether by mortgage, by the trust deeds aforesaid, by the deed to the defendant Sheffey, or by judgments; and that he report said account to the court.

Master Commissioner Harrison, who stated these accounts, made several reports to the court. His last report, dated October 25th, 1860, to which there seems to be no exception, shows that the liens on Weller's real estate, which were superior to the Sheffey trust, amounted to \$16,531.56, whilst the whole available assets did not exceed \$13,163.32; showing a deficiency of assets of \$3,378.24, to pay the debts which had a priority over the debts secured by the Sheffey trust; that is, the 3d and 4th class of those debts, the 1st and 2d class having a higher security than the deed of trust, and being included *in the \$16,531.56. The master was well justified in saying, that it was therefore needless for him to report the debts which depended on that deed of trust as their security. But in a previous report he had stated those debts; to which statement of his report there was no exception, and which is shown to be correct by the deed of trust itself. That statement shows, that the debts of the 3d class secured by said deed, amounted to \$10,262, and the 4th class to \$2,190; making together \$12,452. Add to this sum \$3,378.24, the deficiency of assets, to pay the debts which had priority to the deed of trust, and we have \$15,830.24 of debt, which the proceeds of the sales were short of paying; and this sum must have been greatly swollen by an accumulation of interest. The record does not show the amount of judgments, subsequent to the deed of trust, alluded to by the commissioner. If this report of the commissioner can be relied on, it shows an indebtedness at the date of the decree for the sale of the one hundred and thirty-three acre tract, not provided for by the previous sale, vastly exceeding the value of that tract and the Mount Sidney house and lots combined.

Can this report of the master be relied on? It not having been excepted to by the defendant Weller, or by the creditors, there seems to be no reason why it could not be relied on to show the extent of the indebtedness not provided for by the previous sale, unless the act of the court recommitting it forbids. The reason assigned by the

court, in its decree of the 4th of November, 1863, for recommitting, to wit: that it had been suggested "that there are liens not yet reported on," does not indicate an impression that the master had overstated the amount of indebtedness, or that the court had any doubt (when the decree of sale of the one hundred and thirty-three acre tract was made) that the debts to be provided *for amounted to the sum indicated by the report. It rather implies that the court was apprehensive that there were other debts not reported on. The petitioner, then, was in great error when, in his petition or cross bill, he says: "The report of master commissioner Harrison, while he brings the interest up to the 1st of November 1859, makes the whole indebtedness of your petitioner \$13,022 24." But the petitioner or plaintiff in the cross bill, does not even now point to any errors in said report of the commissioner, or take any exceptions thereto. And supported as it is by the evidence in the record, and acquiesced in by all the parties to the suit; and as the plaintiff in the cross bill had in his answer to the original bill expressly waived all technical rights, and avowed a desire that his property should be sold for the payment of all his debts, and consented to the first decree for the sale of his property before the amount and priorities of the debts were ascertained; and never afterwards withdrew his waiver; and after the amount of the debts and their priorities were sufficiently ascertained by the report of a master commissioner, to show that the sales made in 1863 were necessary to pay the balance of debts not provided for by the previous sale, and no exception taken to that report, we cannot say that for this cause the court erred in decreeing the sale, especially as the petitioner does not show now that there was any error in that report, that he was not owing the debts for which his land was sold, or that he has been damaged in any way by the sale of his property at an inadequate price.

The last sales were decreed, in accordance with what seems to have been adopted by the court, as the proper procedure, with the consent and approval of all parties to ascertain the exact amount of the fund for payment of debts, and then ascertain, or *pari passu* ascertain the exact amount of debts and their priorities; and then to

850 *distribute the fund, according to the right of each creditor to participate. And to this end the funds, as they were collected, were directed to be placed in the hands of the receiver of the court, where they would be under its control and ready for distribution whenever the full amount of the debts, and the exact rights of each creditor were known. And hence, upon the suggestion that there were other debts which had not been reported, so intent was the court to carry out his plan of meting out to each creditor exact justice in the distribution of the fund, that he recommitted the report to the master, to enquire if there were not other debts and liens beside those

which he has reported on, instead of making a distribution of the fund at that term of the court. Now to carry out this plan, which in its inception had been assented to by the debtor, and that assent never withdrawn, it was necessary to sell the defendant's tract of one hundred and thirty-three acres, which had become vested in him during the pendency of the suit, and to which the judgment liens attached, as soon as he became invested with the title, just as effectually as they did to the real estate he owned when the judgments were rendered. And it was necessary that this property should be sold, that the exact fund for payment of debts might be known in order to a proper distribution, a mode of procedure to which the defendant had assented in the beginning. If, however, it was error, it was not such an error as would affect the purchaser. In *Daniel & al. v. Leitch*, 13 Gratt. 195, 210, J. Moncure, in whose opinion the other judges concurred, says, "it is the business of a purchaser at a judicial sale, to see that all the persons who are necessary to convey the title are before the court, and that the sale is made according to the decree. But he will not be affected by error in the decree, such as not giving an infant a day to show
851 cause, in cases in *which a day ought to be given; or decreeing a sale of land to satisfy judgment debts without an account of personal estate." A fortiori he will not be affected by the error of decreeing a sale without an account of the amount or priority of debts, if it appear that a sale was necessary.

2d. With regard to the 2d assignment of error by petitioner, we are not aware that it is per se error to decree the sale of property to enforce judgment liens without giving him time to redeem, as in the foreclosure of mortgages. We think that such a practice ought in general to be pursued; and where it is not, and the debtor shows that he has been damaged unjustly by its not being pursued, we are not prepared to say that it would not be good ground for setting aside the proceeding. But in this case the petitioner has not shown that he was damaged by it.

3d. As to the 3d objection, we think it does abundantly appear from the record, that the rents of the land would have been very inadequate to pay the petitioner's large indebtedness in five years.

4th. The objection that the property was sold for Confederate money. That was an objection which the creditors were more interested in urging than the debtor. If they were willing to receive Confederate money, in payment of ante-bellum debts due them by the petitioner, it was to his advantage that his property should be sold for Confederate money. And the creditors standing by, and allowing the property to be sold for Confederate money, to pay their debts, without objection, it would not lie in their mouths afterwards to object to receive it in payment of their debts.

5th. The fifth and last assignment of

error and ground of objection to the sale, is, that the petitioner was not a party to the proceeding, and is not therefore
852 bound by it. *He was a party to the suit, as the record shows. The subpoena was sued out against him, and was served upon him. He was made a defendant by the plaintiff's bill, and answered the bill, and consented in his proper person to the sale of his property without delay, or the observance of technicalities, for the payment of his debts. He appeared also by counsel, and consented to a decree for the sale, before the amounts and priorities of the debts were ascertained and settled, being content to await the ascertainment of the exact amount of the fund he would have for the payment of debts by an actual sale of his property, before the rights of the several creditors, in its apportionment and distribution, should be determined. After the sale was made under the consent decree, he resisted its confirmation, upon the ground that the sale was improperly conducted, and the property was sacrificed, or sold for an inadequate price, in his absence, attending to an important suit which he had in Kentucky; and from which, if he had been successful, he hoped to get money enough to pay all his debts. The record shows that in this attempt to set aside the sale, which he vigorously prosecuted, he was not unrepresented by counsel; and though Mr. Sheffey may have ceased to act as his counsel, he had other counsel retained for his defence, who appeared on his behalf. But he failed in his purpose to set aside the sale; and having, perhaps, been disappointed in his expectations from Kentucky, and knowing that his property in Augusta was very inadequate for the payment of his debts, he resolved to remove to a remote part of the State, and to leave the suit and his Augusta property in the hands of the court, to be disposed of as might be deemed best, as far as it would go in the payment of his debts. As we have seen, the proceeds of the sale which had been made of his property, were very inadequate to the payment of his debts, and that it was
853 *necessary to execute the decree for the sale of the Mt. Sidney property, which had been made with his consent, and also to decree the sale of another tract of land, which he then owned, in order to raise a fund sufficient for the payment of his debts. By the petition of the creditors the fact was brought to the knowledge of the court, that he was the owner of this tract of land, and that the same was subject to their judgment liens; and the court was asked to decree its sale also. This court cannot perceive that a court of equity had not the same jurisdiction in this suit, to enforce the judgment liens against the land in question, that it had to enforce the liens which had attached when the suit was commenced. The object of the suit was to enforce the judgment liens, not against any particular tract of land, but against all the real estate of the debtor to which the liens attached. It was to enforce the

liens wherever and whenever they attached. And the lien having attached to this land, during the pendency of the suit to enforce it, did not require that the relief prayed for in the original bill should be varied. It was supplemental matter, brought to the notice of the court by petition, virtually involved in the issues made by the original bill, and perfectly consistent with the relief prayed for. It is not, therefore, a supplemental suit. The whole record constitutes but one cause; and one replication and one cause are to be set down for hearing. Stor. Eq. Plead. § 332. And the plaintiff in this cross bill, or petition for a rehearing, being before the court as a party defendant, must be taken to be cognizant of this proceeding. If he could not be present in person, he could be by counsel, as the record indicates he was in this case; and if he was not, it was because he did not choose to be. And if he has sustained any loss by it, it is more equitable that he should bear it, than

that it should be thrown upon innocent purchasers, *under the decree of the court, who had no knowledge of any irregularity, (the record exhibiting none,) who honestly purchased at a fair sale, which was confirmed by the court, paid the purchase money, complied with all the terms imposed by the court, and received a conveyance of the title. In the case referred to, *supra*, *J. Moncure*, after stating the doctrine before recited, says: "A fortiori he (the purchaser) will not be affected by any imperfection in the frame of the bill, if it contain sufficient matter to show the propriety of the decree."

In this case, if the purchaser had looked to the record, he would have seen that all the persons who are necessary to convey the title were before the court; that the sale was made according to the decree; and that it was in the power of the court to make him a good title to the land. If there were any irregularities in the proceedings, they were matters which concerned the parties to the suit; they did not affect him; and of them, he not being a party to the suit, cannot be held to have been cognizant, or bound to have taken notice. He gave what was then considered a high price for the land, in Confederate money; which, although now worthless, was then the only currency in the country, and had a well known purchasing power. He paid the whole of the purchase money into the hands of the general receiver of the court, as directed by the decree, and received from the court a deed conveying to him the title; and, if the money was suffered to lie in bank, until it has perished, it is not his fault. He was not answerable for any disposition which the court might have made of the purchase money. *Daniel & al. v. Leitch*, (*supra*), and *Brown v. Wallace*, 4 Gill. & Johns. R. 479. His contract was complete and executed; and under it he took possession of his land. After a lapse of three years, and after the purchaser had sold and conveyed the land to

855 *another, with general warranty, and received the largest portion of the purchase money, and it had been again sold to another innocent purchaser, the plaintiff in this cross bill files his petition in this same suit, wherein he was a defendant, for a rehearing; and seeks to set aside the sale and to annul the purchaser's title, without even offering to refund to him a dollar of his purchase money; assigning as his only excuse for his delay in inaugurating the proceeding, that he had removed to a remote part of the State during the pendency of the suit, and that a war broke out, which cut him off from all communication with the court, although that war had terminated more than a year before his petition was filed. He asks the court to undo what it has deliberately done; to divest the plaintiff's title, and the title of innocent purchasers from him, without showing that he did not owe the debts for which his land was sold, or that the land was not bound for them, or that the land was sold for an inadequate price, or that there was any unfairness in the sale, or that any injustice or injury was done him by decreeing the sale, or even that he will be benefited by setting it aside. The court is, therefore, of opinion to reverse the decree of the Circuit court of the 18th of June 1868, so far as it sets aside and annuls the decree of the 15th of June 1863, directing a sale of said land, and so much of the decree of November 4th, 1863 as confirms the sale and directs a deed to be executed for the same; to dismiss the appellees cross bill, as to the appellants, at his costs; and to remand the cause for proceeding to be had therein to a final decree.

The other judges concurred in the opinion of Anderson, J.

The decree was as follows:

The court having maturely considered the transcript of the record of the decree 856 aforesaid, and the arguments *of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the decree of the 15th day of June 1863, directing the sale of the tract of 133 acres of land, which can affect the rights of the purchasers under said decree; nor in the decree of November 4, 1863, which confirms the sale and directs a deed to be executed to the purchasers. It is therefore considered that the decree of the 18th of June 1868, so far as it sets aside and annuls the said decree of the 15th of June 1863, and so much of the said decree of the 4th of November 1863 as confirms the sale made under the decree aforesaid, and directs a deed to be made to the purchaser, be reversed and annulled; that the appellees petition or cross bill, as against the appellants, be dismissed at his costs; that the cause be remanded to the said Circuit court of Rockingham county for further proceedings to be had therein, in order to a final decree; and that the appellants be allowed their cost incurred in the prosecution of their appeal aforesaid here, out of any fund in said Circuit court applicable

to the claims of the creditors who are appellees.

All which is ordered to be certified to the said Circuit court of Rockingham county.

Decree reversed.

857 *Sexton v. Crockett & als.

September Term, 1873, Staunton.

Absent, STAPLES, J.*

1. **Appeal from Decree—Limitations—Quere.**—A final decree in a cause was made in October 1860. On the 5th of October 1871 an appeal from this decree was allowed by a judge of the Court of Appeals. The petition with the indorsement was filed with the clerk on the 9th of the same month, and the appeal bond is dated the 26th of April 1871. *Quere*: If the appeal was barred by the statute limiting appeals.

2. **Judicial Sale—Parties Absent—Sale Set Aside.**—In a suit by creditors for the sale of the land of their debtors, a decree is made with their consent, for the sale, but the sale made is set aside, and the land rented out. After this one of the debtors dies intestate, leaving heirs. Then another decree is made, reviving the suit against his administrator, and directing a *scire facias* against the heirs; and with the consent of the parties before the court, commissioners are directed to execute the previous decree of sale. They sell and the sale is confirmed, and the purchase money being paid a conveyance is ordered and made, and this is confirmed. These decrees and the sale having been made when the heirs were not before the court, the decrees are erroneous, and these and the sale must be set aside.

In March 1860 Kent, Paine and Kent, David Sexton and a number of others, creditors by judgment of Stephen S. Crockett and Robert J. Crockett, partners under the style of S. S. Crockett & Son, instituted a suit in *equity in the Circuit court of Wythe county, against them and another, to subject certain real estate belonging to S. S. Crockett and son, to the satisfaction of their judgments. In October 1860 a decree was made appointing a commissioner to sell the property, upon terms and in the mode stated in the decree, and in May 1861 he made his report of the sale, which being excepted to was set aside, and commissioners were directed to rent out the property.

On the 11th of October 1862, the court made a decree in which it is stated that Robert J. Crockett had departed this life intestate and unmarried, leaving the defendant Stephen S. Crockett, Isabella C. Brown, wife of Wm. Brown, and the children of Charles H. and Jane A. Sauffley of unknown number and names, his heirs at law, by consent as well of the plaintiffs as of David A. Whitman, administrator of said Robert J. Crockett, deceased, the cause stands revived against said administrator, and it is

ordered that a *scire facias* issue, &c., to revive the same against the said Brown and wife and the children of Charles H. and Jane A. Sauffley. And it appearing to the court that a favorable season has arrived for executing the decree of sale, made in the cause at the October term 1860, by consent as well of the plaintiff as of the defendant Stephen S. Crockett, and all other defendants now before the court, it is further decreed that Joseph W. Caldwell and Wm. H. Bolling, or either of them, carry into effect said decree of October term 1860, so far as the said decree orders a sale of the property therein mentioned, in the manner and upon the terms therein prescribed.

A sale of the property having been reported, and the priority of the plaintiff's debts fixed, on the 13th of May 1863 the court made a decree confirming the sale, and the purchaser desiring to pay the whole of 859 the purchase *money, Caldwell was appointed a receiver to collect the whole of the purchase money in Confederate States Treasury notes; and after paying costs of suit, apply the balance to the payment of the plaintiffs' debts in the order of priority previously established. And when all the purchase money was paid, then Caldwell was directed to convey the property to the purchaser: And it was further ordered that if any of the creditors refused to receive payment of his debt in Confederate States Treasury notes, the receiver was to invest the amount of such debts in any manner he may deem prudent, pursuant to the provisions of the act of assembly passed March 5th, 1863; and report, &c.

In October 1863 Caldwell made his report stating the debts he had paid, and that he had made a deed with special warranty to the purchaser of the property. And he reported that the whole debt of the plaintiff David Sexton amounting to \$1,100.16, was tendered to him in either Confederate States Treasury notes or in seven per cent. Confederate States bonds; and being by him refused, \$1,000 thereof was as directed by the decree, invested in said bonds, leaving \$100 which could not be so invested.

The cause came on to be finally heard at the October term 1863, when the court confirmed the report, discharged the receiver from all further responsibility on the payment of the balance of the \$100, and directed that the bonds remain filed with the papers of the cause, subject to be withdrawn by said Sexton. And there remaining nothing more to be done in the cause, it was ordered to be stricken from the docket.

On the 25th of September 1871, Sexton presented his petition for an appeal in the case, to one of the judges of this court, who by his endorsement dated the 5th of October 1871, allowed it: the petition with 860 the endorsement *was filed with the clerk on the 9th of the same month; and the appeal bond is dated April 26th, 1872.

Kent and Caldwell, for the appellant.
J. W. & J. P. Sheffey, for the appellee.

*JUDGE STAPLES had been counsel in the cause.

See decision of principal case as to the stay law discussed in *Rogers v. Strother*, 27 Gratt. 417.

BOULDIN, J. A preliminary question has been discussed at the bar in this case, and will be first considered, viz: whether the appeal, when applied for, was barred by the statute of limitations.

The decree was rendered on the 10th of October 1863, and the appeal was not allowed until the 5th day of October 1871, being eight years, less five days, after the decree was pronounced. The law in force when the decree was rendered, limited appeals to five years; that in force when the appeal was granted, limited appeals to two years; so that under either limitation, the appeal was barred, unless protected by some legislative saving or exception. Is there any such saving? I think there is.

Without relying on the ordinance of the Virginia convention of 1861, ordaining a stay law, and suspending during its operation the statutes of limitation, it will be seen that the Legislature, at its session of 1865-6, by the act of March 2d, 1866, entitled "an act to preserve and extend the time for the exercise of certain civil rights and remedies," Sess. acts p. 191, enacted, "that the period between the seventeenth day of April 1861 and the passage of this act, shall be excluded from the computation of the time within which, by the terms or operation of any statute or rule of law, it may be necessary to commence any action or other proceeding, or to do any other act to preserve or to prevent the loss of any civil right or remedy," &c., &c. The period thus excluded from computation, is further extended, in cases of appeal, "to six months

after a supreme court of appeals shall be *organized under the present government." Under the operation of this law, which is very clear and comprehensive in its terms, the statute of limitations was suspended from a time long anterior to the rendition of the decree in this case down to a period of rather more than six months after the passage of the act; for a court of appeals was in fact duly organized very soon thereafter; so that the limitation did not, under the operation of that law, begin to run against this appeal sooner than the last mentioned date. Still, as that date certainly accrued before the end of the year 1866, and as by the act of the 2d day of March 1867, Sess. acts 1866-7, the right of appeal was limited to two years, and the appeal was not allowed until October 5, 1871, it would still be barred unless protected by some other legislative saving. Is there such other saving? I am of opinion that there is.

On the same day on which the saving act first above mentioned was passed, there was enacted by the same Legislature, another law of grave interest and importance to the people of Virginia. I allude to the act known as the stay law, Sess. acts 1865-6, ch. 69, p. 180. The purpose and effect of the two laws thus passed on the same day, were wholly dissimilar. The former had relation almost exclusively, to time which was passed, and its relation to, and effect upon, existing and accruing rights; whilst

the latter was in all respects prospective. The object of the former was merely to exclude from the computation of the period of limitation the time during which a desolating war was raging, and during a temporary disorganization of courts of justice consequent thereon. The exclusion, therefore, as the war was over, embraced no time after, but was necessarily limited to the date of the act, extended for a few months longer to reach the case of a disorganized court. And the second section of the 862 act *confirmed certain acts of the Confederate Legislature, passed for the same purpose.

The purpose and effect of the stay law, on the other hand, was essentially different. Its purpose was to prevent the sacrifice of the property of the citizen, by sales under execution, in the impoverished condition of our people, and to save them from the expenses of law suits, as far as practicable, by discouraging litigation. But as indulgence to the debtor might become hazardous to the interest of the creditor, by exposing his claim to the bar of limitation, it became necessary to make some provision by which indulgence might be extended with safety to the creditor; and to effect this, the seventh section of the stay law provided as follows:

"The period during which this act shall remain in force shall be excluded from the computation of time in which, by the operation of any statute or rule of law, it may be necessary to commence any proceeding to preserve or prevent the loss of any right or remedy." This provision is rather more extensive than the mischief to be prevented required; but it is very clearly in furtherance of the main objects of the law, viz: the prevention of a sacrifice of property by sales under execution, and the suppression of litigation. It rendered indulgence to the debtor safe to the creditor, so far as lapse of time might be involved; and it will be observed that its practical operation commences exactly when that of the other act may be said in the main to end, namely, the passage of the act. The one provides, in the main, for the exclusion of time which is already past; the other wholly for the exclusion of time yet to come; and is limited only by the duration of the act itself.

This seventh section, I repeat, was evidently intended to protect every person who, in deference to the spirit of 863 *the act, should, during its existence as a law, forbear the assertion of any legal right, including, of course, the important right of appeal to the Supreme court. An appeal to that court is not only a legal proceeding, but one of the most important and expensive character, and comes, in my opinion, directly within the letter and spirit of the law. To make this more clear I refer to the 9th section of the stay law, which amends and makes part of the law, the sixth section of the act of January 23d 1865, as amended by the act of June 23d, 1865, but repeals in terms the residue of that act, except as to the counties of

Accomack and Northampton and the city of Norfolk. There is the same saving in substance in that section as in the seventh; but in terms which, to my mind, preclude argument. They are as follows: "Nor shall the time during which this act is in force be computed, in any case, in which the statute of limitation may come in question." The law of which this 6th section constituted a part, is repealed by the stay law of 1866; but the 6th section, with the saving aforesaid, is retained and amended, and made a part of the 9th section of the said stay law of 1866. The two savings explain each other, and are, in my opinion, the same in effect.

I have dwelt at greater length than might seem necessary on the provisions and effect of the act to preserve certain civil rights and remedies, and of the stay law, because it has been supposed by some that the saving clauses of the latter have no reference to cases of appeal; but that these are exclusively provided for by the former act. I have endeavored to show, and think I have shown, that this is a mistake; that the class of cases provided for by the two laws is essentially different and distinct; and that the practical effect of the saving in the stay law begins, and was intended to
864 begin, *exactly where that of the other ends. The stay law on its face provides that it shall remain in force until the first of January 1868; but by act of March 2d, 1867, Sess. acts 1866-7, chap. 297, p. 726, the 5th section of the act was so amended as to extend its operation to the 1st of January 1869, down to which time, under the effect of the section already referred to, the operation of the acts of limitation was suspended. But we have seen that before that time, the period of limitation in cases of appeal had been reduced to two years; and more than two years elapsed between the first of January 1869 and the allowance of the appeal. That is certainly so; but before two years had expired from the first of January 1869, viz: on the 5th day of November 1870, it was enacted by the General Assembly that the time from the 26th January 1870 to the passage of that act, shall be excluded from the computation of the two years aforesaid; and deducting that time, the appeal in this case was allowed within the time prescribed by law. Sess. acts, 1870-1, p. 554.

But it has been contended that the amendatory acts of 1867 and 1870, substituting a period of two years' limitation instead of five, in cases of appeal, writ of error and supersedeas, operate as a repeal of the saving clauses of the stay law. It is very true that these amendatory acts were passed after the passage of the stay law; but they do not expressly repeal the saving clauses of that act, nor indeed do they in terms make the slightest reference to them. If the saving clauses of the latter act be repealed by these amendatory acts, it can only be by implication; and that implication can only arise in such a case, by absolute repugnancy and irreconcilable conflict

between the two laws. In such case the last law must of course stand, and the prior law is repealed. But if there be not such repugnancy and conflict; if by any

865 *fair and reasonable construction, Both laws can stand together, although relating to the same subject matter, a repeal of the prior law will not be implied. Sedgwick on Statutory and Constitutional Law, pp. 121 to 128 inclusive, and authorities cited. Mr. Sedgwick says: "It is laid down as a rule, that a general statute without negative words, will not repeal the particular provisions of a former one, unless the two are irreconcilably inconsistent." And he goes on to say, that "the reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject and he has acted upon it, a subsequent statute in general terms, or treating the subject," (the same subject,) "in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction in order that its words shall have any meaning at all." The writer then refers to and considers the class of cases in which a prior statute is repealed by implication, and concludes as follows:

"But though it is thus clearly settled that statutes may be repealed by implication, and without any express words, still the leaning of the courts is against the doctrine, if it be possible to reconcile the two acts of legislature together. It must be known, says Lord Coke, that for as much as acts of parliament are established with such gravity, wisdom and universal consent of the whole nation for the advancement of the Commonwealth, they ought not by any strained construction, out of the general and ambiguous words of a subsequent act, to be abrogated: Sed hujus modi statuta, tanta solemnitate et prudentia edita, (as Fortescue speaks, ch. 18, folio 21,) ought to be maintained and supported with a benign and favorable construction. So, in

866 *this country, on the same principles, it has been held, that laws are presumed to be passed with deliberation and with full knowledge of all existing ones on the same subject; and it is therefore but reasonable to conclude that the legislature in passing a statute, did not intend to interfere with, or abrogate any prior law relating to the same matter, unless the repugnancy between the two is irreconcilable; and hence a repeal by implication is not favored. On the contrary, the courts are bound to uphold the prior law, if the two acts may well subsist together."

This is the rule of law as laid down by Mr. Sedgwick, even in cases where the two acts refer plainly to the same subject matter. But such is not the fact with the two acts under consideration. They not only do not refer to the same subject matter, but in their scope and effect are essentially separate and distinct. The saving clauses

in the stay law are not in any sense or to any extent, statutes of limitation. They only prescribe a rule of computation of time to apply to an abnormal state of the country, and which, during that state, shall apply to all statutes of limitation whatsoever, without distinction. This rule of computation is in perfect harmony with all statutes of limitation, whether existing at the date of its enactment, or passed thereafter. It does not interfere with or alter in the slightest degree, the period of limitation. It only established a mode of computation, by which the period of limitation may be ascertained. The amendatory statutes, on the other hand, have nothing to do with the computation of time. They only amend a section of a pre-existing law prescribing a period of limitation, changing by the amendment, a previous limitation of five years to two years, and saying nothing at all about the rule of computation; but leaving the section as amended to be treated as a section of the original act, subject to all the rules of construction
867 and computation *to which that act is subject. The several acts, instead of being in conflict, are, in my opinion, in perfect harmony with each other; and of course, the former is not under such circumstances repealed by the latter.

But another question arises on the facts of this case touching the question of limitation. By the statutes in force when this appeal was allowed, the period within which a petition for appeal, &c. could be presented, and that within which the appeal must be perfected, were the same. In each case the limitation was, as a general rule, as it now is, two years from the date of the judgment or decree. Now it appears from the certificate of the clerk of this court, in this case, that the appeal was not perfected by the execution of bond as required by law until the 26th of April 1862, three years, three months and twenty-six days after the date of the decree appealed from, and more than six months after the expiration of the period, within which alone was it lawful for this court to award an appeal. In that state of facts the appeal would necessarily be dismissed, but for a rather incautious proviso in the section limiting the time in which appeals may be perfected, not found in the section limiting the right of appeal. By the former, being the 17th section of ch. 182 of Code of 1860, as amended by the act of June 23d, 1870, Sess. acts 1869-70, ch. 171, p. 224, after prescribing a limitation of two years from the date of the judgment or decree, to the issuing of process on any appeal therefrom, it is enacted that "the appeal, writ of error or supersedeas shall be dismissed whenever it shall appear that two years have elapsed since the said date, before the record is delivered to such clerk, or before such bond is given as is required to be given before the appeal, writ of error or supersedeas takes effect: provided however, that section twenty-six of chapter one hundred and eighty-two of the Code
868 of *1860, instead of this section, shall

remain in full force, and apply to cases in which the appeal, writ of error or supersedeas may be to any judgment or decree rendered before the passage of this act." There is no such proviso in the 3d section of the same act in relation to the time in which a petition for appeal must be presented to the court of appeals or the judges thereof, nor in the act aforesaid of November 5th, 1870, amending the same; and thus in many cases, as in this case, a striking incongruity between the acts will be presented. But the proviso in the 17th section is too plain and imperative to be disregarded, and it must be enforced. *Lex ita scripta est*; and it is not competent to this court, by construction, to amend or repeal it. By the 26th section of chapter 182, of Code of 1860, which in this respect is the law of this case, the limitation is five years instead of two, being in fact the same, with the limitation at that time, to the right of appeal; and five years not having yet elapsed since the first day of January 1869, when the statute of limitation commenced running, the appeal, in my opinion, was regularly perfected, and is properly before us.

This brings us to the consideration of the propriety of the decree appealed from. That decree, and the previous decree of the 13th of May 1863, confirming the sale of real property, and ordering the same to be conveyed to the purchaser, were made in the absence of important and essential parties whose interest appears on the face of the record. It appears on the face of the decree of October 11, 1862, that Robert J. Crockett, one of the original defendants in the suit below, and joint and equal owner with his co-defendant S. S. Crockett, died pending the suit, unmarried and intestate, leaving his brother the said S. S. Crockett, a sister Isabella C. Brown, wife of William H.
869 Brown, and the children *of Charles H. and Jane A. Sauffley, of unknown names and number, his only heirs at law and distributees. These persons were ordered by the decree last mentioned to be brought before the court by scire facias and proper proceedings thereon, yet without awaiting the execution and return of the scire facias or other proceedings, the court, by the same decree, by consent of the parties before the court, ordered a sale of the property; which was made and confirmed by the court, without any return of scire facias executed or evidence of publication against the heirs and distributees aforesaid of Robert S. Crockett, and without further notice of them. In this, there was manifest error. It is unnecessary, at this day, to cite authority for the familiar proposition, that in a court of equity all persons must be made parties who have a material interest in the cause. "All persons materially interested in the subject of controversy ought to be made parties in equity; and if they are not, the defect may be taken advantage of either by demurrer or by the court at the hearing." *Clarke v. Long*, 4 Rand. 451. But as I have already said, it

is needless to cite authority for a proposition so familiar and well established. Nor is it necessary to cite authority, for the proposition, which is really the same, that in a proceeding to charge the lands of the defendant, if he die testate or intestate pending the controversy, there can be no further proceeding against the lands of the decedent until his heirs at law or devisees, as the case may be, shall be brought before the court. It was error, therefore, in this case, to confirm the sale, dispose of the proceeds of the real estate sold, and strike the case from the docket, without having all the heirs of Robert S. Crockett before the court. They should be brought before the court and allowed the option of assenting to or resisting the confirmation of a sale so irregularly *made. I am of opinion, therefore, that the two last decrees entered in the cause should be reversed and annulled, with costs to the appellant; and that the cause be remanded to the Circuit court to be further proceeded in, in accordance with this opinion.

ANDERSON, J., concurred in the opinion of Bouldin, J., throughout. On the question of the limitation of the appeal, Christian, J., dissented, upon the ground that the act of March 2, 1866, entitled "an act to preserve and extend the time for the exercise of civil rights and remedies," contained the only saving applicable to appeals, &c., to the court of appeals. He thought the appeal was too late.

Judge Moncure also dissented, on the question of the limitation of the appeal, on the ground that as to appeals, the 7th section of the stay law was repealed by implication; and therefore the appeal was too late.

All the judges concurred in the opinion that the decree should be reversed, and sent back for want of proper parties.

Decree reversed.

871 *Forrer v. Coffman & al.

September Term, 1872, Staunton.

1. **Arbitration—Sealed Award.**—Arbitrators are required to return their award by a certain day under their hands and seals. They prepare their award; and the day before they are required to return it, one of them hands it to the counsel of the plaintiff. He sees that they have omitted the seals, and he returns it to them, and requests that they will add the seals and insert the word "seal" in the body of the instrument. This they do, and then deliver it on the day to which they are limited by the submission. The award is valid.

2. **Same—Same—Parties Bound.**—The submission is made of matters in controversy in a suit by M against F & C, late partners, on a claim against the partnership. F alone is the party to the submission, and binds himself to perform it, and the award is that F shall pay to M, &c. The fact that C is not named in the award is no objection to it.

*See collection of cases in foot-note to Willoughby v. Thomas, 24 Gratt. 521; Portsmouth v. Norfolk Co., 21 Gratt. 727, and foot-note.

He is not bound by it, having been no party to the submission.

3. **Same—Award Entered as the Judgment.**—The submission providing that the award shall be entered as the judgment of the court, when so entered it is the judgment in the cause, and settles all the matters involved in the action; and it was not necessary that the award on its face should dispose of the action.

4. **Same—Interest.**—The arbitrators might properly allow interest upon the ascertained present value of rents to become due.

5. **Jurisdiction of County Court—Presumption.**—It not appearing in the record whether the term of the county court at which the award was entered as the judgment of the court, was a quarterly or monthly term, it must be presumed by the appellate court, that it was a term at which the court had jurisdiction to enter the judgment.

872 *In June 1871, Magdaline M'D. Coffman instituted an action of assumpsit in the County court of Rockingham, against Henry Forrer and Charles T. Clippinger, late partners under the name and style of Forrer & Clippinger, to recover from them the sum of nine hundred and fifty dollars, with interest, for the rent of a store room and lot in the town of Harrisonburg, due one half on the 12th of November 1870, and the other half on the 12th of May 1871. The process was served on both the defendants, and they appeared and pleaded "non assumpsit."

In January 1872, the cause being still pending in the county court, Henry Forrer and Mrs. Coffman entered into a written agreement, by which, after reciting that certain questions and disputes between Mrs. Coffman and Forrer & Clippinger have arisen and are now pending, in regard to the liability of the said firm of Forrer & Clippinger to the said Coffman for rent due and to become due, under an article of agreement entered into by them on the 13th of January 1868, in regard to the lease of certain property in the town of Harrisonburg, which said property was burned on the 25th of December 1870; and the said Henry Forrer having agreed, and hereby agreeing, to assume and pay any liability that may attach to the said firm of Forrer & Clippinger by virtue of said article of agreement, and desiring to surrender the said lease, and pay over to said M. M'D. Coffman, in cash, the amount, if any thing, that may be due her upon the award to be made by the arbitrators hereinafter mentioned; therefore for the final ending all said questions and disputes, and deciding the same, the said Forrer and Coffman agreed that the matters in controversy should be referred to the final award of Samuel Shacklett, J. Madison Irvin and W. C. Harrison, or any two of them, so as that they should make

873 their award in *writing under their hands and seals, ready to be delivered by the 25th of May 1872. And it was agreed that this submission should be entered on record in the county court of Rockingham, and that the award should be entered up as the judgment of said court.

The arbitrators made their award, by which they awarded that Forrer should pay to Mrs. Coffman the sum of \$2,817.73, with interest on \$356.26, a part thereof, from the 12th of May 1871; on \$475, another part thereof, from the 12th of November 1871, and on \$1,986.47, the residue thereof, from the 12th of May 1872; and further that Forrer should deliver to said Coffman, immediate possession of the lot of ground mentioned in the submission.

At the June term of the county court of Rockingham, on the motion of Mrs. Coffman, a rule was awarded upon Forrer to show cause why the award aforesaid should not be entered up as the judgment of the court. This rule was served on Forrer, who appeared; and the motion came on to be heard at the July term of the court; when the court rendered a judgment in favor of Mrs. Coffman against Forrer, in pursuance of the terms of the award. And Forrer excepted.

By the agreement of the 13th of January 1868, Mrs. Coffman rented to Forrer & Clippinger, for the term of five years commencing on the 12th of May 1870, and ending on the 11th day of May 1875, a store room and its appurtenances, and also all the rest of the lower story of the main building of said house, except, &c.; in consideration for which they agreed to pay to her an annual rent of nine hundred and fifty dollars, to be paid at the end of each successive six months of said lease; and they further bound themselves to make extensive specified improvements on the house at their costs. On the 25th of December 1870, the house was entirely consumed by
874 *fire, the lessees having paid the rent up to November 12th 1870.

The parties not agreeing as to the liability of Forrer & Clippinger to pay the rent after the house was consumed, the suit was brought by Mrs. Coffman against them; and the agreement for a submission of their matters to award, and the award was made as hereinbefore stated. As to the award it appeared in evidence, that it was prepared by the arbitrators and handed to the counsel of Mrs. Coffman by one of the arbitrators on the 24th of May 1872, in the absence of the others. When this was done, the word "seal" was not in the body of the instrument, and no seals were attached to their names; and on the next day the counsel returned it to the arbitrators with the request that they would affix seals to their names, and insert the words "and seals" in the body of the award; which was done by the arbitrators, who thereupon, all being present together, delivered the same to said counsel on the same day.

The defendant proved by one of the arbitrators, that they intended to allow the plaintiff the whole amount of rent accruing after the 25th of December 1870 down to the termination of the lease, reduced to cash on the 12th of May 1872, subject to a credit of \$400 a year from the date of the award to the termination of the lease in May 1875; in like manner reduced to cash on the 12th

of May 1872; which credit was for the value of the surrender of the lease by Forrer to the plaintiff.

And these being all the facts proved in the case, the defendant Forrer moved the court to set aside the award, and not to enter judgment upon it.

1st. Because the original award as made, signed and delivered, was not made under seal, as required by the submission.

2d. Because the award was not final, 875 and did not dispose *of a suit pending in the court, for part of the rent accrued after said 25th of December, 1870.

3d. Because of apparent errors on its face, in allowing interest from a period anterior to the time the rent was due or to become due under the lease.

4th. Because the rent accruing was reduced to cash by simple interest, instead of compound.

5th. Because it is impossible, in requiring the surrender of the lease of Forrer & Clippinger by Henry Forrer.

6th. Because the rule to show cause against the award issued in the action of assumpsit pending in the County court of Rockingham, for part of the rent, and because the court has no jurisdiction at a monthly term to enter the same.

7th. Because the award was unjust and excessive.

But the court overruled the motion to set aside the award; and as before stated, entered judgment thereon in favor of Mrs. Coffman against Forrer. And thereupon Forrer applied to the Circuit court of Rockingham for a writ of error and supersedeas to the judgment; which was refused; and he then made the like application to a judge of this court; which was allowed.

Woodson, for the appellant.

Yancey & Johnston, for the appellees.

STAPLES, J., delivered the opinion of the court.

An action of assumpsit was brought in the Circuit court of Rockingham county, by Mrs. Coffman, against Henry Forrer and Charles T. Clippinger, late partners, trading under the firm and style of Forrer & Clippinger. During the pendency of the action it was agreed between plaintiff and defendant Forrer, to submit the matters in controversy to arbitration, and the award pursuant thereto to be entered up as
876 judgment of the court. *The submission required the arbitrators to make their award under their hands and seals, ready to be delivered on or before the 17th of February 1872. The time was subsequently enlarged to the 25th of May following.

The award was made and completed on the 24th of May, and delivered by one of the arbitrators, in the absence of the others, to the counsel for the plaintiff. The counsel discovering that the award was not "under the seals" of the arbitrators, as required by the submission, returned it to

them on the morning of the 25th, with a request they would supply the omission; which was accordingly done by the arbitrators, all of them being present; and thereupon, on the same day, the award was again delivered to the counsel.

It is insisted that the arbitrators were functus officio, and they were not authorized to change or interfere with the award after it was first delivered to counsel. The objection is of the most technical character. The additions made by the arbitrators were mere matters of form. They did not affect the merits or the substance of the award, or involve the exercise of any new and distinct act of judgment on the part of the arbitrators. It is impossible that either party could be prejudiced by the act. The omission was no doubt accidental, or the result of misapprehension; and the arbitrators had the right, as it was their duty, to supply any mere formal defect of the kind, certainly before the time fixed for the delivery of the award.

In *Irvine v. Elton*, 8 East's R. 52, Lord Ellenborough said, that the arbitrator's authority having been once completely exercised, pursuant to the terms of submission, was at an end, and could not be revived even for the purpose of correcting a mistaken calculation of figures. But that view was placed upon the distinct ground, that such mistakes might involve the essential *merits of the case. And the distinction is well taken between acts which may change and correct the judgment of the arbitrator, and acts which involve mere matters of form; such as the simple insertion of date and the like. As to the latter, there is no valid reason why the arbitrator may not perform them even after a delivery of the award, more especially when the time has not expired, which terminates the arbitrator's authority. The tendency of the modern decisions is to disregard, as far as possible, mere matters of form, and to give force, conclusiveness and effect to awards where no corruption or misconduct on the part of the arbitrators is charged, and no fraud or deceit imputed to the parties.

The second objection is, that Clippinger is not noticed in the award, although he is a party to the action, and one of the lessees of the property involved in the decision of the arbitrators. The answer is, that Clippinger was in no way concerned in the submission, and cannot, therefore, be bound by the award. The defendant Forrer agreed to surrender the lease, to assume any liability which might attach to the firm, and to pay the plaintiff for the rent of the property such sum as should be ascertained by the arbitrators. The award may not be binding upon Clippinger, who was no party to the submission; but it is none the less valid as to Forrer, who did assent to it. As to him, the award is within the terms of the submission.

The third ground of error is the alleged failure of the arbitrators to dispose of the action of assumpsit, and of the several

matters of controversy included in it. The submission provides that the award shall be entered up as the judgment of the court. When so entered, it necessarily terminated the action and all matters of controversy *fairly connected with it. The award was in fact the judgment of the court, and as such ended the suit.

It is also insisted, that the arbitrators had no right to allow interest on the payments. The leased tenement had been destroyed by fire long before the period fixed for the termination of the lease. And the parties desired to ascertain the extent of the lessees' liability for the rent due and to become due; and whatever it might be, the defendant agreed to pay immediately. The arbitrators accordingly ascertained the present value of the lease, and the amount to be paid the plaintiff in satisfaction of her claim; and the sums thus ascertained bear interest. It is clearly competent for the arbitrators to award the payment of interest upon the principal adjudged to be due. Even if they had made a mistake, it is not such a mistake on the face of the award as the court can correct.

The only remaining objection to be considered relates to the jurisdiction of the County court to enter judgment on the award at the July term 1872. It is insisted that this was a monthly term, and the court was not authorized at such term to take any action upon the award. It is unnecessary to consider whether the laws prescribing the jurisdiction of the County courts prohibit these courts at monthly terms, from entering up awards as the judgment of the court. By the act of July 11th, 1870, the judges of the County courts are empowered to designate four or more terms for the trial of civil cases, in which juries are required. Whether the July term of the County court of Rockingham was one of the courts thus designated, the record does not inform us. In the absence of all proof on the subject, we must presume that the court in this case did not assume an unwarranted jurisdiction.

879 *For these reasons I am of opinion to affirm the judgment.

Judgment affirmed.

880 *Gatewood's Adm'r v. Goode & als.

September Term, 1873, Staunton.

Several Defendants—Lien of Judgment—Case at Bar.—

At the March term 1861, of the county court of Monroe, a judgment was rendered at the suit of the bank of V plaintiff against W, S and G, the latter living in the county of Bath. Execution of *fi. fa.* was issued on this judgment and levied on the property of W, and the sheriff returned, after June 1861, a levy upon the personal property of W, that the property was appraised and offered for sale, and not bringing valuation it was returned. G died during the war, leaving real estate in Bath county, and also in West Virginia; and after his death some of his creditors filed their bill in the Circuit court of Bath, to subject his real estate to

the payment of his debts. The commissioner reported the above judgment as a debt by judgment having priority. A copy of the judgment was certified by the clerk of Monroe Circuit court, "and as such, keeper of the records of Monroe county court, and which by law are a part of the records of my office." The Circuit court confirmed the report. **HELD:**

1. **Same—Same—Docketed.**—The judgment constituted, as between the parties thereto, a lien on the real estate in Virginia belonging to the judgment debtors or any of them, whether the said judgment was docketed in the counties in which the real estate might be or not.

2. **Same—Same—Discharged—Satisfied.**—That the lien was not discharged by the levy of the execution upon the property of W. one of the debtors, by the sheriff of Monroe county; nor was the execution satisfied by the act of the sheriff, returning the property so levied on to W. in obedience to the ordinance of the Virginia convention of 1861, whether such ordinance was valid or not; said act of the sheriff being entirely his own act, neither prompted nor assisted by the plaintiff in the judgment.

881 3. ***Same—Same—Effect of Division of Virginia.**

—That the lien of said judgment on the lands of G, in Bath county, was neither lost nor impaired by reason of the division of the State of Virginia into two States, and the falling of the county of Monroe into the State of West Virginia.

4. **Same—Certificate of Clerk of Circuit Court—Proper Evidence.**—That the certificate of the clerk of the Circuit court of Monroe county, in West Virginia, of the records of which court the records of the former county court of Monroe form a part, was proper evidence of such judgment; and there appearing no other judgment binding said lands, or any debt of G of superior dignity, there was no error in the decree.

Samuel V. Gatewood, of the county of Bath, died some time during the late war, seized of real estate in said county, and also in the county of Pocahontas in West Virginia. In his lifetime an action of debt had been instituted in the County court of Monroe county by the Bank of Virginia against Wm. L. Lewis, S. P. Lewis and himself; and at the March term of the court for 1861, there was an office judgment confirmed against them for \$2,500, with interest from July 18th, 1860, and notary's fees and costs amounting to \$8.65. On this judgment execution was sued out against all the defendants, which went into the hands of the sheriff of the county; on which he, after June 1861, returned the receipt in payment of \$1,000, and a levy upon personal property of Wm. L. Lewis; naming it; that the property was appraised and offered for sale; and not bringing valuation, it was returned.

After Gatewood's death Samuel Goode and others, creditors of Gatewood, filed their bill in the Circuit court of Bath county, against his administrator and heirs, to subject his real estate to the payment of his debts; and in the progress of the cause a commissioner was directed to take an account of the debts and their priorities. The only questions in this case relate

882 to the *aforesaid judgment of the Bank of Virginia against the Lewis's and Gatewood. This judgment had not been docketed. A copy of the record of the judgment was certified by the clerk of the Circuit court of Monroe county, who stated in his certificate, that as such clerk he was keeper of the records of Monroe county court, which by law were a part of the records of his office. This judgment the commissioner reported as a debt of the first class, and it amounted on the 1st of January 1870 to \$2,484.95, of which \$1,634.74 was principal.

The cause came on to be heard on the 14th of May 1872, when the court confirmed the report of the commissioner; and it was decreed that the special receiver in the cause should proceed to pay the debts of the intestate according to their respective priorities. And thereupon Gatewood's adm'r applied to this court for an appeal; which was allowed.

Skeen, Sheffey & Bumgardner, for the appellant.

For the purposes of the suit, as it stood in the court below, the judgment of the President and Directors of the Bank of Virginia v. W. L. Lewis, S. V. Gatewood, &c., cannot be regarded as a judgment of the State of Virginia, but must be regarded as a judgment of a foreign State, not conclusive, but subject to such defences as are received against judgments of that class.

The judgment is certified by the clerk of the Circuit court of Monroe county, in the State of West Virginia, and the certificate is certified to be in due form according to the law of West Virginia, by a judge of West Virginia. Such certificates are only competent evidence to prove it as a judgment of the State of West Virginia. As a Virginia judgment it is not proven at all. The certificates of clerks and judges of other States are not competent evidence to prove the judgments of the courts of 883 Virginia. *If a judgment of the State of Virginia, it is not legally proven, and the report stating it as a debt is erroneous. If a foreign judgment, the report is erroneous in stating it as a preferred debt against the estate of S. V. Gatewood: and on either grounds it was erroneous to confirm the report.

But the debt must be regarded as satisfied, at least, as regards the estate of S. V. Gatewood. Execution was issued from the office of the County court of Monroe on the 21st day of March, 1861, and upon that execution the following return was made by the officer: "Levied the within execution upon the following property of William L. Lewis, as per statement attached hereto, to wit: Six horses, &c., the property appraised and offered for sale, and not bringing valuation was returned."

This return was made by the officer in undertaking to pursue section 3d of the ordinance of the convention passed April 30, 1861, and which is found in the (Richmond)

Acts of Assembly of 1861, among the ordinances, page 34. This ordinance is unconstitutional, null, and void, because it clearly impairs the obligation of contracts.

This ordinance is similar in its general scope and design to the stay law of North Carolina of May 11th, 1861, and that of Missouri of March 7th, 1861, both of which were declared unconstitutional, the first in the case of *Barnes v. Barnes*, 8 Jones R. (N. C.) 366. The latter in the case of *Stevens v. Andrews*, 31 Missouri R. 205.

It is in substance identical with the act of Indiana, which was considered by the Supreme court of the United States in the case of *McCracken v. Hayward*, 2 How. U. S. R. 608, except that the ordinance required sale at full valuation according to what would have been its value on the 6th of November, 1860. The Indiana act required sale at two-thirds of the amount of 884 valuation. *In *McCracken v. Hayard*, in which case the case of *Bronson v. Kinzie*, 1 How. U. S. R. 311, to the same effect, was reviewed and approved, the court held the Indiana act to be unconstitutional. The cases on this subject are collected and considered in *Cooley*, Const. Lim. page 290.

The ordinance being unconstitutional, the return made by the officer was illegal; and his act in restoring the property to the principal debtor was official misconduct for which he is answerable to the same extent and in the same way, and which has the same effect upon the parties to the execution as if the ordinance had never been passed. *Cooley*, Const. Lim. 188; *State of Missouri v. Gatzweiler*, 49 Missouri R. 17; *State v. Bradford*, 44 Georgia R. 417; *Brown v. Henderson*, 1 Missouri R. 134.

The sheriff, in pursuing this ordinance, is to be held to the same responsibility, and his acts have the same effect upon the rights of the parties to the execution as though no such act had ever been passed.

In this case the execution was levied upon property of the principal debtor, ample in value to discharge the debt, and the sheriff returned the property to the owner of his own mere notion, without consent of the endorsers. Had the property been sold, as the sheriff was bound to do, the debt would have been paid and the sureties exonerated from liability.

According to the general doctrine "that the levy of an execution upon sufficient property to discharge it, is a satisfaction," as explained and modified in this court in this case of *Walker & als. v. Commonwealth*, 18 Gratt. 13, this execution as against the estate of S. V. Gatewood is satisfied.

In this case the court says "the sureties are interested in having the property of their principal, thus specifically bound for the payment of that debt, applied to 885 that *purpose in their exoneration, in whole or in part, according to the value of the property. They also have a right to be consulted by the plaintiff in giving up the levy, and must consent thereto in order to make them liable to a

new execution, at least, without having credit for the amount of the first levy." And further on: "But if the property levied on be lost to the defendant by the misconduct or neglect of the sheriff, the execution is thereby satisfied, and the plaintiff can then only look to the sheriff for indemnity." * * * "If that property be lost by the default of the officer of the law, who in this respect may be said to be the agent of the plaintiff, and without the consent of the defendant, it is reasonable and proper that the loss should not fall on the defendant." Then by parity of reasoning it must follow, that where property of the principal debtor sufficient to satisfy the execution, has been levied on, and the sheriff, by his misconduct, without the consent of the sureties who "are interested," as this court says, "in having the property of their principal, thus specifically bound for the payment of that debt, applied to that purpose in their exoneration," has returned the property to the principal debtor, "it is reasonable and proper that the loss should not fall" on the sureties, whose valuable interests have been destroyed by the unwarrantable act of the sheriff, "and that they should be held as not subject to a new execution; and that the plaintiff in such a case should be turned over to his remedy against the sheriff, for his misconduct and default, who in this respect may be said to be the agent of the plaintiff," or resort to the principal debtor, as to whom the execution should not be regarded as satisfied, inasmuch as the property was returned to him, necessarily with his consent, and as he has sustained no injury by the action of the sheriff.

886 *Pendleton, for the appellee.

Did the levy made on Lewis' property in 1861 release Gatewood?

This effect is claimed on the ground that the ordinance of the convention of April 30, 1861, was unconstitutional and void.

It is claimed by the appellees that during the period from the 17th of April 1861, to the 4th Thursday in May, 1861, at least, the State of Virginia was not subject to the restraints of either the Federal or the Confederate States constitutions. The State of Virginia, during that period had, by her declared act of secession, resumed her separate sovereignty, was an active belligerent, holding actual possession of her soil by force of arms, and had forces in the field sufficient to make good her pretensions. Her own constitution and laws were then supreme over her territory and people. *United States v. Rice*, 4 Wheat. R. 246; *Fleming v. Page*, 9 How. U. S. R. 614. In *Thorington v. Smith*, 8 Wall. U. S. R. 1, the court says: "to the extent then of the actual supremacy, however unlawfully gained, in all matters of government within its military lines, the power of the insurgent government cannot be questioned;" and on p. 13, "the inhabitants must be regarded as under the authority of the insurgent belligerent power actually established

as the government of the country, and contracts made with them must be interpreted and enforced with reference to the condition of things created by the acts of the governing power." That the counties of Monroe and Bath were during that period within the military lines of the troops of Virginia is a part of the public history of the war.

The third section of the "Ordinance to provide against the sacrifice of property and to suspend proceedings *in certain cases," passed April 30, 1861, provides:

"If the debtor offers no such bond, (the stay bond provided for in the preceding section,) it shall be the duty of the officer to convene three freeholders from the vicinage, who, after being sworn, shall proceed to value the property according to what would have been its value on the sixth day of November 1860; and unless the said property shall sell for the full amount of such valuation, it shall be restored to the debtor without lien."

Can there be a doubt as to the authority, validity and binding force of this ordinance? It emanated from a body composed of the wisest citizens of the Commonwealth, representing immediately and peculiarly the sovereignty of the people, chosen for the performance of the most important functions, in a time of great public peril. Their legislation, in the sacredness and supremacy of its authority, is twin sister to the organic law of the Commonwealth.

The clause under consideration in no manner undertakes to impair the obligation of contracts, but merely protects the citizen against an undue sacrifice of his property by regulating the exercise of the remedy. It is not obnoxious to any constitutional inhibition. It is entirely within the competency of ordinary legislative power, and a fortiori was within the competency of a convention immediately representing the sovereignty of the people. It seems to me to be a very mild application of the maxim, "*Salus populi suprema lex*," which has been held at all times to authorize an interference even with the rights of property, *ob publicam utilitatem*, both under the common and civil law. 2 Kent Com., 339, —(4th edition); Puffendorff *De Jure*

888 Nat. B. 8, ch. *5; Plate Glass Co. v. Meredith, 4 T. R. 794. "*Alibi diximus res subditorum sub eminenti dominio esse civitatis, ita ut civitas, aut qui civitatis vice fungitur, iis rebus uti, easque etiam perdere et alienare possit, non tantum ex summa necessitate, quæ privatis quoque jus aliquod in aliena concedit, sed ob publicam utilitatem, cui privatas cedere illi ipsi voluisse sensendi sunt, qui in civilem cœtum coierunt.*" Grotius, *De Jure Belli et Pacis*, B. 3, ch. 20, s. 7.

The discretion to determine when the state of things exists which justifies the rousing into active energy of this ordinarily dormant but inherent power of sovereignty, must necessarily reside in the political department of the State, and can never be properly the subject of judicial revision.

If the ordinance of April 30, 1861, needed further legislative sanction, it is to be found in the act of Assembly passed March 29, 1862, (Sess. acts, pp. 95, 96, 97). Section 8 of this act repeals the ordinance, but provides that such "repeal shall not affect any right established, accrued or accruing under, or remedy or relief provided by the second, third and seventh sections of said ordinance."

The return of the sheriff of Monroe county on the writ of *fi. fa.* issued in 1861, is in these words: "Levied the within execution upon the personal property of William L. Lewis, as per statement attached hereto, to wit: six horses, &c." "The property appraised and offered for sale, and not bringing valuation, was returned." This return brings the case clearly within the above quoted section of the ordinance. The levy was nullified by the ordinance, and therefore could not operate a satisfaction of the judgment.

But even if this court should hold 889 that the ordinance *was null and void, it is confidently claimed that the levy made by the sheriff of Monroe did not in any manner satisfy or affect the judgment of the Bank of Virginia v. Gatewood. Where property even of sufficient value to satisfy the execution, is levied on and returned to the defendant, it is plain there is no satisfaction of the writ, either actual or technical. There must be either a sale or a destruction of the defendant's interest in the property levied on to accomplish this result. Walker v. The Commonwealth, 18 Gratt. 13, and cases there cited. Walker v. McDowell, 4 Smedes & Marsh R. 118.

If there was no satisfaction of the execution, then the only other mode by which the Bank of Virginia could have lost its recourse on Gatewood was by reason of some act or proceeding on its part in derogation of his rights as a surety. Now, in the first place, there is no proof in the record that Gatewood occupied the position of a surety for Lewis. An endorser is not unfrequently the principal debtor, and the Bank had the right to single Gatewood out and sue him alone.

But admitting, for the sake of the argument, that Gatewood was a mere surety, what ground is there for complaint that the Bank did any thing to his prejudice? Nothing of the kind is shown or pretended. The Bank proceeded regularly to obtain its judgment, issued its execution and caused it to be levied on the property of Lewis. It made no agreement with Lewis for indulgence, and gave no directions to the sheriff as to the disposition of the property levied on. If the property was returned to Lewis it was through no agency of the Bank. If the benefit of the levy was lost, it was not only through no laches of the Bank, but in spite of its efforts to the contrary. Gatewood was not hindered from indemnifying the sheriff and compelling him to sell,

890 *nor from filing his bill *quia timet*. By his silence he acquiesced in the return of the property to Lewis. If the

ordinance was unconstitutional and void, and the release of the levy therefore illegal, it was as much the duty of Gatewood as of the Bank to incur the expense and trouble of making the levy effectual. Will the court now permit his administrator to take advantage of his own negligence? See *Norris v. Crummev*, 2 Rand. 323; *McKenney v. Waller*, 1 Leigh 434; *Alcock v. Hill*, 4 Leigh 622; *Humphrey v. Hitt*, 6 Gratt. 509. Suppose a judgment creditor should refuse to indemnify a sheriff who has levied on property claimed by a stranger, and it should turn out that the title to the property was really in the defendant in execution, would he thereby lose his recourse on the surety? In other words, is he bound at the peril of losing his rights against the surety to indemnify the sheriff in all cases? I know of no case which goes this length.

BOULDIN, J., delivered the opinion of the court.

The court having maturely considered the transcript of the record of the decree aforesaid, and the arguments of counsel, is of opinion:

1st. That the judgment of the bank of Virginia in the proceedings mentioned, constituted as between the parties thereto, a lien on all the real estate in Virginia, belonging to the judgment debtors or any of them, whether the said judgment was docketed in the counties in which the real estate might lie or not.

2d. That this lien was not discharged by the levy of the execution in the proceedings mentioned, made on the property of W. L. Lewis, one of the debtors, by the sheriff of Monroe county, in the county court

891 of which *county the judgment was rendered; nor was the execution satisfied by the act of said sheriff, returning the property so levied on to said Lewis, in obedience to an ordinance of the Virginia convention of 1861, whether such ordinance was valid or not; said act of the sheriff having been entirely his own act, neither prompted nor assented to by the plaintiff in the judgment.

3d. That the lien of said judgment on the lands in the proceedings mentioned, was neither lost nor impaired by reason of the division of the State of Virginia into two States, and the falling of the county of Monroe into the State of West Virginia.

4th. That the transcript of the record of said judgment, duly certified by the clerk of the Circuit court of Monroe county, in West Virginia, of the records of which court the records of the former county court of Monroe county, Virginia, now form a part, was proper evidence to establish the existence of such judgment; and there not appearing to be any judgment prior thereto binding on said lands, nor any debt against Samuel V. Gatewood, dec'd, of superior dignity to said judgment, there was no error in reporting and providing for said judgment as a first class debt.

The court is, therefore, of opinion that there is no error in the decree complained

of; and it is decreed and ordered that said decree be affirmed, and that the appellant, William Skeen, as administrator of Samuel V. Gatewood, dec'd, do, out of the assets of his intestate in his hands to be administered, pay to the appellees their costs by them about their defence in this behalf expended, and thirty dollars damages to the president, directors and company of the bank of Virginia for the owner or owners of said judgment.

892 *All of which is ordered to be certified to the Circuit court of Bath county.

Decree affirmed.

893 *Sively, by &c. v. Campbell & al.

September Term, 1873, Staunton.

Lien of Judgment—Future Assignments—Marriage Settlement.—C, a judgment creditor of S, files his bill against S, to subject his lands, consisting of five small tracts, to satisfy his judgment. S answers and says he has sold a part of his land to M, and a part to G, and a part was settled on his wife by marriage agreement. And since the filing of the bill he had been adjudged a bankrupt on his petition. Camends his bill and makes G, the wife, and the assignee in bankruptcy, defendants. A commissioner reports the plaintiff's judgment \$648.67, and other judgments, in all \$1,284.02; all docketed before the marriage contract; the assessed value of all the lands \$1,745.50; the annual rental of all \$76; the lands sold M and G of one-fifth value of the whole. The assignee has sold 218 acres of the land, not including the wife's; which was not embraced in S's schedule. The court decrees sale of wife's land on a credit, and directs a personal security, the obligors to waive the homestead exemption. **Held:**

1. **Same—Same—Decree for Sale of Wife's Land.**—The commissioner having reported that the lands sold M and G was one-fifth of the value of the land, there is no necessity for further enquiry as to the lands purchased by them, before the decree for a sale of the wife's land.

2. **Same—Same—Same—Unessentials.**—It was not necessary to show the assessed value of the wife's land before decreeing the sale.

3. **Same—Same—Same—Same.**—It was not necessary to have a separate report of the number of acres held by the wife, as that sufficiently appears.

4. **Same—Same—Same—Presumption as to Priority.**—Under the circumstances of this case, the presumption is that M's deed, though it is not in the record, was prior to the marriage contract, and therefore M was not a necessary party.

894 *S. Same—Same—Bankruptcy—Jurisdiction of Court.—The fact that S went into bankruptcy after the bill was filed, could not oust the jurisdiction of the State court as to the wife; nor could it as to S; and the assignee did not object.

6. **Waiver of Homestead Exemption—Quere.**—**Quere:** If the court may require the purchasers under a decree and their sureties, to waive their homestead exemption?

*See foot-note to *Alley v. Rogers*, 19 Gratt. 366.

In April 1871 Calvin S. Campbell instituted a suit in equity in the Circuit court of Alleghany county, against Andrew J. Sively, to subject the lands of said Sively to satisfy a judgment which the plaintiff had recovered against him. In his bill he stated that he had recovered a judgment against Sively in the said court on the 7th of May 1867, for \$313.66, with interest and costs, as stated in the bill: that on the 14th of May this judgment was docketed in the clerk's office of the County court of Alleghany; and that in October 1870 he had sued out an execution of *fi. fa.* upon it; which had been returned no effects.

The bill further states, that at the time of the rendition of this judgment the said Sively was, and still is, the fee simple owner of the following named tracts of land, viz: One tract of fifty-four acres on Jackson's river, one tract of fifty-eight acres on Potts creek, another tract of thirteen acres on same creek, another tract of sixty acres on same creek, and another tract of one hundred and eighty-two acres on same creek. And the prayer of the bill is for the sale of the land, and the payment of his judgment, and for general relief.

The plaintiff filed with his bill a copy of his judgment and of the execution which had issued upon it; and the bill having been taken for confessed, at the June term of the court, the court in vacation made an order, directing a commissioner to take an account of all liens, and their priorities, upon the lands in the bill mentioned, whether by judgment or otherwise, including the plaintiffs, *and also an account of the fee simple and annual rental value of said lands, and report, &c.

At the August term of the court Sively filed his answer. He says the proper parties are not before the court: That he sold a portion of the lands sought to be subjected to sale, to Joseph McCaleb, and another portion to James P. Gillaspie; for both which deeds have been made; and that by a marriage contract with his wife, of record in the clerk's office of Alleghany County court, she is entitled to another part of said lands: And since the filing of plaintiff's bill, defendant has filed his petition in the District court of the U. S. to be declared a bankrupt; and the plaintiff cannot proceed in this cause without making his assignee in bankruptcy a party defendant.

In October 1871 the plaintiff filed an amended bill making Charlotte E. Sively, wife of Andrew J. Sively, Thomas E. Cobbs, assignee in bankruptcy of said Andrew J. Sively, and James P. Gillaspie defendants. He states in his amended bill that Sively conveyed to Gillaspie by deed bearing date May 1st, 1867, several tracts of land, being portions of the land in the bill mentioned. He charges that at least one judgment was rendered against Sively long prior to the date of this deed; and he charges that his own judgment of May 3d, 1867, was rendered and docketed before the said deed was executed; it not having been acknowledged until May 29th 1867.

The amended bill further states, that on the 1st of May 1868, Sively entered into an article of agreement with Charlotte E. Wolf, in contemplation of matrimony, in which it was stipulated that the said Charlotte should hold and enjoy during her natural life, a considerable portion of the lands mentioned in the original bill, including the mansion house; a copy of which is filed *with the bill. It charges that this agreement was subsequent to the docketing of the plaintiff's judgment, and that said judgment is a lien upon said lands.

The bill further states that subsequent to the institution of this suit Sively had filed his petition in bankruptcy, and had been adjudged a bankrupt, and that Thomas E. Cobbs was chosen his assignee. That Cobbs had sold on November 17th, 1871, two hundred and ten acres of the said lands, being all the lands owned at the time by said Sively, except that embraced in the marriage contract; when the plaintiff became the purchaser thereof at \$355; of which he had paid \$118.33, and had given his bonds at one and two years for the balance of the purchase money.

The prayer of the bill is, that Cobbs may be required to pay into court the purchase money received by him, and the plaintiff may be authorized to pay into court the balance of said purchase money as it came due; and that the same may be applied to the payment of the liens upon it in their order. That the court may decree a sale of the land embraced in the marriage contract; and that the proceeds may be applied to pay the plaintiff's debt; and in case of deficiency that the land sold to Gillaspie may be charged with the payment of the same; and for general relief.

The amended bill was taken for confessed at the February rules, 1872. In March Cobbs filed his answer, in which he says he sold the land as stated in the amended bill, it being the real estate set forth in the schedule of the bankrupt, and that he had reported the sale to the court. He insists that the United States court has sole cognizance of the subject; and that Sively having been finally discharged from all his debts by a decree of the United States court, this suit should be dismissed.

897 *The commissioner returned his report; from which it appeared, that there was one judgment against Sively, in favour of N. K. Walker, principal, interest and costs \$136.60, docketed September 20th, 1866; the judgment of the plaintiff for \$548.83, docketed May 14th, 1867; and three others docketed subsequent to the plaintiffs, but before the date of the marriage settlement; all the debts, amounting principal, interest and costs, to \$1,284 02. The commissioner reported that the assessed value of all the lands in the bill mentioned was \$1,745 50. He estimated the annual rental value at seventy-five dollars a year; and he estimated the land conveyed to Gillaspie and McCaleb to be about one-fifth in value

of the entire lands. The deeds to these parties are not in the record.

The cause came on to be heard on the 29th of March 1872, when the court held that the lands embraced in the marriage contract were subject to pay the plaintiff's judgment, and decreed that if the plaintiff's judgment remained unsatisfied at the expiration of sixty days from the adjournment of the court, R. L. Parrish, who was appointed a commissioner for the purpose, after such advertising as he might deem best, should sell at public auction the said lands upon the terms, of cash for enough to pay the costs of suit and the expenses of sale, and as to the residue upon credits of one, two and three years, in equal instalments, taking from the purchaser bonds with good personal security, bearing interest from the date, and waiving the homestead exemption.

From this decree Mrs. Sively, by her next friend, Andrew J. Sively, applied to this court for an appeal; which was allowed.

Mays, for the appellant.

R. L. Parrish, for the appellee.

898 *BOULDIN, J., delivered the opinion of the court.

The proceedings in the Circuit court in this case have been somewhat irregular, but we think there is no substantial error in the record to the prejudice of the appellant.

There is no brief for the appellant and no argument, nor is there any formal assignment of errors in the petition for appeal; but we gather from the petition, that the appellant relies on the following objections, among others, to the decree of the Circuit court: 1st. That there was no proof of the number of acres of land sold by Sively to McCaleb and Gillaspie, nor any production of the deeds.

It might be enough to say that the allegation that a portion of the Sively lands had been sold to those parties, came from the appellant's grantor by way of defence to the claim of the appellee; and if it were important that the deeds should be produced and the number of acres shown, it was certainly incumbent on the appellant and not the appellee, to produce the evidence.

But it does in fact appear from the commissioner's report, that he estimated "the land conveyed to Gillaspie and McCaleb, to be about one-fifth in value of the entire lands." We think therefore that there is nothing in the objection.

The next objection seems to be that the land of the appellant was decreed to be sold without first ascertaining the exact number of acres claimed by her, and the assessed value thereof.

It is not perceived that it was necessary for either party to show the assessed value of the land, prior to a decree for the sale thereof. It is true that the law requires

that the commissioner who may make the sale, *shall report to the court the assessed value of the land sold: but

that sale has not yet been made; and it will be time enough to make such objection, when the delinquency shall in fact occur.

As to the other branch of the objection, viz: that the exact number of acres claimed by the appellant was not shown. We think, on the facts of this case, that it was wholly unnecessary to make a separate report of that matter. The entire quantity of the Sively lands, including the land sold to McCaleb and Gillaspie and the Jackson river tract, amounted to 367 acres, valued by the commissioner at \$1,745.50. Of these lands, the commissioner estimates the lands sold to McCaleb and Gillaspie at one-fifth in value. This one-fifth, if of average value, would be 73 2-5 acres, leaving a residue of only 293 3-5 acres. Of this residue Thomas E. Cobbs, assignee in bankruptcy of Sively, sold 213 acres, which (we are justified in concluding,) embraced all the bankrupt's land, not included in the settlement on the appellant, and would leave to her 80 3-5 acres. The annual value of this settlement is proved to have been only \$35; whilst the amount of judgment liens thereon is reported at \$1,284.02. This latter amount would be very little if at all reduced by the proceeds of the sale made by the assignee in bankruptcy; for the gross amount of that sale was only \$355, of which we have a right to presume that but little, if any, would be left for creditors. This simple statement of facts, shows, we think, with sufficient certainty both the quantity of land claimed by appellant, and the necessity and propriety of a sale thereof.

It is further objected that it was error to decree the sale in the absence of McCaleb as a party to the suit.

There is nothing in the record to show that McCaleb was a necessary party to the suit. All that we have on *the subject is gathered from the answer of A. J. Sively, the husband, grantor and next friend of the appellant, and he does not say that the sale to McCaleb was subsequent to the settlement. On the contrary he says, "that he sold a portion of the land sought to be subjected to sale, to Joseph McCaleb; another portion to James P. Gillaspie, for both of which deeds have been made, and that by a marriage contract between this respondent and his wife, of record in the clerk's office of Alleghany County court, she is entitled to another part of said land." This settlement was made on the 1st of May 1868, and recorded on the 20th of July in the same year; and from the order in which the several alienations are enumerated by Sively in his answer, it would seem to have been the last executed. And this is all we have on the subject, except a statement in the amended bill of the appellee, that the deed to Gillaspie was dated May 1st, 1867, and acknowledged May 29th, 1867, more than a year before the acknowledgment of the marriage contract. The sale to McCaleb was in all probability, made before that to Gillaspie, as it was the first mentioned by the grantor in his answer; but there is literally no

in the stay law are not in any sense or to any extent, statutes of limitation. They only prescribe a rule of computation of time to apply to an abnormal state of the country, and which, during that state, shall apply to all statutes of limitation whatsoever, without distinction. This rule of computation is in perfect harmony with all statutes of limitation, whether existing at the date of its enactment, or passed thereafter. It does not interfere with or alter in the slightest degree, the period of limitation. It only established a mode of computation, by which the period of limitation may be ascertained. The amendatory statutes, on the other hand, have nothing to do with the computation of time. They only amend a section of a pre-existing law prescribing a period of limitation, changing by the amendment, a previous limitation of five years to two years, and saying nothing at all about the rule of computation; but leaving the section as amended to be treated as a section of the original act,

subject to all the rules of construction
867 and computation *to which that act is subject. The several acts, instead of being in conflict, are, in my opinion, in perfect harmony with each other; and of course, the former is not under such circumstances repealed by the latter.

But another question arises on the facts of this case touching the question of limitation. By the statutes in force when this appeal was allowed, the period within which a petition for appeal, &c. could be presented, and that within which the appeal must be perfected, were the same. In each case the limitation was, as a general rule, as it now is, two years from the date of the judgment or decree. Now it appears from the certificate of the clerk of this court, in this case, that the appeal was not perfected by the execution of bond as required by law until the 26th of April 1862, three years, three months and twenty-six days after the date of the decree appealed from, and more than six months after the expiration of the period, within which alone was it lawful for this court to award an appeal. In that state of facts the appeal would necessarily be dismissed, but for a rather incautious proviso in the section limiting the time in which appeals may be perfected, not found in the section limiting the right of appeal. By the former, being the 17th section of ch. 182 of Code of 1860, as amended by the act of June 23d, 1870, Sess. acts 1869-70, ch. 171, p. 224, after prescribing a limitation of two years from the date of the judgment or decree, to the issuing of process on any appeal therefrom, it is enacted that "the appeal, writ of error or supersedeas shall be dismissed whenever it shall appear that two years have elapsed since the said date, before the record is delivered to such clerk, or before such bond is given as is required to be given before the appeal, writ of error or supersedeas takes effect: provided however, that section twenty-six of chapter one hundred and eighty-two of the Code
868 of *1860, instead of this section, shall

remain in full force, and apply to cases in which the appeal, writ of error or supersedeas may be to any judgment or decree rendered before the passage of this act." There is no such proviso in the 3d section of the same act in relation to the time in which a petition for appeal must be presented to the court of appeals or the judges thereof, nor in the act aforesaid of November 5th, 1870, amending the same; and thus in many cases, as in this case, a striking incongruity between the acts will be presented. But the proviso in the 17th section is too plain and imperative to be disregarded, and it must be enforced. *Lex ita scripta est*; and it is not competent to this court, by construction, to amend or repeal it. By the 26th section of chapter 182, of Code of 1860, which in this respect is the law of this case, the limitation is five years instead of two, being in fact the same, with the limitation at that time, to the right of appeal; and five years not having yet elapsed since the first day of January 1869, when the statute of limitation commenced running, the appeal, in my opinion, was regularly perfected, and is properly before us.

This brings us to the consideration of the propriety of the decree appealed from. That decree, and the previous decree of the 13th of May 1863, confirming the sale of real property, and ordering the same to be conveyed to the purchaser, were made in the absence of important and essential parties whose interest appears on the face of the record. It appears on the face of the decree of October 11, 1862, that Robert J. Crockett, one of the original defendants in the suit below, and joint and equal owner with his co-defendant S. S. Crockett, died pending the suit, unmarried and intestate, leaving his brother the said S. S. Crockett, a sister Isabella C. Brown, wife of William H. Brown, and the children *of Charles H. and Jane A. Sauffley, of unknown names and number, his only heirs at law and distributees. These persons were ordered by the decree last mentioned to be brought before the court by scire facias and proper proceedings thereon, yet without awaiting the execution and return of the scire facias or other proceedings, the court, by the same decree, by consent of the parties before the court, ordered a sale of the property; which was made and confirmed by the court, without any return of scire facias executed or evidence of publication against the heirs and distributees aforesaid of Robert S. Crockett, and without further notice of them. In this, there was manifest error. It is unnecessary, at this day, to cite authority for the familiar proposition, that in a court of equity all persons must be made parties who have a material interest in the cause. "All persons materially interested in the subject of controversy ought to be made parties in equity; and if they are not, the defect may be taken advantage of either by demurrer or by the court at the hearing." *Clarke v. Long*, 4 Rand. 451. But as I have already said, it

is needless to cite authority for a proposition so familiar and well established. Nor is it necessary to cite authority, for the proposition, which is really the same, that in a proceeding to charge the lands of the defendant, if he die testate or intestate pending the controversy, there can be no further proceeding against the lands of the decedent until his heirs at law or devisees, as the case may be, shall be brought before the court. It was error, therefore, in this case, to confirm the sale, dispose of the proceeds of the real estate sold, and strike the case from the docket, without having all the heirs of Robert S. Crockett before the court. They should be brought before the court and allowed the option of assenting to or resisting the confirmation of a sale so irregularly *made. I am of opinion, therefore, that the two last decrees entered in the cause should be reversed and annulled, with costs to the appellant; and that the cause be remanded to the Circuit court to be further proceeded in, in accordance with this opinion.

ANDERSON, J., concurred in the opinion of Bouldin, J., throughout. On the question of the limitation of the appeal, Christian, J., dissented, upon the ground that the act of March 2, 1866, entitled "an act to preserve and extend the time for the exercise of civil rights and remedies," contained the only saving applicable to appeals, &c., to the court of appeals. He thought the appeal was too late.

Judge Moncure also dissented, on the question of the limitation of the appeal, on the ground that as to appeals, the 7th section of the stay law was repealed by implication; and therefore the appeal was too late.

All the judges concurred in the opinion that the decree should be reversed, and sent back for want of proper parties.

Decree reversed.

871 *Forrer v. Coffman & al.

September Term, 1878, Staunton.

1. **Arbitration—Sealed Award.**—Arbitrators are required to return their award by a certain day under their hands and seals. They prepare their award; and the day before they are required to return it, one of them hands it to the counsel of the plaintiff. He sees that they have omitted the seals, and he returns it to them, and requests that they will add the seals and insert the word "seal" in the body of the instrument. This they do, and then deliver it on the day to which they are limited by the submission. The award is valid.

2. **Same—Same—Parties Bound.**—The submission is made of matters in controversy in a suit by M against F & C, late partners, on a claim against the partnership. F alone is the party to the submission, and binds himself to perform it, and the award is that F shall pay to M, &c. The fact that C is not named in the award is no objection to it.

*See collection of cases in foot-note to Willoughby v. Thomas, 24 Gratt. 581; Portsmouth v. Norfolk Co., 81 Gratt. 727, and foot-note.

He is not bound by it, having been no party to the submission.

3. **Same—Award Entered as the Judgment.**—The submission providing that the award shall be entered as the judgment of the court, when so entered it is the judgment in the cause, and settles all the matters involved in the action; and it was not necessary that the award on its face should dispose of the action.

4. **Same—Interest.**—The arbitrators might properly allow interest upon the ascertained present value of rents to become due.

5. **Jurisdiction of County Court—Presumption.**—It not appearing in the record whether the term of the county court at which the award was entered as the judgment of the court, was a quarterly or monthly term, it must be presumed by the appellate court, that it was a term at which the court had jurisdiction to enter the judgment.

872 *In June 1871, Magdaline M'D. Coffman instituted an action of assumpsit in the County court of Rockingham, against Henry Forrer and Charles T. Clippinger, late partners under the name and style of Forrer & Clippinger, to recover from them the sum of nine hundred and fifty dollars, with interest, for the rent of a store room and lot in the town of Harrisonburg, due one half on the 12th of November 1870, and the other half on the 12th of May 1871. The process was served on both the defendants, and they appeared and pleaded "non assumpsit."

In January 1872, the cause being still pending in the county court, Henry Forrer and Mrs. Coffman entered into a written agreement, by which, after reciting that certain questions and disputes between Mrs. Coffman and Forrer & Clippinger have arisen and are now pending, in regard to the liability of the said firm of Forrer & Clippinger to the said Coffman for rent due and to become due, under an article of agreement entered into by them on the 13th of January 1868, in regard to the lease of certain property in the town of Harrisonburg, which said property was burned on the 25th of December 1870; and the said Henry Forrer having agreed, and hereby agreeing, to assume and pay any liability that may attach to the said firm of Forrer & Clippinger by virtue of said article of agreement, and desiring to surrender the said lease, and pay over to said M. M'D. Coffman, in cash, the amount, if any thing, that may be due her upon the award to be made by the arbitrators hereinafter mentioned; therefore for the final ending all said questions and disputes, and deciding the same, the said Forrer and Coffman agreed that the matters in controversy should be referred to the final award of Samuel Shacklett, J. Madison Irvin and W. C. Harrison, or any two of them, so as that they should make

873 their award in *writing under their hands and seals, ready to be delivered by the 25th of May 1872. And it was agreed that this submission should be entered on record in the county court of Rockingham, and that the award should be entered up as the judgment of said court.

The arbitrators made their award, by which they awarded that Forrer should pay to Mrs. Coffman the sum of \$2,817.73, with interest on \$356.26, a part thereof, from the 12th of May 1871; on \$475, another part thereof, from the 12th of November 1871, and on \$1,986.47, the residue thereof, from the 12th of May 1872; and further that Forrer should deliver to said Coffman, immediate possession of the lot of ground mentioned in the submission.

At the June term of the county court of Rockingham, on the motion of Mrs. Coffman, a rule was awarded upon Forrer to show cause why the award aforesaid should not be entered up as the judgment of the court. This rule was served on Forrer, who appeared; and the motion came on to be heard at the July term of the court; when the court rendered a judgment in favor of Mrs. Coffman against Forrer, in pursuance of the terms of the award. And Forrer excepted.

By the agreement of the 13th of January 1868, Mrs. Coffman rented to Forrer & Clippinger, for the term of five years commencing on the 12th of May 1870, and ending on the 11th day of May 1875, a store room and its appurtenances, and also all the rest of the lower story of the main building of said house, except, &c.; in consideration for which they agreed to pay to her an annual rent of nine hundred and fifty dollars, to be paid at the end of each successive six months of said lease; and they further bound themselves to make extensive specified improvements on the house at their costs. On the 25th of December 1870, the house was entirely consumed by
874 *fire, the lessees having paid the rent up to November 12th 1870.

The parties not agreeing as to the liability of Forrer & Clippinger to pay the rent after the house was consumed, the suit was brought by Mrs. Coffman against them; and the agreement for a submission of their matters to award, and the award was made as hereinbefore stated. As to the award it appeared in evidence, that it was prepared by the arbitrators and handed to the counsel of Mrs. Coffman by one of the arbitrators on the 24th of May 1872, in the absence of the others. When this was done, the word "seal" was not in the body of the instrument, and no seals were attached to their names; and on the next day the counsel returned it to the arbitrators with the request that they would affix seals to their names, and insert the words "and seals" in the body of the award; which was done by the arbitrators, who thereupon, all being present together, delivered the same to said counsel on the same day.

The defendant proved by one of the arbitrators, that they intended to allow the plaintiff the whole amount of rent accruing after the 25th of December 1870 down to the termination of the lease, reduced to cash on the 12th of May 1872, subject to a credit of \$400 a year from the date of the award to the termination of the lease in May 1875; in like manner reduced to cash on the 12th

of May 1872; which credit was for the value of the surrender of the lease by Forrer to the plaintiff.

And these being all the facts proved in the case, the defendant Forrer moved the court to set aside the award, and not to enter judgment upon it.

1st. Because the original award as made, signed and delivered, was not made under seal, as required by the submission.

2d. Because the award was not final, 875 and did not dispose *of a suit pending in the court, for part of the rent accrued after said 25th of December, 1870.

3d. Because of apparent errors on its face, in allowing interest from a period anterior to the time the rent was due or to become due under the lease.

4th. Because the rent accruing was reduced to cash by simple interest, instead of compound.

5th. Because it is impossible, in requiring the surrender of the lease of Forrer & Clippinger by Henry Forrer.

6th. Because the rule to show cause against the award issued in the action of assumpsit pending in the County court of Rockingham, for part of the rent, and because the court has no jurisdiction at a monthly term to enter the same.

7th. Because the award was unjust and excessive.

But the court overruled the motion to set aside the award; and as before stated, entered judgment thereon in favor of Mrs. Coffman against Forrer. And thereupon Forrer applied to the Circuit court of Rockingham for a writ of error and supersedeas to the judgment; which was refused: and he then made the like application to a judge of this court; which was allowed.

Woodson, for the appellant.

Yancey & Johnston, for the appellees.

STAPLES, J., delivered the opinion of the court.

An action of assumpsit was brought in the Circuit court of Rockingham county, by Mrs. Coffman, against Henry Forrer and Charles T. Clippinger, late partners, trading under the firm and style of Forrer & Clippinger. During the pendency of the action it was agreed between plaintiff and defendant Forrer, to submit the matters in controversy to arbitration, and the award pursuant thereto to be entered up as
876 judgment of the court. *The submission required the arbitrators to make their award under their hands and seals, ready to be delivered on or before the 17th of February 1872. The time was subsequently enlarged to the 25th of May following.

The award was made and completed on the 24th of May, and delivered by one of the arbitrators, in the absence of the others, to the counsel for the plaintiff. The counsel discovering that the award was not "under the seals" of the arbitrators, as required by the submission, returned it to

them on the morning of the 25th, with a request they would supply the omission; which was accordingly done by the arbitrators, all of them being present; and thereupon, on the same day, the award was again delivered to the counsel.

It is insisted that the arbitrators were *functus officio*, and they were not authorized to change or interfere with the award after it was first delivered to counsel. The objection is of the most technical character. The additions made by the arbitrators were mere matters of form. They did not affect the merits or the substance of the award, or involve the exercise of any new and distinct act of judgment on the part of the arbitrators. It is impossible that either party could be prejudiced by the act. The omission was no doubt accidental, or the result of misapprehension; and the arbitrators had the right, as it was their duty, to supply any mere formal defect of the kind, certainly before the time fixed for the delivery of the award.

In *Irvine v. Elton*, 8 East's R. 52, Lord Ellenborough said, that the arbitrator's authority having been once completely exercised, pursuant to the terms of submission, was at an end, and could not be revived even for the purpose of correcting a mistaken calculation of figures. But that view was placed upon the distinct ground, that such mistakes might involve the essential *merits of the case. And the distinction is well taken between acts which may change and correct the judgment of the arbitrator, and acts which involve mere matters of form; such as the simple insertion of date and the like. As to the latter, there is no valid reason why the arbitrator may not perform them even after a delivery of the award, more especially when the time has not expired, which terminates the arbitrator's authority. The tendency of the modern decisions is to disregard, as far as possible, mere matters of form, and to give force, conclusiveness and effect to awards where no corruption or misconduct on the part of the arbitrators is charged, and no fraud or deceit imputed to the parties.

The second objection is, that Clippinger is not noticed in the award, although he is a party to the action, and one of the lessees of the property involved in the decision of the arbitrators. The answer is, that Clippinger was in no way concerned in the submission, and cannot, therefore, be bound by the award. The defendant Forrer agreed to surrender the lease, to assume any liability which might attach to the firm, and to pay the plaintiff for the rent of the property such sum as should be ascertained by the arbitrators. The award may not be binding upon Clippinger, who was no party to the submission; but it is none the less valid as to Forrer, who did assent to it. As to him, the award is within the terms of the submission.

The third ground of error is the alleged failure of the arbitrators to dispose of the action of *assumpsit*, and of the several

matters of controversy included in it. The submission provides that the award shall be entered up as the judgment of the court. When so entered, it necessarily terminated the action and all matters of controversy *fairly connected with it. The award was in fact the judgment of the court, and as such ended the suit.

It is also insisted, that the arbitrators had no right to allow interest on the payments. The leased tenement had been destroyed by fire long before the period fixed for the termination of the lease. And the parties desired to ascertain the extent of the lessees' liability for the rent due and to become due; and whatever it might be, the defendant agreed to pay immediately. The arbitrators accordingly ascertained the present value of the lease, and the amount to be paid the plaintiff in satisfaction of her claim; and the sums thus ascertained bear interest. It is clearly competent for the arbitrators to award the payment of interest upon the principal adjudged to be due. Even if they had made a mistake, it is not such a mistake on the face of the award as the court can correct.

The only remaining objection to be considered relates to the jurisdiction of the County court to enter judgment on the award at the July term 1872. It is insisted that this was a monthly term, and the court was not authorized at such term to take any action upon the award. It is unnecessary to consider whether the laws prescribing the jurisdiction of the County courts prohibit these courts at monthly terms, from entering up awards as the judgment of the court. By the act of July 11th, 1870., the judges of the County courts are empowered to designate four or more terms for the trial of civil cases, in which juries are required. Whether the July term of the County court of Rockingham was one of the courts thus designated, the record does not inform us. In the absence of all proof on the subject, we must presume that the court in this case did not assume an unwarranted jurisdiction.

*For these reasons I am of opinion to affirm the judgment.

Judgment affirmed.

**Gatewood's Adm'r v. Goode & als.*

September Term, 1878, Staunton.

Several Defendants—*Lien of Judgment—Case at Bar.*—

At the March term 1861, of the county court of Monroe, a judgment was rendered at the suit of the bank of V plaintiff against W, S and G, the latter living in the county of Bath. Execution of *A. fa.* was issued on this judgment and levied on the property of W, and the sheriff returned, after June 1861, a levy upon the personal property of W, that the property was appraised and offered for sale, and not bringing valuation it was returned. G died during the war, leaving real estate in Bath county, and also in West Virginia; and after his death some of his creditors filed their bill in the Circuit court of Bath, to subject his real estate to

substance, though informal, will be sustained though demurred to.

2. **Same—Same—Identity of Offence.**—In the first case the defendant is charged as the "keeper of a house of entertainment," in the second as "keeper of an ordinary." The offence charged in both being the same not only in kind but in fact, the acquittal in the first case is a bar to the second.

On the 12th of December 1871, the attorney for the Commonwealth in the corporation of Alexandria, filed an information against Samuel Day, that on the 11th of September, for the year 1871, in the city of Alexandria, Samuel Day, the keeper of an ordinary in said city, did in the said ordinary of him the said Samuel Day, in the city aforesaid, permit unlawful gaming, by permitting divers persons there assembled, then and there to play at cards, &c.

Day having been summoned, appeared, and in his proper person, filed a plea of autrefois acquit. In his plea he sets out in full the record of the previous information and the proceedings upon it. The only difference between the two informations is, that in the first he is charged as being the keeper of a house of entertainment, and in the last he is charged as keeping an ordinary. In the first case he appeared, and he pleaded "not guilty," and filed a demurrer to the information, which was overruled.

916 *The case came on to be tried on the 11th of December, 1871, when the jury rendered a verdict in his favour, and he was discharged by the court. And his plea averred that he was the same person and the offence was the same for which he had been before prosecuted.

The attorney for the commonwealth demurred to the plea; and the court sustained the demurrer. And thereupon the defendant pleaded not guilty; and upon the trial there was a verdict against him; and the court adjudged that he should pay a fine of one hundred dollars and costs; and that he should forfeit his license and give bond for his good behaviour. And Day applied to this court for a writ of error; which was allowed.

A. & C. E. Stuart, for the appellant.

The Attorney General, for the commonwealth.

ANDERSON, J., delivered the opinion of the court.

The court is of opinion that the plea of the plaintiff in error to the information, although very informal, substantially avers matter which constitutes a bar to the prosecution, the counsel having agreed that the record referred to, is to be regarded as copied in and part of the plea. It sets out the record of proceedings in the corporation court of Alexandria, upon an information which is recited, together with the proceedings thereon, in which it is charged that on the 11th of September in the year 1871, in the city of Alexandria, Samuel Day, the

keeper of a house of entertainment, in the said city, did in the house of entertainment of him the said Samuel Day, in the city aforesaid, permit unlawful gaming, by permitting divers persons there assembled, then and there to play at cards, against the peace and dignity of the commonwealth of Virginia. That there was a demurrer by

the defendant to said information, 917 which was *overruled by the court; that the defendant then pleaded not guilty; upon which plea issue was joined; that the issue was tried by a jury who rendered a verdict of "not guilty," and the judgment of the court thereon that the said Samuel Day be discharged of the said offence, and go thereof without day. And the plea avers that he (the defendant) and the said Samuel Day, so indicted and acquitted as aforesaid, are one and the same person, and the misdemeanor of which he was prosecuted and acquitted as aforesaid, and the misdemeanor of which he is indicted, are one and the same and not different misdemeanors. Parker, C. J., we think justly said in *Commonwealth v. Goddard*, 13 Mass. R. 455: "Whenever it is made to appear substantially, by the record of a trial, that the second prosecution of the same party is for the same offence, and that on the first prosecution judgment has been awarded and actually executed (the plea in that case was autrefois convict,) the court passing the first judgment having jurisdiction over the person and the offence, the second prosecution must be barred. In this case we are of opinion that the plea substantially avers, that the defendant had been previously prosecuted, tried and acquitted, by a court of competent jurisdiction, for the same offence, and that the judgment of acquittal remained in force and effect, and although inartificially drawn, it is a good plea of autrefois acquit upon demurrer; and consequently that the court below erred in sustaining the demurrer to the plea. The court is of opinion that the demurrer ought to have been overruled, and the attorney for the commonwealth, if he desired it, to have had leave to reply. And if he did not wish to reply, judgment should have been entered for defendant. The court is, therefore, of opinion that the verdict in this cause be set aside, and 918 *the judgment be reversed and annulled, and the cause is remanded to the Corporation court of Alexandria, to be proceeded in, in conformity with this order.

Judgment reversed.

919 *Jackson v. The Commonwealth.

January Term, 1873, Richmond.

1. **Criminal Law—Indictment for Murder—Right to Examination before a Justice.**—A jury of inquest find that the deceased was killed by J and the justice who acted as coroner, issues process, upon which J is committed to prison. The grand jury in the County court find an indictment against J for murder, and he is brought into court and

arraigned, and on his arraignment elects to be tried in the Circuit court. In the Circuit court J moves to quash the indictment because he had not been sent before a justice for examination; and that motion being overruled, and the cause continued to the next term on his motion, he at the next term files a plea in abatement to the indictment, on the ground that he had not had the benefit of an examination before any justice of the peace or other legally authorized officer for commitment. To this plea the attorney for the commonwealth demurs, and the demurrer is sustained. **Held:**

1. **Same—Same—Same.**—J was not entitled to be sent before a justice for examination.

2. **Same—Same—Same—Waiver—Querre.**—**Querre:** If J was entitled to such an examination, he had not waived it, by electing to be tried in the Circuit court, and not making his motion until he was at the bar of that court.

2. **Venire—Opinion Formed—Competency.**—*If a venire man has formed, and still more, if he has formed and expressed a decided opinion as to the guilt or innocence of the accused, no matter on what ground it was formed, whether from having heard the evidence on some former trial or examination, or from mere rumour or otherwise, he is an incompetent juror to try the case. If on the other hand, his opinion is merely hypothetical, he is not incompetent on that ground.

920 *3. **Same—Opinion Formed from Evidence on Former Trial—Competency.**—If a venire man has formed an opinion as to the guilt or innocence of the accused from having heard the evidence on a

***Venire—Opinion Formed—Competency.**—There are many cases in Virginia as to the competency or incompetency of jurymen on account of previously formed, or previously formed and expressed, opinions concerning the guilt or innocence of the prisoner, and, as said in the principal case, it would be difficult to adduce any definite rules on the subject.

A juror, who having heard the testimony of a witness in the cause, and then formed an opinion on it, and was doubtful whether he had expressed the opinion or not, though he thought it most probable he had expressed it, but declared that at the time of the trial he had no prejudice against the prisoner, or his cause, and that he could, as he believed, give the prisoner as fair a trial as if he had not heard any thing on the subject, is an impartial juror, and a challenge against him for cause ought to be overruled. *Pollard v. Com.*, 5 Rand. 659.

On a trial for murder, two jurors are severally examined on *voir dire*. 1. One states, that he was not present at the examination of the prisoner before the hustings court, and has heard no statement of the evidence from any witness or any person who was present; that he has heard the case spoken of in the town, and rumors in regard to its circumstances, upon which he has expressed no opinion, though he believes those rumors to be true, and if they should turn out upon the trial to be true, he has a decided opinion in regard to the case; but he feels no prejudice, and is satisfied he shall be able to decide the case upon the evidence which may be given in, uninfluenced by the rumors he has heard; that the opinion he has formed was, that if the prisoner had stabbed the deceased under the circumstances which he had heard, he ought to be punished. 2. The other juror states, that he has made up no decided opinion; that he has heard a

former trial or examination of the case, it would be difficult if not impossible to regard such opinion otherwise than as decided or substantial, within the meaning of the rule; and he would generally, if not always, be considered an incompetent juror, even though he might think and say that he could give the accused an impartial trial.

4. **Same—Opinion Formed from Rumor—Presumption—Competency.**—If a venire man has formed an opinion of the guilt or innocence of the accused from mere rumour, the presumption, in the absence of evidence to the contrary, is, that such opinion is merely hypothetical; and will be so considered even though he speaks of it as a decided or substantial opinion, if he says he has no prejudice against the accused, and thinks he can give him a fair and impartial trial. But if the court be satisfied, either from the venire man's own statement or otherwise, that the opinion is in fact decided or substantial, he will be an incompetent juror.

5. **Same—Competency—Opinion of the Court.**—In all cases great weight is justly due to the opinion of the court before whom the venire men are questioned and examined in regard to their competency as jurors.

6. **Impeachment of Witnesses—Prior Inconsistent Statements—Laying the Foundation.**—The testimony of witnesses examined before a jury of inquest, and committed to writing, cannot be used to impeach the evidence given on the trial of the prisoner, unless their attention has been called to it and to any discrepancies between that and their evidence.

part of the evidence of one witness, and formed an impression, and if the balance of the testimony should run in that way, that impression would be confirmed; that as far as the evidence went, he has a decided opinion, if the rest should not run against it; but that he has no prejudice, has not expressed any opinion, and is prepared to decide the case according to the evidence which may be given in, uninfluenced by the portion of evidence he has heard. *Held*, both the jurors are competent. *Moran v. Com.*, 9 Leigh 651.

The entertaining a decided opinion of the prisoner's guilt formed on the testimony as published in the newspapers, is not a valid objection to a juror, if he thinks he can discard his opinion, and that it would not influence his judgment; and that he could give the prisoner a fair trial according to the law and the evidence submitted to the jury. *Smith v. Com.*, 7 Gratt. 598.

A venire man when called, stated, "That he had not heard any of the evidence nor had he heard any report of it from those who had heard it; but from the rumor of the neighborhood he had formed an opinion which was at the time he spoke existing on his mind, and which he should stick to, unless the evidence should turn out to be different from what rumor had reported it to be. That he had no prejudice nor partiality for or against the prisoner, and believed he could give him a fair and impartial trial according to the evidence that should be given in." He is a competent juror, and challenge of him for cause by the prisoner was properly overruled. *Clore's Case*, 8 Gratt. 606.

A talesman when examined on his *voir dire* said that he had heard a great deal said about the case, but that he had not heard or read the evidence given at the examinations before the mayor or hustings

This is a writ of error to a judgment of the Circuit court of the county of Alexandria pronounced on the 16th day of November 1872, convicting William Jackson of murder in the first degree, and sentencing him to be hung therefor. The accused was indicted at a County court held for said county on the first day of April 1872, for the murder of Mary Jackson, who was his wife. On the 17th day of February 1872, an inquisition was taken in the said county before F. P. Crocker, a justice of the peace acting as coroner of said county, upon the view of the body of the said Mary Jackson then and there lying dead; and the jurors found
921 by *their verdict that the deceased came to her death from a fracture of the skull produced by a blow inflicted by the said William Jackson, during the night of Thursday, February 15th, 1872. The said justice and acting coroner returned to the said County court the inquisition, written testimony, and recognizance of witnesses, taken by him, and issued a warrant against the said William Jackson, under which he was apprehended and committed to the jail of said county; where he remained until the said first day of April 1872, when an indictment was found against him as aforesaid, by the grand jury of said county. Though he was then in jail under the warrant aforesaid, a *capias* was awarded against him forthwith to answer the said indictment; which being executed, and the accused being set to the bar and arraigned upon the said indictment, he, without pleading thereto, demanded to be tried for the offence aforesaid before the Circuit court of Alexandria county. Whereupon it was ordered by the said County court, that he be remanded to the said Circuit court to be tried for the offence aforesaid; and he was remanded to jail, and the witnesses for the commonwealth were recognized to appear before the said Circuit court on the

court; and that he had formed no opinion on the subject. He then stated that since the prisoner had been in jail his wife and family had moved to the lot adjoining his residence, and had lived there; that they were often at his house, and that there was great intimacy between the families, and on that account he would rather not sit in the case, that his mind might be influenced; and in answer to a question from the court he said he was unwilling to trust himself under the circumstances. He thought he could give the prisoner a fair trial on the evidence. That he had no prejudice for or against the prisoner, there was no connection by blood or marriage between them, and that he had never spoken to the prisoner's wife or family on the subject of the trial. He is a competent juror, and it is error to set him aside, for which the prisoner may except and have the judgment reversed. *Montague's Case*, 10 Gratt. 768.

A person called as a juror in a trial for murder, says in answer to a question—I have expressed an opinion from what I have heard. What I have heard was not from any witness. My opinion was not a fixed one. I think I can give the prisoner a fair trial without reference to the opinion I have expressed. He is a competent juror. *Little's Case*, 25 Gratt. 921.

first day of the next term thereof, as witnesses aforesaid. On which day, to wit: the 20th day of May 1872, the accused moved the said Circuit court to continue the cause till Wednesday next thereafter; which was accordingly done. On the latter day, to wit: the 22d day of May 1872, he moved the court to quash the proceedings against him, upon the ground that he had not been examined before a justice of the peace; which motion the court overruled. The accused then moved the court to quash the proceedings, upon the ground that the clerk had not issued a proper *venire facias*; which motion the court also overruled. And then the accused moved the court to con-
922 tinue the *cause on the ground of the absence of a material witness; and the court accordingly continued the case till the first day of the next term; "on account," as stated in the order, "of its being a case in which the life of the accused was involved, and the court being willing to afford him every facility of defence."

At the next term of the said court, to wit: on the 11th day of November 1872, the accused filed a plea in abatement to the said indictment, upon the ground that he had not the benefit of an examination before any justice of the peace, or other legally authorized officer for commitment, bail or discharge; to which benefit he claimed to be entitled. There was a demurrer to the plea, &c., joinder in demurrer; and the court sustained the demurrer and overruled the plea. The accused was then arraigned upon the indictment and pleaded "not guilty;" and issue was thereon joined. The case having been heard, the accused was found guilty of murder in the first degree; and judgment was pronounced accordingly as aforesaid, on the 16th day of November 1872.

In the progress of the prosecution in the Circuit court, three bills of exceptions were

In a trial for murder, a juror on *voir dire* said that newspaper accounts had made an impression on his mind, but that "it would yield to evidence," and that he could give prisoner a fair and impartial trial. A second said the same, and that he would not be willing to act on those accounts, but that it would take evidence to remove the impression. A third said he had not formed "a decided opinion," but an impression that "would be right hard to get over, but that it would not require sworn statements to remove it." *Held*, these jurors were competent." *Hall v. Com.*, 80 Va. 171, 15 S. E. Rep. 517.

See *Epes' Case*, 5 Gratt. 876, for opinion formed and expressed which will not disqualify juror in a trial for murder.

See *foot-note* to *Shinn v. Com.*, 23 Gratt. 899, where there is a collection of cases holding that opinions formed by jurors were not such decided opinions as to disqualify them from serving, and also a collection of cases holding jurors disqualified because of previously formed opinions.

See also, *Smith's Case*, 3 Va. Cas. 6; *Kennedy's Case*, 2 Va. Cas. 510; *Poore's Case*, 3 Va. Cas. 474; *Hughes' Case*, 5 Rand. 655; *Oslander's Case*, 3 Leigh 780.

signed by the court at the instance of the accused; which, in the order in which the questions arose, though not in the order in which the bills are copied in the record, are as follows: The first states, that upon the arraignment of the accused in the County court, he, without pleading, elected to have his case removed to the Circuit court; which was done; that upon the trial before the Circuit court, and before he had pleaded to the indictment, he moved to quash the indictment on the same grounds set out in the special plea aforesaid. But the court overruled the motion and refused to quash the indictment; to which he excepted. The second bill states, that on the trial, —

923 Graham, a venire man, sworn on his voir dire, said "that *he had heard the subject of the trial spoken of in the county; that some of the persons from whom he had heard the relation of the evidence, were present at the examination upon the coroner's inquest; that the persons he had heard speak of the evidence were those whose statement of the evidence he believed to be entitled to full credit, and that he believed what they said was a true narrative of what was testified before the coroner; that upon this he had expressed and formed an opinion with regard to the guilt or innocence of the prisoner; that such an opinion was not a decided one; that he believed that notwithstanding the formation and expression of such opinion, he could, as a juror, do justice to the prisoner; that he felt no prejudice against the prisoner; and that he believed that he would be able to render his verdict upon the evidence at the trial, uninfluenced by his preconceived opinion." This juror was challenged for cause by the accused, and the challenge was overruled by the court; to which the accused excepted.

The third and last bill states, that on the trial, the testimony of the witnesses taken down at the inquest of the coroner and properly authenticated, was excluded from the jury when it was sought to be submitted during the argument of the cause, and not before, for the purpose of impeaching the credibility of the witnesses. Upon the examination of the witnesses on the trial, their testimony contained in the written evidence taken before the coroner, was not read to them; but they were especially interrogated in regard to it. One of the witnesses, Caroline Coleman, testified that she had given evidence before the coroner's inquest; that she remembered what she then stated; that she had thought much, and considered on the subject since; that her memory was accurate and correct. But the court being of opinion that
924 *the attention of the witnesses should have been called during their examination to the discrepancies, if any, between their statements on the trial, and those made by them before the coroner, refused to allow the said record of their testimony to go before the jury as evidence for any purpose, when offered by counsel for prisoner during his closing argument in the

case, or to permit him to comment thereon; but upon the motion of the attorney for the Commonwealth, excluded the same; to which ruling of the court the prisoner excepted.

Kent & Neale, for the prisoner.

The Attorney General, for the Commonwealth.

MONCURE, P., after stating the case, proceeded:

Four errors are assigned in the proceedings and judgment aforesaid: 1st. That the court erred in refusing to quash the indictment, or to order the prisoner to be carried before a justice of the county, and to summon the witnesses, upon whose information the indictment was made, to appear and testify before the justice: 2d. That the court erred in sustaining the demurrer to the plea in abatement, which presented the same question as that set out in the first assignment of error: 3d. That the court erred in overruling the challenge for cause to the venireman Graham: 4th. That the court erred in excluding from the jury, the written testimony of the witnesses, or of the witness Caroline Coleman, taken down and properly authenticated at the inquisition held by the coroner, when offered in evidence to impeach the witnesses. We will consider these errors in the order in which they are assigned.

The 1st and 2d present the same question; and we will therefore consider them together. That question is, that the accused was entitled, as matter of right, to
925 demand *that he be carried before a justice of the county to be examined for the said offence, before he could be tried, or even effectually indicted therefor; and that he was so entitled, even though he had been actually indicted for the offence in the County court; and upon his arraignment on the indictment in that court, had thereon demanded to be tried for the offence before the Circuit court; and even though he asserted his supposed right, for the first time, in the Circuit court, when set to the bar of that court, according to his demand to be tried therein.

The question whether, under the act passed April 27, 1867, entitled "an act to revise and amend the criminal procedure," (acts of assembly, 1866-67, p. 915,) a person indicted for felony in the proper court to try him for the offence, but, when indicted, not being in custody, nor having been arrested or examined by a justice, should be arrested and sent before a justice to be examined; or whether he may be taken on a *capias*, and tried upon the indictment, without an examination by a justice, was very fully considered by this court in Chahoon's case, 20 Gratt. 733; and three of the judges delivered elaborate opinions upon it. The judgment of the court below upon the question, was therefore, in that case, affirmed, and Chahoon was tried and convicted, without having been previously ex-

ained by a justice. When that decision was made, the legislature was in session; and there have since been two sessions of the legislature, including the present—and yet there has been no change of the law made, and no act passed declaratory of the meaning of the legislature in the existing law on the subject. The presumption, therefore, is, that the legislature is satisfied with the construction thus placed upon the law, and is disposed to acquiesce therein.

We consider it important that the construction of the law should be settled; 926 *more important indeed than that it should be settled in one way rather than the other; especially as the legislature can, at any time, change the law, if deemed proper, and as may be deemed proper. If it be deemed advisable to have a preliminary examination in cases of felony, the legislature can easily prescribe how, when, and by whom the examination is to be made, and what shall be the effect of it—whether it shall be made by a justice of the peace, or two or more justices, or by the county or corporation court, or the judge thereof in vacation, or otherwise. We are, therefore, of opinion, without reviewing and reconsidering the question which was so much considered in Chahoon's case, as aforesaid, that the decision of this court in that case, though by a divided court, should, for the reasons and under the circumstances aforesaid, be accepted and regarded as a decision and settlement of the question as to the proper construction of the said act.

Such being our opinion upon the general question as to the necessity of a preliminary examination by a justice of the peace in any case of felony, it is unnecessary to enquire, whether if such necessity exists in any case, it existed in this case; in which the accused was arrested and committed for the offence by the warrant of a justice of the peace and the acting coroner in the case, and was actually in the jail of the county under such arrest and commitment when the indictment was found against him in the County court; or whether, if he even had a right to demand that he be carried before a justice of the county to be examined for the said offence, he did not waive that right by demanding in the County court to be tried for the offence in the Circuit court, instead of demanding to be carried before a justice for examination as aforesaid; and by failing to make

927 such *latter demand, until he was set to the bar of the Circuit court under his demand to be tried therein.

We are, therefore, of opinion that the Circuit court did not err in refusing to quash the indictment, or to order the accused to be carried before a justice of the county for examination; nor in sustaining the demurrer to the plea in abatement as aforesaid.

The 3d assignment of error presents the question, whether the venireman Graham was a competent juror.

There is no question, perhaps, about which there has been more apparent conflict

of decision in this State, or in regard to which it is more difficult to derive from our many cases on the subject any definite rules which will apply to all cases that may arise. The object of the law is, to secure to every man who is charged with a criminal offence, a trial by an impartial jury. And this rule has been established by the cases, if no other, that if a venireman has formed, and still more if he has formed and expressed, a decided or substantial opinion as to the guilt or innocence of the accused, no matter upon what ground it was formed, whether from having heard the evidence on some former trial or examination, or from mere rumor or otherwise, he is an incompetent juror to try the case; and if, on the other hand, his opinion be merely hypothetical, he is not incompetent on that ground. The difficulty is in determining, in any given case, whether the opinion be decided or substantial or merely hypothetical, there being in almost every case some peculiarity of circumstance. And the desire to remove or lessen this difficulty by laying down certain other rules for our guidance, has been the fruitful source of the apparent conflict in many of the cases. Thus, if a venireman has formed an opinion as to the guilt or innocence of the accused from having

heard the evidence on a former trial 928 *or examination of the case, it would be difficult, if not impossible, to regard such opinion otherwise than as decided or substantial, within the meaning of the rule; and he would, generally, if not always, be considered an incompetent juror, even though he might think and say that he could give the accused an impartial trial. So, on the other hand, if a venireman has formed an opinion as to the guilt or innocence of the accused, from mere rumor, the presumption, in the absence of evidence to the contrary, is, that such opinion is merely hypothetical, and will be so considered, even though he speak of it as a decided or substantial opinion, if he says he has no prejudice against the accused and thinks he can give him a fair and impartial trial. But if the court be satisfied, either from the venireman's own statement or otherwise, that the opinion is in fact decided or substantial, he will be an incompetent juror. There are intermediate cases which often give rise to difficulty on this subject. The venireman may have formed an opinion from having heard a part only of the evidence on a former trial; or from having heard the whole or part of the evidence given on a former trial, through persons who were present, in whose veracity and accuracy he may have more or less confidence; or from having read an account of such evidence in a newspaper. We cannot lay down any rule for the government of such cases, except the general rule before stated; and the court must determine, as best it may, whether the opinion be decided or substantial, or merely hypothetical. It would be dangerous to lay down a rule; and no case has ever decided, that a venireman, who has formed an opinion from accounts received from

witnesses out of court, and still less from accounts received from others, as to statements made by witnesses, either in or out of court, is therefore necessarily an incompetent juror, *even though he may regard the persons from whom he received his information as persons of general veracity and accuracy, and may credit what he has heard from them. We know that witnesses who make statements out of court, of transactions about which they may have testified in court, still more persons who profess to detail what they may have heard in or out of court, often speak carelessly, and generally omitting particulars which may be very material. And we know that those who listen to them, often listen carelessly; and though they almost always form some impression or opinion of the case from what they hear, yet that opinion is not always, and perhaps not often, decided or substantial, in the meaning of the rule aforesaid. The court must determine that question in all such cases, in view of all the circumstances.

There is nothing in the decision of Clore's case, 8 Gratt. 606, which is in conflict with what has been said; though there are expressions in that case which may seem to be so. We need not say that we have the highest respect and reverence for the memory of the great Judge, (Lomax,) who delivered the opinion of the court in that case; and it is certainly a very learned and philosophical opinion. But the opinion of every court must be read and construed in reference to the decision of the court. So read and construed, we entirely approve the opinion of the court in Clore's case; in which it was held that the venireman Huffman was a competent juror. He stated "that he had not heard any of the evidence, nor had he heard any report of it from those who had heard it; but from the rumor of the neighborhood he had formed an opinion, which was, at the time he spoke, existing on his mind, and which he should stick to, unless the evidence should turn out to be different from what rumor had reported it to be. That he had no prejudice nor partiality for or against the prisoner, and believed

930 *he could give him a fair and impartial trial, according to the evidence that should be given in." Some of the observations of the court in regard to the competency of the said juror, are very appropriate to the present occasion. After saying that none are so apt to form opinions upon what they may have heard that is material in the case, than those who are the most intelligent, discreet and upright, and at the same time, the most discriminating; such as are, of all the community, the most fit to sit in trial upon the criminal, the court thus proceeds: "If they are disqualified as jurors, then those best qualified will be excluded from passing between the Commonwealth and the prisoner, in cases where vindication of guilt or innocence will be most vital. Courts should be careful in laying down rules as to the qualification of jurors, which will throw jury trials, and

the administration of criminal justice, into the hands of the most senseless and ignorant and least competent to pronounce a just and legal verdict."

Observations equally strong and appropriate on this subject have been made by the court in other cases. In Moran's case, 9 Leigh 651, which was decided by a very able court consisting of fifteen judges, the opinion of the court was delivered by Summers, J. It thus proceeds, on the subject we are now considering: "This court is unanimous in the opinion that the prisoner's challenges for cause to the jurors, H. and T. were properly overruled. Those jurors entertained no ill will against the prisoner, or prejudices by which their minds might have been influenced in trying his cause. They had heard the reports of the occurrence, and one of them a part of the evidence. Their minds had necessarily come to some conclusions, dependent however on the accuracy and fullness of the reports and statements which had reached them; and they were each satisfied

931 *that they could pass fairly and impartially between the prisoner and the commonwealth. This, we think, was all that the most scrupulous regard to public justice, and the rights and safety of the prisoner required. When atrocious acts are committed, they necessarily become the subjects of conversation and remark, leading to impressions and opinions favorable or unfavorable to the party accused: but when such opinions have not impressed the mind with strong and decided conviction, by which the justice and fairness of the juror's decision upon the evidence may be influenced, we think that no disqualification is produced. Sustaining challenges to jurors for favor on slight grounds, tends to place the administration of public justice in the hands of the most ignorant and least discriminating portion of the community, by which the safety of the accused may be endangered, and the proper administration of the laws put to hazard; and we are therefore not disposed to enlarge the grounds of challenge beyond those properly deducible from the cases heretofore decided."

Besides the cases before referred to, the following seem to be the principal ones on the subject in our reports; many of them being referred to and commented upon by the learned counsel for the plaintiff in error. Lithgow's case, 2 Va. ca. 297; Sprouce's case, id. 375; Pollard's case, 5 Rand. 659; Mendum's case, 6 Rand. 704; Osiander's case, 3 Leigh 780; Maile's case, 9 Leigh 661; Armistead's case, 11 id. 657; McCune's case, 2 Rob. R. 771; Eppe's case, 5 Gratt. 676; Smith's case, 6 id. 696, and 7 id. 593; Wormley's case, 10 id. 658; Montague's case, id. 767; and Bristow's case, 15 id. 634.

We have examined all the cases, and according to the rule laid down or recognized in all of them, the venireman Graham in this case was a competent juror, not having formed a decided or substantial opinion as *to the guilt or innocence of the accused; his opinion on that sub-

ject, so far as he had formed one, being in fact only hypothetical. He was not present when the coroner's inquest was taken, and heard none of the evidence given on that occasion. He did not even converse with any of the witnesses who were then examined. Some of the persons from whom he had heard the relation of the evidence were present at the examination upon the said inquest. He believed the statement of the evidence, made to him by the persons he had heard speak of it, to be entitled to full credit; and that what they said was a true narrative of what was testified before the coroner; and upon this he had formed and expressed an opinion with regard to the guilt or innocence of the accused. But he did not say that such opinion was a decided one. On the contrary he expressly said that it was not a decided one; that he believed, notwithstanding the formation and expression of such opinion, he could as a juror, do justice to the accused; that he felt no prejudice against him; and that he believed he would be able to render his verdict upon the evidence at the trial, uninfluenced by his preconceived opinion. In some of the cases referred to, the venireman whose competency was in question, spoke of his preconceived opinion as being decided; in some of them it was formed, in part at least, from his having heard a part of the evidence given at a former trial; and in several, if not most of them, the evidence tending to show that such opinion was decided, was much stronger than it was in this case, if it can be said that there was any such evidence in this case; and yet it was held that such opinion was not decided within the meaning of the rule, but only hypothetical, and that such veniremen were competent jurors. Without setting

out a statement of the facts in
933 *regard to the opinions of these different veniremen, we refer to the cases themselves, in which those facts can readily be seen; and besides the cases of Moran and of Clore, to which we have already specially referred, we also refer specially to Pollard's case, Osiander's case, Maile's case, Armistead's case, Eppe's case, (a strong one,) Smith's case, (two cases) and Wormley's case, *ubi supra*. We call special attention to the opinions of the court delivered by Scott, J., in Osiander's case, and by Leigh, J., in Eppe's case. We all know how great were the learning and experience of those judges, and indeed of the whole court of which they were members, in the criminal law and practice of the State. In all cases great weight is justly due to the opinion of a court before whom veniremen are questioned and examined in regard to their competency as jurors. Montague's case, 10 Gratt. 767. That court, which sees, hears and knows the venireman, can much better judge of his fitness to be a juror than we can.

We are, therefore, of opinion, that the venireman Graham was a competent juror in this case.

The 4th and only remaining assignment

of error presents the question, as to the competency of the testimony of the witnesses taken down at the inquisition held by the coroner, when offered in evidence to impeach the testimony of the said witnesses on the trial.

Nothing was said about this assignment of error in the argument, and it seems to have been abandoned. At all events we think it is not well founded, for reasons which sufficiently appear in the bill of exceptions taken to the ruling of the court excluding the impeaching testimony from the jury. The said testimony was not offered by the counsel for the accused until during his closing argument in the case; and the attention of the witnesses was not called during their examination to 934 the *discrepancies, if any, between their statements on the trial and those made by them before the coroner. That their attention should have been so called, in order to make the latter statements admissible as impeaching testimony, even if offered in due time, see 1 Greenleaf on Ev., § 462, and the note. See also *Unis v. Charlton's adm'r*, 12 Gratt. 484.

Upon the whole, we are of opinion that there is no error in the judgment, and that it be affirmed. And as the day fixed for the execution of the sentence of the court below has already passed, the cause must be remanded to the said court in order that another day may be fixed for that purpose.

Christian, J., said that on the question of the right of the prisoner to be examined by a justice, he had concurred in the opinion of Staples, J., in Chahoon's case. He had not changed his opinion on that question; but acquiesced in the decision in this case; and the prisoner had waived his right to such an examination, if he had it.

STAPLES, J., concurred in the decision, because he thought the prisoner had waived his right to an examination by a justice.

ANDERSON, J., concurred in the opinion of Moncure, P. Bouldin, J., dissented on the first point. He was of opinion that the prisoner had a right to be examined by a justice, and that he had not waived it. He also dissented as to the juror Graham; not as to the law as stated by Moncure, P., but upon the facts as applicable to the law.

Judgment affirmed.

935 *Speer v. The Commonwealth.

March Term, 1873, Richmond.

1. Statute—Sale of Goods by Sample—Resident Merchant—Resident Citizen.—S. 101 of ch. 193. Sess. acts of 1870-71, p. 99, prohibits the sale of goods by sample, &c., by any person not a resident merchant, mechanic or manufacturer, and applies to citizens of the State who are not merchants, &c., as well as to citizens of other States; and the charge in the information that the party is not a resident merchant, &c., is not equivalent to the charge that he is not a resident citizen. The question therefore does not arise whether the statute is in violation of the constitution of the United States.

2. *Same—Same—Interpretation of "Resident."*—The word resident in the statute, in connection with the words merchant, &c., does not import a personal residence; but refers to the place of business; and any person though a citizen of and living in another State, may take out a license to transact business as a merchant, &c., in the State, and the statute therefore is not unconstitutional.

3. *Same—Same—A Revenue Law.*—The statute is not a regulation of commerce, but is simply a revenue law.

This was an information in the Corporation court of the city of Alexandria filed in August 1872, against Alfred Speer, that on the 4th of August 1871, he, who was not at the time a resident merchant or manufacturer of this State, did by sample, card, description and other representation, offer to sell in the city aforesaid, wines, brandies, goods, wares, and merchandise, without having first obtained the license therefor required by law. Speer appeared and demurred to the information; but the

936 *court overruled the demurrer. He then filed the plea of "not guilty;" and the cause coming on for trial at the October term of the court, the jury found him guilty, and fixed his fine at two hundred dollars. Whereupon Speer moved the court to set aside the verdict and grant him a new trial; but the court overruled the motion, and entered a judgment against him in accordance with the verdict. And upon his application to a judge of this court, a writ of error and supersedeas was awarded.

C. E. Stuart and Murbach, for the appellant.

The Attorney General, for the Commonwealth.

ANDERSON, J., delivered the opinion of the court.

The information in this case charges that the plaintiff in error, who was not at the time a resident merchant or manufacturer of this State, did by sample, card, description, and other representation, offer to sell in the city of Alexandria, in the State of Virginia, wines, brandies, goods, wares and merchandise, without having obtained the license therefor required by law. There was a demurrer to the information which was overruled. Then issue was joined upon a plea of not guilty; and upon this issue the defendant was found guilty and fined \$200. None of the facts are certified, and the only question raised by the record, is upon the demurrer to the information. Do the facts which it avers constitute an offence against the commonwealth, for which an information lies?

The offence is charged to have been committed by a person who was not a resident merchant, mechanic or manufacturer. And the specific license tax on every such person was \$100. Sess. acts of 1870-71, chap. 193, § 20, p. 278. And by section 148 of chap. 72, *Ibid.* p. 113, it is enacted that when-

ever a license shall be specially
937 *required by law, and whenever the General Assembly shall levy a license tax on any business, &c., it shall be unlawful to engage in such business, &c., without a license. The tax, it will be perceived, is levied on, and the license required to be obtained by every person who sells by sample, card, &c., who is not a resident merchant, mechanic or manufacturer. And the information alleges that the defendant, who was not at the time a resident merchant, &c., did by sample, card, &c., offer to sell, wines, &c., without having first obtained the license therefor required by law. And the last clause of section 101 of this act, (Sess. acts 1870-71, p. 99,) declares that any person who shall sell or offer to sell, in violation of this act (it is not limited to the section,) shall pay a fine of not less than \$200 dollars, nor more than \$500 for each offence. The court is therefore of opinion that the averments of the information clearly charge an offence against the statute.

But it is contended that the statute is unconstitutional and void, or that provision of section 101 thereof, which prohibits "any person or persons, not residents of the State, to sell or offer to sell," &c., "by sample," &c., "without first having obtained a license therefor," because it is repugnant to Art. 1, § 8, of the constitution of the United States, which gives Congress the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes;" and also to art. IV, § 2, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

It seems to have been the intention of the legislature to have inhibited such sales by sample, &c., by any person who was not a resident merchant, mechanic or manufacturer, whether he was a resident citizen of this State or not. And the effect of
938 this act would be the same if *the words, "not residents of the State," were stricken from this clause of section 101. But the court is of opinion that the question as to the constitutionality of this clause in the statute, is not raised by the pleadings in the record. It is no where averred in the information, or otherwise shown in the record, that the plaintiff in error was not a resident citizen of Virginia, and that this prosecution was instituted against him as such non-resident. It is averred that he is not a resident merchant, &c. But that is not tantamount to an averment that he was not a resident citizen; For he might have been a resident citizen, though not a resident merchant, &c. And whether he was or was not a resident citizen of Virginia, he was prohibited from selling or offering to sell by sample, without license, unless he was a resident merchant, &c., and was alike punishable for the infraction, whether a resident citizen or not. But even if this were not so, and

this provision of section 101 of the act aforesaid, was unconstitutional, it does not appear upon the record, that the plaintiff in error has cause to complain of it, or that he has been aggrieved by the decision, in as much as it does not appear from the record that he was not a resident citizen of Virginia. And it is well settled that a statute must be assumed to be constitutional and valid, "until some one complains, whose rights it invades," as held by this court in the recent cases of *Wright, Sheriff, &c., v. Smith*, and *Antoni v. Wright, Sheriff, &c.*, 22 Gratt. 833; citing *Cooley on Constitutional Limitations*, p. 1634.

But the appellant states in his petition that he was not a resident citizen of Virginia. Taking the fact to be as stated, and that it so appeared from the information, the court is of opinion, that there was no error in the judgment of the court below overruling the demurrer, upon the ground that the act of Assembly under which

939 *the plaintiff in error was prosecuted is not in conflict with the constitution of the United States. Upon a fair construction of the said act, there is no discrimination in favor of a citizen of this State. The word "residents," as used in connection with the words "merchant, mechanic or manufacturer," was not intended to import a personal residence, but only the "place of business." And this we think is implied by the phraseology itself; but is more clearly shown by section 147 of this same chapter, under the head of "Licenses: to whom granted;" which provides that "A license may be granted to any citizen of this State; to any person entitled to the privileges and immunities of a citizen thereof; (which embraces the citizens of any of the United States,) to any person residing in the State; to any firm or company having a place of business in the State, and doing business thereat; to any corporation created by this State, or any of the United States," &c.; so that a citizen of any of the United States has the same privilege of obtaining a license under this act, that a citizen of this State has; and as we have seen, is liable only to the same penalty that a citizen of the State is liable to, for selling or offering to sell by sample, without license. It is also evident that the act aforesaid is purely a revenue law, and not designed to regulate commerce; and is plainly not in conflict with the clause of the Federal constitution, which invests Congress with power "to regulate commerce with foreign nations, and among the several States and with the Indian tribes." It can not be perceived how a tax upon business, which does not discriminate as to the residence or citizenship of the person, who is engaged in the business and subject to the tax, can be a regulation of commerce. The court is of opinion, therefore, that the act aforesaid is not unconstitutional, and

940 that *there is no error in the judgment of the court below overruling the demurrer, and that the same be affirmed.

Judgment affirmed.

941 *Harvey v. The Commonwealth.

March Term. 1873. Richmond.

Criminal Law—Larceny—Verdict Fixing Punishment.

—H was indicted for the larceny of three beehives of the value of \$5; three swarms of bees of the value of \$3; and forty pounds of honey of the value of \$5, of the goods and chattels of C. The jury by their verdict, found him guilty as charged in the indictment, and ascertained the term of his imprisonment in the county jail at three months, and the judgment of the court was for three months imprisonment; W then moved in arrest of judgment, because, 1st. The jury was not authorized to fix the term of his imprisonment; and, 2. Two of the three subjects of larceny charged in the indictment are not proper subjects of larceny.

Held:

1. *Same—Same—Same—Surplusage.*—Though the jury had no authority to fix the imprisonment, it was mere surplusage, and the verdict of guilty was good; and the imprisonment was the act of the court.
2. *Same—Same.*—It may be intended after verdict, that the bees were reclaimed, and the honey the property of C.
3. *Same—Same.*—If any one of the three subjects mentioned in the indictment, might be the subject of larceny, it is sufficient, and the verdict will not be arrested.

This is a writ of error to a judgment of the Circuit court of Pittsylvania county, affirming a judgment of the County court of said county, convicting the plaintiff in error of petit larceny, and sentencing him to imprisonment therefor in the county jail for the term of three months. The indictment was for stealing, taking and carrying away, "three beehives, of the value of 942 *five dollars; and three swarms of bees, of the value of three dollars; and forty pounds of honey of the value of five dollars; of the goods and chattels of one Vincent Shelton. The case was tried upon the plea of not guilty," and the verdict of the jury was in these words: We, the jury find the defendant guilty, as charged in this indictment, and ascertain the term of his imprisonment in the county jail to be three months." Whereupon the defendant moved the court to set aside the verdict and grant him a new trial. But the court not being advised of its judgment

*Verdict Fixing Punishment—Surplusage.—In *State v. Greer*, 22 W. Va. 829, the court, citing the principal case as authority for the proposition, said: "The last error assigned is, that the jury ascertained the term of imprisonment by their verdict. This was irregular, and the court should have informed them that it was no part of their duty to fix the term of imprisonment and should have sent them back to their room to correct it. But it was surplusage and did not vitiate the verdict. The court fixed the term, as the judgment shows; and because he fixed the same term found by the jury, is immaterial. Jurors may be influenced by courts; but we cannot presume that courts will be influenced in the discharge of their duties by jurors."

See monographic note on "Larceny" appended to *Johnson v. Com.*, 24 Gratt. 555.

to be given, took time to consider thereof. On the next day the defendant moved the court to arrest the judgment for the following reasons:

I. Because the jury, after being sworn was charged, if they found the defendant guilty, to ascertain the term of imprisonment in the county jail, so that said term be not more than one year.

II. Because the verdict is contrary to the statute in such case made and provided, because the jury had no right to fix the term of imprisonment in the county jail. The statute gives that power to the court in such cases. Code of 1860, p. 814, § 24.

III. Because the indictment, as to the bees and honey, therein named, does not set forth any offence, in this, that it is not stated whether the bees therein named, were wild bees or reclaimed bees; nor whether they were honey bees; nor whether the honey was strained, (or liquid honey,) or honey comb; nor whether it was honey made by honey bees, or reclaimed bees or not, or by wild bees.

The fourth reason need not be stated, as no question arises upon it.

The court having fully considered the motion for a new trial, and the motion in arrest of judgment, overruled
943 *the same; and ordered that the defendant be imprisoned in the county jail for three months, the period ascertained by the jury, and that he pay the costs of the prosecution. This judgment of the County court was affirmed by the Circuit court, and to the judgment of the Circuit court, a writ of error was awarded by this court.

Marshall, for the appellant.

The Attorney General, for the Commonwealth.

MONCURE, P., delivered the opinion of the court. After stating the case, he proceeded:

This case presents the question, whether the judgment ought to have been arrested on either or both of these two grounds; viz: 1st. That two of the three subjects of the larceny charged in the indictment are not proper subjects of larceny; and 2dly, that the term of imprisonment for the offence was ascertained by the jury, and not by the court. We will proceed to consider these two grounds in their order; and—

1st: As to the ground that two of the subjects named in the indictment, are not proper subjects of larceny. Those two subjects are, "three swarms of bees of the value of three dollars," and "forty pounds of honey of the value of five dollars." When animals or other creatures are not domestic, but are *feræ naturæ*, larceny may, notwithstanding, be committed of them, if they are fit for the food of man, and dead, reclaimed, (and known to be so,) or confined. 2 Russell on Crimes, 83. If *prima facie*, the thing taken is not the subject of larceny, as an animal *feræ*

naturæ, the indictment must show it to be dead, tame or confined, in which state it may be the subject of individual property.

2 Bishop on Crim. Pro. § 663. Bees are in their nature, creatures *feræ naturæ*,
944 *but they may be, and often are, reclaimed, and then become property.

Though not fit for food themselves, their honey is. *Id.*; The State v. Murphy, 8 Blackf. R. 498. Bees, in the possession of the owner, are the subject of larceny. *Id.*; 2 Russell on Crimes, 83. In this case, the three swarms of bees are described to be of the goods and chattels of one Vincent Shelton; which is, in effect, an averment, that when stolen they were his property and in his possession. They were, therefore, in that view, clearly a subject of which larceny could be committed, according to the authority just cited. As to the "forty pounds of honey," named in the indictment, that was clearly such a subject, whether it was made by wild bees, or bees that had been reclaimed. It is described as "of the goods and chattels of one Vincent Shelton," which, as just stated, is, in effect, an averment, that when stolen, it was his property and in his possession. There can be little or no doubt but that the three swarms of bees and forty pounds of honey named in the indictment, were, when taken, in the three beehives therein named; in other words, that it was intended to charge the accused with stealing three beehives, with three swarms of bees and forty pounds of honey therein. If the charge had been in those words, there could have been no doubt that each of the subjects named would have been a proper subject of larceny. In support of the verdict the indictment should be so construed, if necessary; the defect, if any, having been cured by the verdict. The accused did not make any objection on that ground, as he might have done, before verdict; did not then ask the court to exclude any evidence that might be offered as to the stealing of the three swarms of bees. It may, therefore, be presumed after the verdict, that it was proved to the satisfaction of the jury that the bees were the property of Vincent
945 Shelton, and not wild bees, *especially as such proof is consistent with the indictment.

But, certainly, two of the three subjects named in the indictment, are proper subjects of larceny, to wit: the beehives and the honey. It is not pretended that the beehives are not; and that is enough to sustain the verdict and the judgment, even though the other subjects named were not proper subjects of larceny. The grade of the offence is the same; whether all, or any intermediate number, or only one of the subjects named, were stolen, taken, and carried away. The offence is but *petit larceny* in either event. It may be said that the measure of punishment may have been affected by evidence in regard to the stealing of the bees, which would be wrong, supposing the bees not to be a proper subject of larceny. But how can it be known

that any such evidence was before the jury? If it was offered, and was illegal, the presumption is that it was, as it ought to have been, excluded, by the court. If the accused had moved to exclude it, and the court had refused to do so, a bill of exceptions would have been taken to the ruling of the court. There being no such bill of exception in the record, this court would presume, if necessary to sustain the verdict and judgment, that no such evidence was offered, or if offered, that it was excluded by the court below.

But, whether one or more of the subjects named in the indictment were proper subjects of larceny or not, could not affect the question before the jury, if any subject named in the indictment was a subject of which larceny could be committed, and the larceny of that subject was proved to the satisfaction of the jury. The offence was petit larceny, and no more nor less, whether all, or any number less than all, of the things named in the indictment, were

946 stolen. It was the province of the jury only to respond to the issue of guilty or not guilty. They did respond to that issue, and found the accused guilty—that is, guilty of larceny of all the subjects named in the indictment of which larceny could be committed. They had nothing to do with the measure of punishment, which the court alone had the right to ascertain. It is true they did in their verdict “ascertain the term of imprisonment in the county jail to be three months.” But that part of the verdict was mere surplusage, and did not vitiate the general finding of guilty, which was within their province.

Then it was not a good ground in arrest of judgment that any one or more of the subjects named in the indictment were not proper subjects of larceny, some of them clearly being such proper subjects; and the court, therefore, properly overruled the motion in arrest upon that ground. It was a proper matter, of course, to be considered by the court, in ascertaining the term of imprisonment, that one or more of the subjects named in the indictment were subjects of which larceny could not be committed, supposing such to be the fact. But how can we say that the court did not duly consider that matter, and did not adjudge three months to be the proper term of imprisonment, whether all, or any number, or only one of the subjects named in the indictment, were, in fact, stolen by the accused? And now, as to the other ground of the motion in arrest, viz:

2d. That the term of imprisonment for the offence was ascertained by the jury, and not by the court. Beyond all question, it was the province of the court, and not of the jury, to ascertain the term of imprisonment in this case. The Code, ch. 199, § 24, provides, that “the term of confinement in jail of a person found guilty of a misdemeanor, where that punishment is prescribed, shall be ascertained by the court.

Petit larceny is a misdemeanor,
947 *and imprisonment in jail is a pun-

ishment prescribed therefor. But, as before stated, the finding of the jury in regard to the term of imprisonment in this case was mere surplusage, and did not vitiate the rest of the verdict. It was not a good ground for arresting the judgment. It was the province of the court, in proceeding to pronounce judgment upon the verdict, to ascertain the term of imprisonment of the accused in jail, for the offence of which he had been convicted by the jury. And the court, after properly overruling the motion in arrest, did accordingly ascertain such term of imprisonment to be three months. To be sure, the words “three months” in the judgment, are followed by the words: “the period ascertained by the jury;” and it would appear, from the causes assigned in arrest of judgment, that the jury had been charged, “if they found the defendant guilty, to ascertain the term of imprisonment in the county jail, so that said term be not more than one year.” But it did not any more vitiate the verdict that the jury were so charged, than that they so ascertained the period of imprisonment. It still remained for the court, in pronouncing the judgment, to ascertain the term of imprisonment; and the court accordingly did so. That the court adopted the term fixed by the jury, does not vitiate the judgment. The opinion of the jury may have been, and doubtless was, persuasive in ascertaining the term, but it did not control the court. It cannot be presumed that the court did not know what the law was; and certainly such presumption will not be made to invalidate the judgment, when the contrary presumption is equally consistent with the judgment. That the court knew what the law was, affirmatively appears from the fact, that in the causes assigned in arrest of judgment, the court was twice referred to the page and section of the Code, which declared the law.

948 *But this very question was decided by the late General court in House's case, 8 Leigh 755; in which a writ of error was denied, without a dissenting voice. Indeed that case is stronger than this against the validity of such an objection as we are now considering. In that case the defendant was indicted for a misdemeanor, and the jury found him guilty on the first count, and ascertained the term of his imprisonment to be six months, and assessed his fine to \$200. And the court pronounced judgment that the defendant be imprisoned in jail, “for the term ascertained by the jury,” and pay the fine, &c. There was a motion in arrest of judgment, but not upon the ground that the jury had ascertained the term of imprisonment. It does not appear, therefore, that the attention of the court was called in that case, as it was in this, to the law which made it the duty of the court and not of the jury to ascertain the term of imprisonment in such a case. It was assigned as error in that case, that the jury ascertained the term of imprisonment instead of the court; and yet a writ of error was denied. To be sure,

that case occurred before the enactment of § 24 of ch. 199 of the Code; but that enactment was merely in affirmance of the common law, which was precisely the same in this respect as in the statute.

We are, therefore, of opinion that there is no error in the judgment, and that it ought to be affirmed.

Judgment affirmed.

949 *Adams v. The Commonwealth.

March Term, 1878, Richmond.

1. **Larceny of Bank Notes—What Indictment Must State under the Statute.**—In an indictment for stealing bank notes, it is sufficient to state that the notes were for a certain sum of money, without stating their value, under the act, Code of 1860, ch. 194, § 15-16.

2. **Same—Same—Value of Notes Not Traversable.**—In such a case, since the statute, the value of the bank notes is not traversable.

The case is fully stated by Judge Christian, in his opinion.

Grattan, for the appellant.

The Attorney General, for the Commonwealth.

CHRISTIAN, J., delivered the opinion of the court.

The record in this case presents a single question for the consideration of this court. That question is raised, 1st, by a motion to quash the indictment; and 2d, by a motion in arrest of judgment.

The indictment is in the following form:

The jurors of the Commonwealth of Virginia in and for the body of the county of Pittsylvania, and now attending said court, upon their oath present, that Robert Adams, on the 2d day of September 1872, in the said county, divers, to wit: fourteen bank notes for the payment of divers sums of money, in the whole amounting to the sum of seventy dollars, the property and bank notes of Philip Coleman, then and there being, the said *sum of seventy dollars secured and payable by and upon the said bank notes, being then and there due and unsatisfied to the said Philip Coleman, and seventeen pieces of silver coin current in this commonwealth, and called half dollars, of the value of fifty cents each; and twenty-three pieces of silver coin current in this commonwealth, called quarter dollars, of the value of twenty-five cents each; each of the moneys, property, and coin of the said Philip Coleman then and there being, feloniously did steal, take, and carry away; against the peace and dignity of the commonwealth.

Upon his arraignment, to answer this indictment, the defendant moved to quash the same; which being overruled, he pleaded "not guilty." The jury found the prisoner guilty of grand larceny, as charged in the indictment, and ascertained his term of

imprisonment in the penitentiary, to be five years.

The question raised by the motion to quash, and the motion in arrest of judgment, is, whether the indictment is defective in failing to set forth the value of the bank notes charged to have been stolen by the defendant.

At common law, no rule of criminal pleadings was better established than that which required that in indictments for larceny the value of the property should be stated. The reason of the rule was to distinguish between grand and petit larceny. It is also true that this rule, applied to every species of property to bank notes and other money, as well as to other property. And before a party could be convicted of grand larceny, it was necessary to charge and prove the value of the things stolen to be at least of that amount which the law makes grand larceny. Except where modified by statute, these well settled rules still apply to all prosecutions for larceny. But it is not to be denied, that it is competent for the legislature to modify these 951 rules, and to declare *what shall constitute grand larceny, (as it has done in this and other States,) without respect to the value of the thing stolen; and what shall be deemed the value of certain specified property, irrespective of its real value.

Before the passage of the act of assembly, incorporated in the Code, ch. 194, § 15 and 16, it was certainly necessary to state in an indictment for the larceny of bank notes, the value of the notes, and the offence would be grand or petit larceny, according to the value charged and proved. But the question we have to consider is, whether, according to the true construction of these two sections, an indictment for stealing bank notes is defective, for not stating the value of the notes.

These sections are in the following words:

§ 15. "If any person steal any bank notes, checks or other writing, or paper of value, or any book of accounts for or concerning money or goods due or to be delivered, he shall be deemed guilty of larceny thereof, and receive the same punishment, according to the value of the thing stolen, that is prescribed for the punishment of larceny of goods and chattels."

§ 16. "In a prosecution under the preceding section, the money due or secured by the writing, paper or book, and remaining unsatisfied, or which in any event might be collected thereon, or the value of the property or money affected thereby, shall be deemed to be the value of the article stolen."

These two sections read, together, in effect declare that it shall not be necessary to prove the actual value of bank notes and other writings therein specified, but they shall be deemed to be of the value expressed on their face. The mischief to be remedied by these statutory provisions was the difficulty in proving the real value of such notes or other writings. Especially was this the case with respect to bank notes. At

*See monographic note on "Larceny" appended to Johnson v. Com., 24 Gratt. 555.

952 the time *of their enactment the money in circulation was, for the most part, the notes of a great number of banks of this and other States, some of which were much more depreciated than others; and it was often difficult if not impossible to prove their real value, or even to state it with any degree of certainty in an indictment. To remedy this mischief, the statute simply declares that in the cases mentioned no proof of actual value shall be required, but they shall be deemed to be of the value expressed on their face.

It being manifest then, that the legislature, as it had the unquestioned right to do, has dispensed with the necessity, in such cases, of any proof of value, the question recurs, is an indictment defective which fails to state the value of bank notes, but which states the amount due and secured by such notes? It is sufficient in every indictment, if the charge contain such a description of the crime that the defendant may know what crime it is which he is called upon to answer, that the jury may appear to be warranted in their conclusion of guilty, or not guilty upon the premises delivered to them; and that the court may see such a definite crime that they may apply the punishment which the law prescribes. Bishop on Crim. Procedure, § 267. It is certainly essential to state with certainty, every fact which is necessary to constitute the crime charged; and every indictment is defective which fails to state a fact which is traversable by the defendant. Hence, (without any statutory provision modifying the rule,) it has always been held that the description of notes being of certain amount, is not tantamount to an averment of their being of that value, nor a compliance with the well established principle, that indictments for larceny must state the value of the thing stolen; for the

notes may have been spurious and 953 of no value; the contrary of *which it was necessary to be shown by charging them to be of a certain value; and this is a traversable fact. 2 Hale's P. C. 183; State v. Corbin, 1 Porter's R. 124. The value of the thing stolen being necessary to distinguish between grand and petit larceny, it was necessary to state it; for whatever is necessary as a guide to the court in pronouncing the sentence, must be alleged in the indictment. Bishop Crim. Pro. § 293. But under the statute referred to, the value of bank notes charged to be stolen, is no longer a traversable fact. The law fixes their value, by declaring that value to be the amount expressed on their face. It matters not whether the bank note be of value or not, provided it be the note of a bank. The law declares that they shall be deemed to be of the value expressed on their face. When, therefore, the indictment charges the larceny of certain "bank notes amounting to seventy dollars due and unsatisfied," it is (under this statute) tantamount to an averment that said notes are of the value of seventy dollars, because the law expressly attaches such value to such

notes in all prosecutions for the larceny of the same; and such value cannot be traversed or put in issue by the defendant.

The court below, was, therefore, not in error in overruling the motion to quash the indictment, and the motion in arrest of judgment; and the judgment must be affirmed.

STAPLES, J., dissented.

Judgment affirmed.

954 *Christian v. The Commonwealth.

March Term, 1873, Richmond.

1. **Indictment—Attempt to Commit Rape—Word "Ravish" Unnecessary.**—It seems, that in an indictment for an attempt to commit a rape, the word ravish, as descriptive of the offence attempted, is not necessary, but the words attempting "feloniously carnally to know," are sufficient.

2. **Same—Same—Insufficient Evidence.**—What evidence not sufficient to convict of the offence of attempting to commit a rape upon a woman of easy virtue.

In January 1873, Henry Christian, a man of color, was indicted in the Corporation court of the city of Richmond, for this, that on the 26th day of September 1872, at &c., he did feloniously attempt to commit the crime of rape, by then and there attempting feloniously to carnally know one Martha Mallory, a female, then and there being over the age of twelve years, to wit: of the age of twenty-one years, against her will, by force, and that he, the said Henry Christian, did then and there, in his said attempt to commit the felony aforesaid, in and upon the said Martha Mallory, commit an assault upon and throw her down, but did not carnally know the said Martha Mallory; against, &c.

Upon the trial the jury found the prisoner guilty, and ascertained the term of his imprisonment in the penitentiary at one year. The prisoner, thereupon, moved the court to set aside the verdict and grant him a new trial, on the ground that the verdict was contrary to law and the evidence: but the court overruled the motion, and 955 *rendered judgment in accordance with the verdict. To which opinion of the court the prisoner excepted. The facts certified, are as follows:

The prosecutrix proved, that one night, about four months before the trial, she went with the prisoner to a performance of negroes from Washington, given at the Metropolitan hall, the prisoner paying all expenses; that after the performance was over, they started home together. On their way home, when near the Tredegar works, the prisoner asked her an unfair question; asked her to do it; and she refused; and he laid hold of her, pushing her down on a pile of lumber, choking her, and trying to pull up her clothes; that she resisted, and he did not accomplish his object; and after awhile desisted from his effort, and she started on home, he following behind her,

entreating her to yield to his wishes, but making no effort to lay hold of her again, or use any violence towards her; that she had never been married, and lived on Brown's island, with a negro woman; herself and her two children, and the negro woman, comprising the household.

Upon the application of the prisoner, a writ of error was awarded.

Page and E. C. Cabell, for the prisoner.

The Attorney General, for the Commonwealth.

ANDERSON, J. This is an indictment for an attempt to commit an offence under section 10, of chap. 199 of the Code, as amended by chap. 45, of the acts of Assembly of 1871-72. When the statute makes an attempt to commit an offence punishable, the commission of which was a crime antecedent to the statute, it is sufficient to charge the attempt in the terms of the statute; but it is necessary to describe the

956 offence which the accused is *charged with having attempted to commit, with the same legal precision and certainty, and in the terms, with which it is necessary to describe it in an indictment for the commission of the offence. Thus, this being an indictment for an attempt to commit a rape, the offence of rape must be described with all the precision and certainty, and in the terms required, in an indictment for a rape. And it seems to have been well settled, that the word "ravish" is a technical term necessary to be employed in the description of the offence in an indictment. "It is essential to aver that the offender did feloniously 'ravish' the party, and the omission of the word ravished, will not be supplied by an averment that the offender did carnally know." 1 Russ. on Crimes 686. And in *Howell's case*, 2 Gratt. 664, 672, J. Lomax delivering the opinion of the court, says: "In framing indictments upon statutes, as in the present case, it is in general necessary, not only to set forth on the record all the circumstances which make up the statutable definition of the offence, but also to pursue the precise and technical language in which they are expressed; and upon this ground, an indictment for rape must contain the word 'ravishd.' Nor will any expressions of force or carnal knowledge excuse its omission."

Was this indispensable requirement, in pleading, changed by the revival of 1849, by simply 'dropping' the word "ravish" from the statute? If the offence charged was an offence antecedent to the statute, it must be described as required before the statute was enacted. For illustration: If the statute declares that any person who commits the crime of rape, shall be punished by confinement in the penitentiary, which was the punishment before the revival of 1849, it would not be sufficient to charge in the indictment that the accused had committed rape but it would be necessary in describing the offence, *to pursue the precise and technical language pre-

scribed; and the indictment must contain the word "ravished." So, if the statute, as it does, declares that "if any person shall carnally know a female of the age of twelve years or more, against her will, by force, he shall be punished," as above, the statute does not create a new offence. For, although the word "rape" is not in the body of the act, the heading, taken in connection with the body of the act, shows that it is the offence meant. It must therefore be described in the indictment with all the particularity required before this statute was enacted. The only alteration made in the act of 1849, by the amendatory act of February 9, 1866, is the omission of the third word, "white" in the first line, and prescribing the punishment of death, or confinement in the penitentiary, as in the revival, at the discretion of the jury. Sess. acts of 1865-6, p. 82, Code of 1860, ch. 191, sec. 15, p. 785. We are of opinion that the words "carnally know," &c., employed by the statute, give to it no greater force or effect than the word rape would have given to it. 3 Ark. R. 400.

But even if this were not so, the act under which this prosecution is made, uses the word "rape," instead of the words "carnally know," and declares the offence to be an attempt to commit "rape." We are of opinion, therefore, that in an indictment for an offence under this act, it is necessary to describe the crime of rape, in the terms in which that offence could only be described; and that without the insertion in the indictment of the word "ravish," it would be fatally defective, even after verdict.

We think, also, that the offence of an attempt ought to be set out in the terms of the statute; that is, that the accused attempted to commit the crime of rape, (describing that crime as in an indictment 958 for rape;) that *in such attempt, any acts which were done towards its commission,—but that the accused failed to commit it, or was prevented from committing it. The indictment should charge acts done, not merely to obtain the consent of the female, but showing a purpose to ravish her, against her consent. We think such acts are necessary to be shown, in order to constitute the crime created by the statute. They are necessary elements or constituents of the crime of an attempt.

If they were sufficiently charged in the indictment, we are clearly of opinion that they are not sufficiently shown by the certificate of facts in this case. It is the province of the jury to weigh the evidence, and to decide what facts are proved; subject, of course, to the supervision of the court. But, whether the facts proved do constitute the offence charged, is a question of law, proper to be decided by the court. In this case the facts proved are certified, and the question is, do they constitute the offence charged?

Whether the proof is sufficient or not, must depend on the circumstances of each case; among which the character and con-

dition of the parties may have an important bearing. Acts of the accused, which would be ample to show and to produce conviction on the mind, that it was the wicked attempt and purpose to commit this infamous crime, if done in reference to a female of good and virtuous character, would be wholly insufficient to establish guilt, if they were acts done to a female of dissolute character, or easy virtue. The certificate of facts in this case shows, that the accused and the prosecutrix, were both negroes, and had been to witness some dramatic exhibition of negroes at night, at the Metropolitan hall, to which the prosecutrix had gone with the accused, and at his expense; and that the alleged attempt to commit this crime, was against *one, whose virtue had been overcome on previous occasions; as she was, by her own admission, the mother of two bastard children. The evidence indicates that he had wooed her pretty roughly in a way that would have been horrible and a shocking outrage toward a woman of virtuous sensibilities, and should have subjected him to the severest punishment which the law would warrant. But how far it affected the sensibilities of the prosecutrix does not appear. It by no means appears, from the facts certified, that it was an attempt to ravish her, against her will, or that it was not only an attempt to work upon her passions, and overcome her virtue, which had yielded to others before—how often it does not appear. But, that he desisted when he could probably have accomplished his purpose, if it had been to force her, when he found her more unyielding, than he perhaps expected, without any interference, or any outcry on her part, together with his after conduct, show, we think, that his conduct, though extremely reprehensible, and deserving of punishment, does not involve him in the crime which this statute was designed to punish. We are of opinion, therefore, to reverse the judgment of the Hustings court of the city of Richmond.

CHRISTIAN, STAPLES and BOULDIN, Js., concurred in the reversal of the judgment upon the facts proved; but they thought the indictment good.

MONCURE, P., concurred in the opinion of Anderson, J.

Judgment reversed.

960 *Murphy v. The Commonwealth.

March Term, 1878, Wytheville.

1. **Statute—Jurisdiction of Justice—Conviction by Justice for Assault—No Bar to Prosecution for Felony.**—The act of March 30th, 1871, Sess. acts 1870-71, p. 332, does not give justices of the peace jurisdiction to try a case of felony; and the conviction and punishment of a party by a justice for an assault and battery, will not bar a prosecution for wounding with intent to kill, by the same act for which he was punished by the justice.

2. **Conviction for Assault in County Court No Bar to Prosecution for Felony.**—If the accused has been indicted and convicted for a mere assault and battery in the county court having jurisdiction of such offence generally, the conviction will not be a bar to an indictment for a felony, in the perpetration of which the assault and battery was committed.

3. **Evidence—Witnesses—Questions Tending to Incriminate—Testimony Inadmissible.**—On a trial for an assault with intent to kill, the witness upon whom the assault was alleged to have been made, was asked if he did not tell his wife that the prisoner acted only in his own defence. The answer to the question may tend to criminate himself, and the testimony is inadmissible. 2d: It required him to state a communication supposed to have been made by him to his wife; which, if made, was a confidential communication, and which he was not bound to disclose.

4. **Same—Same—Question Relating to Collateral Matter—Answer Conclusive.**—A question is put to the witness which he answers, and which relates to a collateral matter not connected with the subject of the prosecution. His answer to that question was conclusive, and could not be contradicted.

5. **Same—Same—Privileged Communications—Husband and Wife.**—In this case, after the witness was asked the question whether he did not state to his wife that the defendant had acted only in his own defence, and he had answered the question denying that he had done so, the wife of the witness was introduced to prove the statement was made to her. She is not a competent *witness to prove it, though at the time it was alleged to have been made, they were living apart from each other; but not divorced.

6. **The Law Presumes a Man Intends the Natural Consequence of His Own Act.**—A man is taken to intend that which he does, or which is the natural and necessary consequence of his own act. Therefore, if the prisoner wounded the prosecutor, by the deliberate use of an instrument likely to produce death under the circumstances, the presumption of the law is that he intended the consequences that resulted from said use of said deadly instrument.

7. **Malice—Inferred from the Use of a Deadly Weapon.**—Malice may be inferred from the deliberate use of a deadly weapon, in the absence of proof to the contrary.

8. **Indictment of Two Counts—Verdict of "Guilty."**—Where there are two counts in an indictment for a felony, and there is a general finding by the jury of "guilty," if either count is good it is sufficient.

At the October term for 1872, of the County court of Scott county, Alexander Murphy was indicted for making an assault on John Murphy, with intent to maim, disable, disfigure and kill him. The indictment contains two counts. The first charged the assault with the felonious and malicious intent, in the usual form; and there was no doubt that it was a good count. The second charged that Alexander Murphy, on the — day of —, in the year 1872, in the county of Scott, did make an assault in and

*See monographic note on "Autrefois, Acquit and Convict" appended to Page v. Com., 26 Gratt. 943.

†See *McDaniel v. Com.*, 77 Va. 287; *State v. Welch*, 36 W. Va. 700, 15 S. E. Rep. 423.

upon the body of one John Murphy, and him the said John Murphy, feloniously did strike on the head with a hoe, and by so striking the said John Murphy on the head as aforesaid, with the hoe as aforesaid, he, the said Alexander Murphy, then and there feloniously and maliciously did cause the said John Murphy great bodily injury, with intent, him the said John Murphy, to maim, disfigure, disable, and kill; against the peace and dignity of the commonwealth.

The proceedings in the case are fully stated in the opinion of Judge Moncure.

962 *J. A. Campbell and Lane, for the prisoner.

The Attorney General, for the Commonwealth.

MONCURE, P., delivered the opinion of the court.

This is a supersedeas to a judgment of the Circuit court of Scott county, affirming a judgment of the County court of said county, convicting the plaintiff in error, Alexander Murphy, of felony, in feloniously and maliciously striking and wounding his father, John Murphy, with intent to maim, disfigure, disable, and kill the said John Murphy. The errors complained of appear in the several bills of exception, which were taken to opinions of the County court given during the progress of the trial. We will notice them in the order in which the said bills of exception were taken and are numbered in the record. And,—

First: We are of opinion that the county court did not err in overruling the motion of the plaintiff in error to withdraw his plea of not guilty, and file the special plea set out in the first bill of exceptions. Even if the special plea had been offered in time it presented no bar to the prosecution, and was properly rejected on that ground. It avers that the plaintiff in error had been charged before a justice of the peace of said county, with having committed an assault upon the said John Murphy; that the said justice had jurisdiction of the case, and after hearing all the evidence, found the accused guilty of the assault charged, and adjudged him to pay the sum of ten dollars as a penalty therefor and costs; that the said judgment was final, unrevoked and in full force; that the assault and battery so charged, and of which he was so convicted before said justice, is the same identical offence set forth in said indictment; and that the record of said proceeding had been
963 lost, so that *the same could not be produced; but that he was ready to make proof of the same by said justice and others.

This proceeding before a justice of the peace, must have been under the act approved March 30, 1871, entitled "an act to extend the jurisdiction of police justices and justices of the peace in certain cases;" acts of assembly, 1870-71, p. 362. But that act, while it gives to justices of the peace

"concurrent jurisdiction with the county and corporation courts of the State, of all cases of assault and battery, not felonious, occurring within their jurisdiction," gives them no jurisdiction whatever of such cases of assault and battery as are felonious. And as the assault and battery charged in the indictment in this case, and of which the accused was convicted by the verdict and judgment, was felonious, therefore a justice of the peace had no jurisdiction of the case; and any judgment which may have been rendered by a justice as alleged in said plea is null and void, and was no bar to the prosecution for the felony.

But even if the accused had been indicted and convicted of a mere assault and battery, in the County court having jurisdiction of such an offence generally, the conviction would not have been a bar to an indictment for a felony in the perpetration of which the assault and battery was committed. The misdemeanor in such case is considered as merged in the felony. "Where the prisoner has been convicted of a misdemeanor, and is afterwards indicted for a felony, the two offences have been considered so essentially distinct, that a conviction of one was deemed no legal bar to an indictment of the other. In the Commonwealth v. Roby, 12 Pick. R. 496, the misdemeanor was an assault charged to have been committed with intent to murder. After conviction of this offence, the party assaulted died,

and then the prisoner was indicted of
964 murder. He pleaded autrefois *convict, to which there was a demurrer; and after full argument and great consideration, the judges came unanimously to the conclusion, that the facts constituting the murder would not have been competent evidence to warrant a conviction of the assault, and judgment was entered that the plea was not good, and that the prisoner should answer over to the indictment." 3 Rob. Pr. old ed. 131.

Secondly: We are of opinion that the County court did not err in excluding certain evidence from the jury, as mentioned in the 2d bill of exception. It is stated in that bill, "that upon the trial of this case, the commonwealth introduced John Murphy as a witness; and upon his examination, he was asked by the defendant if he did not state to his wife, Nancy Murphy, at his own house, a short time after he was struck by the defendant, that the defendant acted only in his own defence; to which he replied, that he did not make any such statement. The defendant further asked the said witness, Murphy, if he was not living at the time in a state of adultery, and that the difficulty arose by his espousing the cause of the said Mary Elliott; to which he replied that he never had any sexual intercourse with the said Elliott. The said Nancy Murphy was then called by the defendant, and stated that at the time of the said difficulty, said John Murphy and Mary Elliott, were living together as man and wife; that he had driven the witness, his wife, off, some six or seven years since,

and also his children, and they still live apart; and further, that he stated to her at his own house, a short time after the difficulty, that he would rather be killed than that Mary Elliott should be hurt; and that at the time Alexander Murphy, the defendant, struck him, he was acting only in his own defence; all of which, upon the 965 motion of the commonwealth *was excluded from the jury;" to which the defendant excepted.

The evidence thus excluded consisted of answers of the witness, John Murphy, to two questions put to him by the defendant on cross examination; and a statement made by the witness, Nancy Murphy, on her examination in chief by the defendant. The court did not err in excluding the 1st question propounded to the witness, John Murphy, and his answer thereto; 1st, because the question tended to criminate the witness; and 2d, because it required him to state a communication supposed to have been made by him to his wife; which, if made, was what the law considers a confidential communication, and which he was not bound to disclose. Nor did the court err in excluding the 2d question propounded to the said John Murphy, and his answer thereto; 1st, because the question tended to criminate the witness; 2d, because the facts sought to be proved by the answer to this question was wholly irrelevant and inadmissible evidence in the case; and 3d, because the answer of the witness to the question, "that he never had any sexual intercourse with the said Elliott," denied the guilt imputed to him by the question; which being a collateral matter not connected with the subject of the prosecution, his answer to the question was conclusive, and could not be contradicted by any testimony on behalf of the defendant. In regard to the statement made by the witness, Nancy Murphy, wife of the said John Murphy, the court did not err in excluding it, if not because the whole of it tended to criminate her husband, at least, because that part of it which related to John Murphy and Mary Elliott's living together as man and wife, and to his having driven off his wife and children, and living apart from them, was irrelevant and inadmissible evidence in the case, and because the 966 residue *of it disclosed communications supposed to have been made by the husband to the wife, is what the law considers confidential; and which, therefore, she had not a right to disclose.

To show that the evidence of the wife was admissible in this case. 1 Phil. on Ev. top page 68, marg. 84, was referred to, and relied on by the counsel for the plaintiff in error. It is there said, that "although the husband and wife are not allowed to be witnesses against each other, where either is directly or immediately interested in the event of a proceeding, whether civil or criminal, yet in collateral proceedings, not immediately affecting their mutual interest, their evidence is receivable, notwithstanding that the evidence of the one

tends to contradict the other, or may subject the other to a legal demand, or even to a criminal charge." "The rule laid down in the case of *The King v. The Inhabitants of Cliviger*." (2 T. R. 263,) it is further said by that writer, (namely: that a husband or wife ought not to be permitted to give any evidence that may even tend to criminate each other,) "is now considered as having been laid down in terms much too general and undefined." He then refers to the cases of *The King v. The Inhabitants of All Saints, Worcester*. (6 Maul. & Sel. 194;) and *The King v. The Inhabitants of Bathwich*, 6 Barn. and Ad. R. 639, in which he says the rule was much discussed, and the Court of King's Bench was of opinion, after much argument, that the rule laid down in *The King v. Cliviger*, was too large and general. In a subsequent case, however, *The King v. Gleed*, (2 Russ. Cr. and M. 983, ed. by Greaves,) also mentioned by Phillips: "Upon an indictment for larceny, where a woman was called on the part of the crown, to prove that her husband who had absconded, had been present

when the article was stolen, and that 967 she saw him deliver *it to the prisoner; Taunton, J., after consulting with Littleale, J., rejected the witness. His Lordship says: "The evidence of the wife here would directly charge the husband with being a principal; and although there is no prosecution pending, her evidence cannot but facilitate an accusation against her husband. Now the law does not allow the wife to give evidence against her husband, and it is quite consistent with that principle, that this evidence should not be received." "It may be doubted, however," says Phillips, whether this ruling was correct. It would certainly appear not to be so upon the principles laid down in *Rex Bathwich*, (which was cited in the case,) for if the husband were indicted for the theft, the wife could not be a witness on that trial, nor could any thing she had said on the former trial be in any way adduced in evidence against him.

Thus the law seems to stand in England, where the weight of authority now is, that in such a case as this the testimony of the wife would not be inadmissible on the ground of interest, and that it tended to criminate her husband; and the weight of authority in this country that is in the States of this Union, may be the same way. See 1 Greenl. on Ev. § 342 and notes. But in *Stein v. Bowman*, 13 Peters, R. 209, the case of *The King v. Cliviger*, 2 T. R. 263, is mentioned without disapprobation by McLean, J., in delivering the opinion of the court; though he refers also to the subsequent case, reported in 6 Maul. & Sel. 194, and concludes that the law does not seem to be entirely settled how far in a collateral case a wife may be examined on matters in which her husband may be eventually interested. The most that can be said on the subject seems to be, that the law upon the question is unsettled.

But we do not deem it necessary to

968 decide the question *in this case, as there is another ground upon which we think that so much of the evidence rejected as is relevant to the case, is clearly inadmissible—we mean that portion of the evidence of Nancy Murphy, which says that her husband “stated to her at his own house, a short time after the difficulty, that he would rather be killed than that Mary Elliott should be hurt; and that at the time Alexander Murphy, the defendant, struck him, he was acting only in his own defence.” The ground on which this evidence is inadmissible is thus stated in *Greenleaf on Evidence*, § 254. “Communications between husband and wife belong also to the class of privileged communications; and are therefore protected, independently of the ground of interest and identity, which precludes the parties from testifying for or against each other. The happiness of the married state requires that there should be the most unlimited confidence between husband and wife; and this confidence the law secures, by providing that it shall be kept forever inviolable; that nothing should be extracted from the bosom of the wife, which was confided there by the husband. Therefore, after the parties are separated, whether it be by divorce or by the death of the husband, the wife is still precluded from disclosing any conversation with him; though she may be admitted to testify to facts which came to her knowledge by means equally accessible to any person not standing in that relation.” Several authorities are cited in the note to this section, but only two of them will be noticed here. In *Stein v. Bowman*, 13 Peters’ R. 209, it was held that a wife, after the death of her husband, cannot be allowed to prove that her husband had confessed to her that he had committed perjury in a deposition read in the cause. *McLean, J.*, delivering the opinion of the court, said: “In the present case the witness 969 was called to discredit *her husband; to prove in fact that he had committed perjury, and the establishment of the fact depended on his own confession—confessions which, if ever made, were made under all the confidence that subsists between husband and wife. It is true the husband was dead, but this does not weaken the principle. Indeed it would seem rather to increase, than lessen, the force of the rule. Can the wife, under such circumstances, either voluntarily be permitted, or by force of authority be compelled, to state facts in evidence, which render infamous the character of her husband? We think, most clearly, that she cannot be. Public policy and established principles forbid it.” In *Robin, &c., v. King*, 2 Leigh, 140: In a suit by persons held in slavery against their master, to recover their freedom, defendant claimed plaintiffs as slaves by purchase of them as slaves from W. K., dec’d; and plaintiffs offered K. K., widow of W. K., to prove that W. K., in his lifetime, before sale to defendant, repeatedly declared, in presence of his family, and without in-

junction of secrecy, that the mother of plaintiffs then held by him in slavery was an Indian woman. Held: Widow not competent witness to prove such declarations of her deceased husband. This is the reporters’ abstract of the decision. Judge Carr, in his opinion, in which the other judges concurred, fully recognizes the principle of evidence which forbids the disclosure by a husband or wife of confidential communications received from the other. After citing and commenting upon several cases of the kind, he says: “These are cases in which the husband was a party; but the principle applies also where he is no party; for in the one case or the other, it is equally a violation of the confidence reposed, to divulge, in a court of justice, what was imparted in the sacred privacy of domestic intercourse: and of this opinion, Starkie seems to be.” After quoting a passage 970 *from that author’s work on evidence, part (IV. p. 709,) he further says: “Now the case from *Strange* did not violate this rule; the wife disclosed no communication; but being present when the goods were bought, she was called to prove on whose credit the sale was made. But is not our case very different? I think so. The husband was at the time holding in slavery the mother and her children. If she was an Indian woman they were all entitled to their freedom. Can we possibly suppose that he meant to make such a declaration public? It is stated that the party offered to prove that these declarations were made repeatedly, in the presence of the family, and they were not requested to keep them secret. This could only, I presume, be proved by the wife; and I question the propriety of permitting her thus to qualify herself to disclose such communications. But suppose it proved, that the declarations were so made, and no secrecy enjoined; would it follow that the husband wished or expected they should be divulged? Are we to say that every word spoken in the thoughtless, careless confidence of the domestic circle, is free for public disclosure, unless secrecy be expressly enjoined? Is not the converse of the proposition true? And would it not have a most mischievous effect, would it not seriously break in upon that confidence which is the charm of domestic life, if men should from our decisions, have cause to fear that after they were in their graves, their reputation might be injured and their children ruined, by the declarations they had made in the bosoms of their families? This freedom from restraint or apprehension, in the intercourse of one’s own fireside, seems to me so necessary to the quiet and repose of society, that I am fearful of trenching upon it in the slightest degree.”

According to the authorities referred 971 to, we think *there can be no doubt of the inadmissibility, as evidence in this case, of the statement said by the witness, Nancy Murphy, to have been made to her by her husband, at his own house. That the husband and wife lived apart

when the statement was made, does not take the case out of the operation of the principle. The parties were not legally separated. They still were man and wife, entitled to all their legal rights as such, however unworthily the husband may have acted. The rest of the evidence set out in the second bill of exceptions is inadmissible, as we have already seen, upon other grounds.

Thirdly: We are of opinion, that the said County court did not err in overruling the motion of the prisoner to set aside the verdict and grant him a new trial, as mentioned in his third and last bill of exceptions; and that all the reasons assigned in said bill for granting such new trial are insufficient for that purpose. They are five in number. The 1st: "Because he was arraigned and plead without the aid of counsel, having none present when he plead not guilty to the indictment," is not well founded. A man may plead for himself. The prisoner said he had counsel, though they happened to be absent. He plead voluntarily, and had the cause continued; and his counsel were present and defended him at his trial. The 2d and 3d have already been disposed of, being the subjects of the 1st and 2d bills of exception. The 4th is, "because the court erred in giving to the jury the instructions asked for by the commonwealth. These instructions were not excepted to when they were given, nor till after the verdict; and it is at least doubtful, whether they can be regarded as a part of the record. They are not copied in the 3d bill of exceptions, nor are they therein referred to, except by being mentioned as aforesaid, in the 3d of the 972 reasons assigned for a *new trial.

They are copied by the clerk at the end of the record. Without deciding whether they can properly be considered as a part of the record, but assuming them to be so, for the purposes of this case, we are of

opinion, that the court did not err in giving them. After giving two instructions on the motion of the prisoner, the court gave the following on the motion of the commonwealth:

"The court also instructs the jury, that the law is, that a man is taken to intend that which he does, or which is the natural and necessary consequence of his own act; and therefore, that if they believe from the evidence, that Alexander Murphy wounded his father, John Murphy, by the deliberate use of an instrument likely to produce death, under the circumstances; then the presumption of the law, arising in the absence of proof to the contrary, is, that he intended the consequences that resulted from said use of said deadly instrument.

"The court further instructs the jury, that the law is that malice may be implied from the deliberate use of a deadly weapon in the absence of proof to the contrary." These two instructions correctly expound the law; and were appropriate, and not mere abstractions. The 5th and last of the reasons assigned are, that "the judgment should be arrested, because there is no felony charged in the 2d count of the indictment, which may be the one under which the jury found him guilty." They found him guilty under both; and if either be sufficient, it is enough. Whether a felony be charged in the 2d count or not, is a question which we need not decide; as the 1st is certainly a good count, and is conceded to be so by the plaintiff in error. No motion was made to set aside the verdict, upon the ground that it was contrary to law and evidence; and certainly it was contrary to neither.

973 *We are of opinion, that there is no error in the judgment, and that it ought to be affirmed.

Judgment affirmed.

INDEX.

ABANDONMENT.

1. See *Vendor & Purchaser*, No. 1, and *Hardy v. McCullough & als.*, 251

ACCOUNTS.

1. The decided cases do not fix any period as limiting the demand for an account. If, from the delay which has taken place, it is manifest that no correct account can be rendered, that any conclusion to which the court can arrive must, at best, be conjectural, and that the original transactions have become so obscured by time and the loss of evidence and the death of parties, as to render it difficult to do justice, the court will not relieve the plaintiff. If, under the circumstances of the case, it is too late to ascertain the merits of the controversy, the court will not interfere, whatever may have been the original justice of the claim.

Harrison & als. v. Gibson & als., 212

2. Though a delay of fourteen years after a right has accrued, does not create a statutory bar, it will, in connection with other circumstances, be very persuasive against the justice of the claim. Relief refused in this case. *Idem*, 212

3. Coverture is no excuse for delay in bringing the suit. *Idem*, 212

4. The provisions of § 16, ch. 132, Code of 1860, prescribing what shall be done by a commissioner in settling the accounts of fiduciaries, apply to the report, regular or special, mentioned in § 34, of the same chapter.

Whitehead's adm'r v. Whitehead & als., 376

5. When the accounts of an administrator c. t. a. should be settled as guardian's accounts.

See *Strother & als. v. Hull & als.*, 652

ACTIONS.

H contracts to sell to M not less than 200 and not more than 300 good fat hogs, each to weigh not less than 180 lbs. gross; to be delivered at G, by the 8th of December, and to be weighed at the scales at G. And M binds himself to pay to H for the said hogs, when weighed, 13½ cents per pound gross weight, part in cash and part in twenty days. H has at G on the 8th of December, 241 good fat hogs, of which he gives M notice; but M declines to take them, and does not come to G on that day. H on that day procures R, the weighmaster at the scales and G to weigh the hogs; and they weigh them in 16 parcels of from 7 to 20 hogs in a parcel, showing from the aggregate weight of all and the weight of each parcel, that the average weight is much above 180 lbs. gross. HELD:

1. H may maintain an action on the contract against M, for the damages sustained by him for the failure of M to comply with his contract.

McCormick & Co. v. Hamilton, Wood & Co., 561

2. To entitle H to recover from M, it is not necessary for him to prove that the whole 241 hogs each weighed over 180 lbs. gross, and were "good fat hogs;" but if he prove that any number of them over 200 were of such weight and quality, he is entitled to recover. *Idem*, 561

3. It is not necessary that H should have had each hog weighed separately in order to entitle him to recover; but if he proves, to the satisfaction of the jury, that 200 or more of them, each weighed 180 lbs. that is sufficient. *Idem*, 561

4. An experienced drover of hogs, accustomed to butchering and weighing *them, who was present when the hogs were weighed, and saw them and attended to the weighing of them, may give to the jury his opinion as to the weight of each hog. *Idem*, 561

5. As the hogs had not been weighed separately, either at G or afterwards, the opinion of the witness is not substitutional, but is original evidence; and the best which under the state of facts is attainable. *Idem*, 561

6. There having been no market price for hogs at G on the 8th of December, H may show by testimony, what was the market price at that time and shortly before and afterwards, in the surrounding country. *Idem*, 561

ADMINISTRATION.

1. Testator having directed certain land to be sold, and his debts to be paid out of its proceeds and his personal estate; and the executor having sold the land and paid debts out of this common fund, and being in arrear, and his sureties not being liable for the proceeds of the land; how to ascertain the amount of debts with which each fund is to be charged.

See *Executors & Administrators*, No. 4 and

Murphy's adm'r v. Carter & als., 477

2. In October 1865, T, one of the heirs at law and the administrator of G, filed his bill against the other heirs, some of whom were infants, for the sale of the land of G, on the ground that partition could not be made of it. He said he had proceeded to administer the assets, and so far as he knew, there was but one debt due from the estate, and the assets were sufficient to pay it. The court decreed a sale of the land, and directed a commissioner to take an account of the available

assets, and of the outstanding debts of G. The commissioner reported the debts between three and four thousand dollars, and assets nearly as much. The land was sold for \$12,741, one-third cash, and the balance in one, two and three years. The cash payment and the first credit payment were divided among the heirs. At the November term 1867, the court made a decree directing the second payment to be collected and distributed ratably among the creditors of G, according to the report of the commissioner. **HELD:**

1. The court erred in charging the proceeds of the sale of the land with the debts of G, without first taking an account of the entire personal estate which came to the hands of the administrator, and directing its application in discharge of such debts.

Elliott & wife & als. v. George & als., 780

2. So long as the debts due the estate were not collectible by reason of the operation of the stay law, the debts against the said estate could not be enforced, for the same reason, against the land or the money resulting from its sale. **Idem,** 780

3. If the Circuit court apprehended a deficiency of personal assets, or that the rights of creditors would be endangered by a distribution of the land fund among the heirs, it would have been proper to retain under its control so much of said fund as was necessary, until the amount of such deficiency was accurately ascertained, and then to supply the same by a resort to such land fund. **Idem,** 780

ADVANCEMENTS.

1. J held an estate for her widowhood in a tract of land, remainder to the children of her husband; two of whom were by her. Her son R used her money, with her concurrence, to buy the interest of the remaindermen in the land, and took the conveyances to himself. Upon the evidence in the cause, held that the money so used by R was intended as an advancement by his mother to him.

Gregory & als. v. Winston's adm'r & als., 102

APPEALS.

1. When an appeal is obtained from a decree by default before an application is made to the court to correct it, the appeal will be dismissed as improvidently
977 *awarded, unless the appellees waive the objection.

Commonwealth of Virginia v. Levy & als., 21

2. When appeal may be in a case of prohibitions. See *Prohibition*, No. 1, and

Burch, mayor, v. Hardwicke, 51

3. The longest period of limitation within which a petition for an appeal, writ of error or supersedeas can be presented, is two years, nine months and ten days, as to final judgments, decrees and orders rendered be-

fore the passage of the act of November 5th, 1870; and as to those since rendered such period of limitation is two years.

Callaway v. Harding, 542

4. When an appeal will be dismissed, or the decree corrected and affirmed, with costs to the appellee.

See *Executors & Administrators* No. 12 and

Strother & als. v. Hull & als., 652

5. A final decree in a cause was made in October 1863. On the 5th of October 1871, an appeal from this decree was allowed by a judge of the court of appeals. The petition, with the endorsement, was filed with the clerk, on the 9th of the same month, and the appeal bond is dated the 26th of April 1871. *Quære:* If the appeal was barred by the statute limiting appeals.

Sexton v. Crockett & als., 857

6. An award is made in a cause in a county court, and is entered as the judgment of the court. It not appearing in the record whether it was entered at a quarterly or monthly term, it must be presumed by an appellate court that it was at a term at which the court had jurisdiction to enter the judgment.

Forrer v. Coffman & al., 871

ARBITRATION AND AWARDS.

1. Where an order is made in a pending cause, submitting the matters in dispute therein to arbitration, and the arbitrators have before them the pleadings and exhibits, duly consider them, and return them to court with their award, if it appears from an inspection of the whole, that the arbitrators have made a plain and palpable mistake of law, there can be no valid ground for refusing relief in such cases.

Moore v. Luckess' next of kin, 160

2 L's ex'or sues M upon his bonds executed to L, and M pleads payment, and files an account of set-off, consisting of charges for services rendered to L, running through fourteen years. Pending the suits, the ex'or and M agree to refer the matters in dispute to arbitration, the submission to be entered of record in said causes. The arbitrators return their award by which they 1st, ascertain that M is indebted to the ex'or in the amount of the bonds; and 2d, that M is entitled to the credits he claims for the five years before the suit brought, specifying the amount in each year. The ex'or declining to oppose the confirmation of the award, the next of kin of the residuary legatee of L file their bill to set it aside, on the ground that the arbitrators intended to decide the case according to law, and had mistaken it. The arbitrators say in their testimony, that they intended to decide the case according to law, and apply the statute of limitations to the account of M; and they had before them the papers in the causes, the account of M and the depositions filed, and returned them with the award. **HELD:**

1. Though the award does not refer to the papers, yet they are so identified, that the

court will consider them in connection with the award; and it being apparent that the arbitrators took the institution of the actions, instead of the filing of the plea, as the date from which the statute would cease to run, the court will correct the error.

Idem, 160

2. A court of equity, alone, has jurisdiction to correct the error; and the ex'or declining to oppose the confirmation of the award, the next of kin may maintain the suit.

Idem, 160

3. Under the statutes, an award cannot be set aside in a common law court, except for error apparent on the face of the award, or unless it has been procured by corruption or other undue means, or misbehaviour in the arbitrators.

Idem, 160

978 *4. The error of the arbitrators may be corrected without setting aside the award, by striking out from it the credits allowed M to which the statute applies, dating from the filing of the plea.

Idem, 160

3. Arbitrators are required to return their award by a certain day, under their hands and seals. They prepare their award; and the day before they are required to return it, one of them hands it to the counsel of the plaintiff. He sees that they have omitted the seals, and he returns it to them, and requests that they will add the seals and insert the word "seal" in the body of the instrument. This they do, and then deliver it on the day to which they are limited by the submission. The award is valid.

Forrer v. Coffman & al., 871

4. The submission is made of matters in controversy in a suit by M against F & C, late partners, on a claim against the partnership. F alone is the party to the submission, and binds himself to perform it; and the award is that F shall pay to M, &c. The fact that C is not named in the award is no objection to it. He is not bound by it, having been no party to the submission.

Idem, 871

5. The submission providing that the award shall be entered as the judgment of the court, when so entered it is the judgment in the cause, and settles all matters involved in the action; and it was not necessary that the award on its face should dispose of the action.

Idem, 871

6. The arbitrators might properly allow interest upon the ascertained present value of rents to become due.

Idem, 871

7. It not appearing in the record, whether the term of the county court at which the award was entered as the judgment of the court, was a quarterly or monthly term, it must be presumed by the Appellate court, that it was a term at which the court had jurisdiction to enter the judgment.

Idem, 871

ATTACHMENTS.

1. See *Judicial Sales*, No. 3, and *Underwood v. McVeigh*, 409

2. The treasurer of the State who holds bonds of a foreign insurance company doing business in the State, under the act of February 3d, 1866, as amended by the act of March 3d, 1871, is not liable to be summoned as a garnishee by a foreign creditor of the insurance company.

Rollo, assignee, v. Andes Ins. Co., 509

3. A public officer of the State cannot be made liable by attachment at the suit of an individual, for funds in his hands clothed with a trust under the authority of a public law.

Idem, 509

4. See *Insurance Companies*, No. 2, and *Idem*, 509

AUTREFOIS ACQUIT.

1. A plea of *autrefois acquit*, if it is good in substance, though informal, will be sustained though demurred to.

Day's case, 915

2. In the first case the defendant is charged as the "keeper of a house of entertainment," in the second as "keeper of an ordinary." The offence charged in both being the same not only in kind but in fact, the acquittal in the first case is a bar to the second.

Idem, 915

BONDS.

1. Bonds taken at sales made under the act of May 28, 1870, sess. acts 1869-70, p. 162, to prevent the sacrifice of personal property at forced sales, are in the nature of forthcoming bonds; and the creditor is not bound to receive them as so much paid on his debt.

Garland v. Brown's adm'r, 173

2. T executes his bond to S, by which on demand he promises to pay to S, in gold or silver, or the equivalent thereof, \$2,400. This is a promise to pay gold or silver coin, or the equivalent thereof; and debt may be maintained upon it.

Turpin v. Sledd's ex'or, 238

3. Upon a sale of a house and lot upon credits extending through several years, separate bonds are taken for the interest. They will bear interest from the time they fell due.

Grame v. Cullen & als., 266

Hunter v. Johnston & als., 266

4. For guardian's bonds, see *Guardian and Ward*, No. 4, and *Sayers v. Cassell & als.*, 525

5. M held the bond of G for \$700, executed before the war. In September 1862, G proposed to pay M in Confederate money, which she refused to receive, saying she would receive the interest, but not the principal money. His brother C said he wanted money, and G said if she would let C have the money and give up his bond, he would go C's security. M then let C have \$100 of Confederate money, and C and G executed their bond to M for \$800, and she gave up G's bond. Nothing was said about the bond being for Confederate money, and G paid to C \$700 in that money. This was not a novation of the debt, but it retained its original character; and as

to \$700 it was to be paid in full, and as to \$100 it was to be scaled.

Barnetts v. Miller's adm'r, 551

6. A paper perfect as a bond, except that there is a blank for the name of the obligee, is signed by P and M, and put into the hands of M for the purpose of borrowing money upon it. It is expected that F will lend the money, but if he does not it may be gotten from some other person. M obtains the money from H, and fills the blank in the paper with the name of H, and delivers it to him. This is done in the absence of P, and without his knowledge. It is not the bond of P.

Preston v. Hull, 600

7. See *Equitable Defences*, No. 10, and *Harris v. Harris' ex'or*, 737

BUILDING FUND ASSOCIATIONS.

1. When the shares of a building fund association are redeemed, it is not a security for the sum advanced for their redemption, but it is an absolute sale to the association, whereby the association acquires an absolute right of property in the shares redeemed, and they are sunk and extinguished.

Winchester Building Association v. Gilbert & als., 787

2. The sum advanced for the redemption of the shares is no part of the debt of the shareholder whose shares are redeemed, to the association. The only debt due from him which is a lien under his deed of trust is the monthly dues and interest upon the money advanced, to be paid monthly and continuing until the unredeemed shareholders have received the amount the articles of the association provide for. *Idem*, 787

3. H, whose shares were redeemed, gives another deed to secure a debt to G, upon the property conveyed to secure the association, and he ceases to pay his dues and interest, and his property is sold by the trustees of the association. H and G may elect to have the proceeds of the sale invested, and the unpaid monthly dues and interests paid out of the interest and as much of the principal as may be necessary, or to have the present value of these monthly dues and interest ascertained and paid out of the proceeds of the sale, to the association.

Idem, 787

CAPIAS PRO FINE.

1. For the distinctions between a *capias pro fine* and a *ca. sa.* see the opinion of *Christian, J.*, in *Wilkerson, sheriff for &c. v. Allan*, 10

2. How a person in custody under a *capias pro fine* may obtain his discharge. See Code of 1860, ch. 209, §§ 19-20. *Idem*, 10

CIRCUIT COURTS.

1. A Circuit court has no authority to make a decree or render a judgment, in a cause in vacation, except such decree and orders as are authorized by statute; and the consent of the parties cannot give the jurisdiction.

Tyson's ex'ors v. Glaize & als., 799

CO-DEFENDANTS.

1. There cannot be a decree between co-defendants, in a case where *there is no decree in favor of the plaintiff.

Ould & Carrington v. Myers & als., 383

Myers v. Ould & Carrington & als., 383

COMMISSIONS.

1. When commissions not allowed an administrator. See *Executors and Administrators*, No. 8, and

Strother & als. v. Hull & als., 652

2. What commissions will be allowed an administrator. See *Executors & Administrators*, No. 16, and

Boyd's sureties v. Oglesby & als., 674

CONFEDERATE CONTRACTS.

1. R made his will on the 22d of April 1861, and died in 1862. By his will he directs his executor to sell to his sister a tract of land at \$15,000, if she is willing to take it at that price. S agrees to take the land; and in January 1863, executes her bond for the amount. It is not a contract made with reference to Confederate currency as the standard of value, or to be paid in that currency; there having been no such currency when the will was made.

Gregory & al. v. Winston's adm'r & als., 102

2. M sues the adm'r of W upon a bond dated July 18th, 1863, and payable with interest two years after date "in current funds." The bond states on its face it was given for part of the price of land. Parol evidence is admissible to show that the parties had reference to Confederate currency.

Sexton v. Windell's adm'r, 534

3. The court instructs the jury "that if they believe from the evidence, the parties contemplated Confederate money as the funds to be paid, the note falling due since the close of the war, when Confederate money was not current, and had no appreciable value, they should find the scaled value of the money at the time of the contract." It was error to stop with this, but he should have added that in fixing the amount of the plaintiff's recovery they were authorized to take into their consideration the fair value of the land. *Idem*, 534

4. When ante-war debt not converted into a Confederate contract by taking another bond for it.

See *Bonds*, No. 5, and *Barnetts v.*

Miller's adm'r, 551

5. On the 19th of December 1862, L and S made an agreement in writing, which recited that L had that day purchased of B two tracts of land, one of 100 and the other of 50 acres, adjoining, for the price of \$1,708 25; and L agreed to let S have the use and possession of the land for five years from date, on condition that S would pay to L, punctually at the end of each year, the interest on

said sum; and if at the end of five years S had paid the interest, and would then pay the whole of said principal sum, L would make such a deed in fee simple to S for the land as B should make to L. And S agreed to take the land on these terms. B had purchased the larger parcel from S for a debt S owed him, and had made a similar agreement with him, with which S had failed to comply; and it was at the instance of S that L had purchased the land, he paying B in Confederate money, though the debt due from S to B was due before the war. This is not a Confederate contract; but S must pay to L the \$1,708.25, in good money.

Shifflett v. Long's adm'r, 718

6. In October 1862, B sold T land for \$2,800, about what he had given for it in 1854; cash \$1,000, and the balance in one, two and three years. The article of agreement says nothing of the kind of money to be paid, but the bonds, which were written by T and sent to B, are made payable "in bankable currency." B expecting to use the \$1,000 in another purchase, at his instance, T gives him his bond for it payable on demand, and holds the money ready to pay it at any time; but no demand is made until after the war; and in 1865 and 1866, T makes two payments to B, each of \$300. T says his understanding of the contract was that he was to pay in Confederate money. B says his understanding was it was to be paid in good money.

Held:

981 *1. There is no evidence to show that this was a contract according to the true understanding and agreement of the parties, to be performed in Confederate money, or with reference to Confederate money as the standard of value; and as the price was not more than the land was worth in good money, it was not a Confederate contract.

Tams v. Brannaman, 809

2. If it is a Confederate contract, the value of the land at the time of the contract is the most just measure of recovery.

Idem, 809

3. The \$1,000 having been retained by T at the instance of B, it is to be considered a borrowing by T from B of \$1,000 of Confederate currency and to be scaled.

Idem, 806

CONFISCATION.

1. In 1863, proceedings were instituted in the District Court of the United States, at Alexandria, under an act of Congress to confiscate the real estate of M. Before the condemnation M appeared by counsel and filed his answer; which, afterwards, on the motion of the attorney for the United States, were struck out; and the court not allowing M to appear in the cause, decreed that the property should be sold at auction by the marshal. This was done, and the property was conveyed by the marshal to the purchaser. Upon appeal by M to the Supreme court of the United States, the decree was reversed; and when the case came back to

the District court, it was dismissed. In ejectment by M against the purchaser, to recover the property, Held:

The decree having been made in the absence of M, was a nullity, and the deed of the marshal passed no title to the purchaser.

Underwood v. McVeigh, 409

CONSTITUTIONAL LAW.

1. The act of May 28, 1870, sess. acts 1869-70, p. 162, to prevent the sacrifice of personal property at forced sales, is not unconstitutional, as impairing the obligation of the contract, or as being in violation of § 4, article 11, of the State constitution, prohibiting the enactment of a stay law.

Garland v. Brown's adm'r, 173

2. The 5th section of ch. 171, sess. acts 1869-70, p. 227, in relation to the transfer by the Court of Appeals to the Circuit courts, of causes lately pending in the District courts of Appeal, to be there heard as by an appellate court, is constitutional.

Cowan v. Fulton, J., 579

3. The act of March 5th, 1870, commonly called the enabling act, is a valid act, except the proviso which authorizes the Court of Appeals to review the decisions of the Court of Appeals organized under the reconstruction acts; and the District courts of appeal, sitting in December, 1869, had jurisdiction to hear and decide the causes then pending therein.

Teel & als. v. Yancey & als., 691

4. § 101, ch. 193, sess. acts of 1870, 71, p. 99, which prohibits the sale of goods by sample, &c., by any person not a resident merchant, mechanic or manufacturer, is not unconstitutional as violating the constitution of the United States.

See *Sales by Sample*, No. 1, 2, and *Speer's case*, 935

CONSTRUCTION OF STATUTES.

1. A proviso to one section of an act cannot be applied to another section of the same act, unless it manifestly appears, by reference to the whole act, that it was the intention that it should limit the operation of other sections than that to which it is appended.

Callaway v. Harding, 542

CONTRACTS.

1. What is not a Confederate contract.

See *Confederate Contracts*, No. 1, and *Gregory & al. v. Winston's adm'r*, 102

2. To constitute a new contract the first must be rescinded and set aside by the parties to it, and the second adopted as a substitute for it, with the intention to be governed thereafter by its terms.

Grame v. Adams, 225

982 *3. A contract to build houses provides that the price shall be payable in instalments bearing interest. That contract cannot be discharged by the tender of cash at the time when the buildings are comple-

ted. A debtor has no right to anticipate the payment of a debt payable at a future day, and bearing interest, without the consent of the creditor. *Idem*, 225

4. M employs S to build a house, and he is to pay for it in ten notes of \$5,000 each, payable at different periods, to be delivered by M to S when R shall say he is entitled to them; one note to be first delivered, then two at the same time, when the work has advanced to a certain stage, &c. If S should fail to carry on the work to completion, any notes not delivered should be forfeited to M. The first note is properly issued. Before S is entitled to receive the next two, M, at the request of S, delivers him one of them; S having done more work than the amount of that note; and S, soon after receiving the last note abandons the work. **Held:**

1. Though the note was given by M to S for his accommodation, before he was bound to deliver it, yet it is not an accommodation note in the legal sense, but is upon valuable consideration; and M has no equity on this ground, either against S or the holder of the note for value, to have the note delivered up to him.

Ould & Carrington v. Myers & als., 383

Myers v. Ould & Carrington & als., 383

2. M not having alleged in his bill damage by the failure of S to complete the work by the time prescribed, he cannot have relief on that ground. *Idem*, 383

3. The parties in this case having provided in the contract the forfeiture of S for the failure to complete the work, *quare*, if M is entitled to any other compensation.

Idem, 383

5. When taking another bond for an ante-war debt is not a novation of the debt.

See *Bonds*, No. 5, and

Barnetts v. Miller's adm'r, 551

6. What performance of a contract for sale of articles to be delivered, valid, and will entitle vendor to recover.

See *Actions*, No. 1, and

McCormick & Co. v. Hamilton, Wood & Co., 561

7. The fairness of a contract, like all its other qualities, must be judged of as at the time it was entered into.

Boyd's sureties v. Oglesby & als., 674

8. On the 19th of December 1862 L and S made an agreement in writing which recited that L had that day purchased of B two tracts of land, one of one hundred and the other of fifty acres, adjoining, for the price of \$1,708.25; and L agreed to let S have the use and possession of the land for five years from date, on condition that S would pay to L punctually at the end of each year, the interest on said sum; and if at the end of five years S had paid the interest and would then pay the whole of said principal sum, L would make such a deed in fee simple for the land as B should make to L. And S agreed to take the land on these terms. B had purchased the larger parcel from S for a debt S owed him, and had made a similar agreement

with him, with which S had failed to comply; and it was at the instance of S that L had purchased the land, he paying B in Confederate money, though the debt due from S to B was due before the war. This is not a Confederate contract; but S must pay L the \$1,708.25 in good money.

Shiflett v. Long's adm'r, 718

9. On the effect of fraud upon the question of enforcing a contract,

See *Equitable Defences*, *passim*, and

Harris v. Harris' ex'or, 737

COUNTY COURTS.

1. The provision of § 16, ch. 132, Code of 1860, prescribing what shall be done by a commissioner in settling the accounts of fiduciaries, apply to the report, general or special, mentioned in § 34, of the same chapter; and therefore under this § 34, a County 983 court is not authorized to make an *order for investing or loaning out the money or funds therein referred to, unless the commissioner has previously conformed to the provisions of § 16, by posting the notice as therein required.

Whitehead's adm'r v. Whitehead & als., 376

2. If in such a case, the order is made by the County court, without the report required by the statute, the County court has jurisdiction, on the motion of the parties whose money is invested, upon notice to the other party, to annul the order.

Idem, 376

COURTS.

1. See *County Courts*, and *Whitehead's adm'r v. Whitehead & als.*, 376

2. See *Circuit Courts*, and *Tyson's ex'ors v. Glaize & als.*, 799

3. After suit in equity to subject debtor's land to satisfy a judgment, making debtor and alienees defendants, the debtor goes into bankruptcy. This does not oust the jurisdiction of the State court as to the debtor and alienees.

Lively, by &c. v. Campbell & al., 893

CREDITOR AND DEBTOR.

1. A debtor has no right to anticipate the payment of a debt payable at a future day and bearing interest, without the consent of the creditor.

Grame v. Adams, 225

2. When creditors will be bound to receive payment in Confederate money received on sale of land under a decree.

See *Judicial Sales*, No. 11, and

Crawford & als. v. Weller & als., 835

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. A jury of inquest find that the deceased was killed by J, and the justice who acted as coroner, issues process, upon which J is committed to prison. The grand jury in the

county court find an indictment against J for murder, and he is brought into court and arraigned, and on his arraignment elects to be tried in the Circuit court. In the Circuit court J moves to quash the indictment because he had not been sent before a justice for examination; and that motion being overruled, and the cause continued to the next term, on his motion, he, at the next term, files a plea in abatement, on the ground that he had not had the benefit of an examination before any justice of the peace or other legally authorized officer, for commitment. To this plea the attorney for the commonwealth demurs, and the demurrer is sustained. **Held:**

1. J was not entitled to be sent before a justice for examination.

Jackson's case, 919

2. *Quare:* If J was entitled to such examination, he had not waived it, by electing to be tried in the Circuit court, and not making his motion until he was at the bar of that court. *Idem,* 919

2. The testimony of witnesses examined before a jury of inquest, and committed to writing, can not be used to impeach their evidence given on the trial, unless their attention has been called to it and to any discrepancies between that and their evidence. *Idem,* 919

3. Upon the question of the competency of veniremen as jurors great weight is justly due to the opinion of the court before whom the veniremen are questioned and examined in regard to their competency as jurors. *Idem,* 919

4. H was indicted for the larceny of three beehives of the value of \$5; three swarms of bees of the value of \$3; and forty pounds of honey of the value of \$5, of the goods and chattels of C. The jury, by their verdict, found him guilty as charged in the indictment, and ascertained the term of his imprisonment in the county jail at three months, and the judgment of the court was for three months imprisonment. H then moved in arrest of judgment, because, 1st.

The jury was not authorized to fix 984 *the term of his imprisonment; and

2d, two of the three subjects of larceny charged in the indictment are not proper subjects of larceny.—**Held:**

1. Though the jury had no authority to fix the imprisonment, it was mere surplusage, and the verdict of guilty was good; and the imprisonment was the act of the court. *Haney's case,* 941

2. It may be intended after verdict, that the bees were reclaimed, and the honey the property of C. *Idem,* 941

3. If any one of the three subjects mentioned in the indictment might be the subject of larceny, it is sufficient, and the verdict will not be arrested. *Idem,* 941

5. A trial and conviction of a party by a justice of the peace or the County court, for an assault and battery, will not prevent an indictment of the party for a felony, in the

perpetration of which the assault and battery was committed. *Murphy's case,* 960

6. On a trial for an assault with intent to kill, the witness upon whom the assault was alleged to have been made, was asked if he did not tell his wife that the prisoner acted only in his own defence. The answer may tend to criminate himself, and the testimony is inadmissible. 2d: It required him to state a communication supposed to be made by him to his wife; which, if made, was a confidential communication, and which he was not bound to disclose. *Idem,* 960

7. A question is put to a witness which he answers, and which relates to a collateral matter not connected with the subject of the prosecution. His answer to that question is conclusive, and can not be contradicted. *Idem,* 960

8. In this case, after the witness was asked the question, whether he did not state to his wife that the defendant had acted only in self defence, and he had answered the question, denying that he had done so, the wife of the witness was introduced to prove the statement was made to her. She is not a competent witness to prove it, though at the time it was alleged to have been made, they were living apart from each other; but not divorced. *Idem,* 960

9. A man is taken to intend that which he does, or which is the nature and necessary consequence of his own act. Therefore, if the prisoner wounded the prosecutor by the deliberate use of an instrument likely to produce death under the circumstances, the presumption of law is that he intended the consequences that resulted from said use of said deadly instrument. *Idem,* 960

10. Malice may be inferred from the use of a deadly weapon, in the absence of proof to the contrary. *Idem,* 960

11. Where there are two counts in an indictment for a felony, and there is a general finding by the jury of "guilty," if either count is good it is sufficient. *Idem,* 960

DEBT.

1. T executes his bond to S, by which on demand he promises to pay to S, in gold or silver, or the equivalent thereof, \$2,400. This is a promise to pay \$2,400 in gold or silver coin, or the equivalent thereof; and debt may be maintained upon it.

Turpin v. Sledd's ex'or, 238

DEMURRER TO EVIDENCE.

1. The general rule is, that a party has a right to demur to the evidence; and an action for negligence is no exception to the rule. The exceptions to the general rule are, when the case is clearly against him; or where the court doubts what facts should reasonably be inferred from the evidence demurred to.

Trout v. Va. & Ten. R. R. Co., 619

2. The principles governing demurrers to evidence, as stated by *Green, J.*, in *Whittington v. Christian*, 2 Rand. 353, and the opinion of *Stanard, J.*, in *Ware v. Stevenson*, 10 Leigh 155, approved and acted on. *Idem,* 619

985

*DEVISES.

See *Wills*.

EASEMENTS.

1. One of two adjoining lots owned by the same parties, is sold at auction under the decree of the court. At the time of the sale nothing is said of an easement running from the unsold lot through the one sold, for carrying the water from the former to a culvert in the street; and such easement was not to be seen on the lot sold and was not known to the purchaser. The purchaser is entitled to have his lot free of the easements.

Scott & al. v. Bestel & als., 1

2. Both lots having been owned by the same person, though he had constructed the drain or culvert more than fifteen years before the sale, for the benefit of both lots, there can be no right by prescription to the use of the easement by the owners of the unsold lot, as there could be no adversary possession or use of it, whilst both lots were owned by the same person. *Idem,* 1

3. So long as the tenements were owned and occupied by one and the same person, no easement was created or began to be created in favor of the one, and operating as a service or burden on the other. *Idem,* 1

4. S and others were the owners of two wharves and a small dock between them, fronting on Elizabeth river at Norfolk; which dock was used in connection with both wharves. In 1851, they sold to W the eastern wharf with its appurtenances, with general warranty, making the logging on the west line of the wharf the boundary; and in their deed they covenant to allow W to have the common use, with themselves or their tenants, of the said dock, for the purpose of landing goods on his wharf, from vessels or boats which may enter therein, as long as the said dock and adjoining premises are owned by them, or until they may choose to fill up the dock. W, in consideration thereof, undertaking to clean out from time to time, the said dock at his own expense. HELD:

1. If there had been no special covenant for the use of the dock by W, the right to use it in connection with and for the benefit of the wharf, as it had been openly used by the grantors, would have passed to the grantee by implication of law, as an easement, or as a part of the property granted.

Hardy v. McCullough & als., 251

2. But in the face of the express contract for the use of the dock, no implication or presumption of law in favour of a different or more extended use of the dock can arise.

Idem, 251

EQUITABLE DEFENCES.

In debt on bonds by the executor of H against G, G tenders a special plea: That at the time of the execution of said bonds he owed nothing to H, and the consideration of said bonds was as follows: In 1866 four suits at law were pending against him in the

county, naming the plaintiffs, to recover damages for trespass during the civil war in impressing horses &c., by him, under orders of the Confederate Government, he being an officer in the army under that government. He did not regard these claims as debts or just liabilities on his part, but owing to the unfavourable and unjust constitution of courts and juries at that time, he feared they might be enforced against his property. He was informed by his counsel that the result was uncertain, that judgment had been given in similar cases in Berkeley county. That he conferred with his father, who warmly advised him to secure his property against these claims. The plan adopted was for him to execute to his father the bonds sued on, antedated, with the distinct understanding that they were only to be used and treated as obligations to claim priority over the plaintiffs in case of necessity, and if unnecessary, were to be handed back to the defendant; and said bonds were executed under this understanding, and no other. Wherefore H and his executor were bound to redeliver said bonds to defendant, because said suit had been dismissed in 1867, before the death of H, 986 and the bonds were therefore null and void, and to be surrendered. Therefore he has sustained damages, &c. On the motion of the plaintiff the plea was rejected. HELD:

1. The plea was properly rejected, because no issue, either by general or special replication, could be made upon it.

Harris v. Harris' ex'or, 737

2. It was not a good plea under the statute, for failure of consideration. The statute only applies to cases where the consideration was originally valuable, and not where there was no consideration.

Idem, 737

3. Such a defence can not be made to a specialty either at common law or under the statute. The seal imports a consideration, and a party can not avoid it on the ground of a want of consideration.

Idem, 737

4. The plea is not good on the ground that the facts stated would entitle defendant to relief in equity; because his ground of relief is his own fraud.

Idem, 737

5. The averment of his fears that the courts and juries would not do him justice, could not avail him, as the court must presume that no injustice would be perpetrated in regular legal proceedings had in the forum where such proceedings were pending.

Idem, 737

6. It is not a good plea at common law; because it is emphatically of the class of cases in which the maxim, *nemo allegans suam turpitudinem audiendus est*, applies with full force.

Idem, 737

7. The case does not come within the maxim, *in pari delicto potior est conditio defendentis*.

Idem, 737

8. There is a marked distinction between contracts which are void *ab initio*, and

contracts which are void as to third persons, but are valid between the parties.

Idem, 737

9. Where the contract is void *ab initio*, when it appears either by the allegations of the plaintiff, or by a proper plea of the defendant, that the contract is so void, the court will not lend its aid either to enforce it on the one hand, or give relief on the other.

Idem, 737

10. Though the bonds are void as to creditors, they are valid between the parties, and therefore they will be enforced by the courts.

Idem, 737

11. In order to apply the rule *potior est conditio defendentis*, it is necessary to consider, not who is plaintiff or who is defendant, but by whom the fraud is alleged or sought to be made a ground of defence or recovery.

Idem, 737

12. Upon the question whether a fraudulent contract shall or shall not be enforced, there is no distinction between an executed and an executory contract.

Idem, 737

13. A party claiming damages for the acts of another, must be regarded in law as much the creditor of that other as one holding his bonds or other promises to pay.

Idem, 737

EQUITABLE JURISDICTION AND RELIEF.

1. In a bill in equity to recover slaves, there is a call for discovery of facts, which the evidence shows the plaintiffs knew at the time, or had the means of knowing. If this call for a discovery be the only ground of equity jurisdiction, the bill should be dismissed with costs.

Hale & al. v. Clarkson & als., 42

2. In a suit to recover slaves against an adverse claimant, the fact that the title to the slaves depends upon the construction of a provision in a will, is no ground of equitable jurisdiction.

Idem, 42

3. The fact that there are more claimants than one of slaves in the adverse possession of others, and that distributions among the claimants will be necessary if the slaves are recovered, is no ground of equitable jurisdiction.

Idem, 42

4. In a creditor's suit by Y against F., in his own right and as administrator
987 *of A, Y claims to be a creditor by judgment against F as adm'r of A; and F, in his answer, admits he owes his intestate's estate for land purchased in his lifetime \$1,100. On the filing of his answer the court may make a decree, that F shall pay said \$1,100 into court or to a receiver; and this, though F is one of the next of kin of A.

Farmer v. Yales & wife, 145

5. For the rules governing in such cases, see the opinion of *Moncure, P.*

Idem, 145

6. When relief will be given in equity

against an award. See *Arbitration & Award*, No. 1, 2, and

Moore v. Luckess' next of kin, 160

7. By mistake in the printing of a record in the court of appeals, a decree is made establishing a provision of a will different from the true will, and the legatee affected by it is not a party in the cause. A court of equity has jurisdiction on the ground of accident, to correct the error of the court of appeals, establish the true will, and enforce the payment of the legacy.

Byrne & wife v. Edmonds, 200

8. The decree of the court of appeals was in 1857, and the bill was filed in 1866. Under the circumstances of the case and the condition of the country, the legatee is not barred of relief by the delay in bringing the suit.

Idem, 200

9. W, ex'or of M, files a bill against G, in which he says that his testator in his lifetime, owned a number of bonds or notes amounting to about \$4,000, which were drawn payable to him, and were in his possession a few days before his death. That after his death they were in the possession or under the control of said G, and were not assigned to him; and that G gave no consideration for them. The averments do not make a case against G, and do not entitle the plaintiff to any discovery or relief against him.

Morrison's ex'ors v. Grubb, 342

10. The bill further alleges that the bonds, &c., were the property of M at his death, and became assets of said estate, which should come to the plaintiff's hands; that he is entitled to know what bonds of M said G holds, and to recover them for M's estate; and he calls for a full answer. G answers, and denies that he had in his possession or under his control, at the time of M's death, or at any time since, any bonds which were at his death his property, or to which plaintiff as his ex'or or otherwise, had any right, title or interest. These averments of the bill are facts, and necessary to sustain it, and being positively denied by the answer, must be proved.

Idem, 342

11. The defendant having denied the allegations of the bill, proceeds to state that the bonds were the property of M, and were given to him by M, and when and how it was done. The whole statement must be taken together as his answer.

Idem, 342

12. A plaintiff can not have relief on a ground not stated in his bill.

Ould & Carrington v. Myers & als., 383

Myers v. Ould & Carrington & als., 383

13. See *Contracts*, No. 4 and

Idem, 383

14. In an action of debt upon two bonds executed on the 29th of December, 1862, and payable twelve months after date, the defendants appeared and defended the action; and the jury scaled the debt, reducing it from \$5,193 to \$3,000, with interest from the day the bonds fell due, and the judgment was accordingly. About a year after the judg-

ment was rendered, the defendants in the action filed their bill for an injunction to the judgment, on the ground that the debt was scaled as of its date, instead of the day of its payment. **Held:**

The defendants having defended themselves at law, can not come into equity for relief.

Penn & als. v. Reynolds, 518

ESTOPPELS.

1. All estoppels whether estoppels at common law, or equitable estoppels, are founded upon the great principles of morality and public policy. Their purpose is to prevent that which deals in duplicity and inconsistency, *and to establish some evidence as so conclusive a test of truth, that it shall not be gainsaid. But estoppels whether legal or equitable, are not to be extended by construction.

Bower & als. v. McCormick & als., 310

2. A mistake in the recitals of a deed, referring to a previous deed of marriage settlement between the grantors, may in equity, be shown by the grantees, by introducing in evidence the deed referred to in the recitals.

Idem, 310

3. What is sufficient proof that the deed offered in evidence is the deed referred to in the recitals, see opinion of the court.

Idem, 310

4. Where it can be collected from the deed, that the parties to it have agreed upon a certain admitted state of facts, as the basis on which they contract, the statement of these facts, though but in the way of recital, shall estop the parties to aver the contrary.

Idem, 310

5. When a recital in a deed is intended to be a statement which all the parties to a deed have mutually admitted to be true, it is an estoppel upon all. But where it is intended to be the statement of one party only, the estoppel is confined to that party; and the intention is to be gathered from the deed.

Idem, 310

6. When the recitals in a deed refer to what the grantors have done, or intend to do, among themselves, and in which the grantees have no part nor interest, and the wording of the recitals indicate that the scrivener did not have the recited deed before him; and there is no evidence that the grantees knew anything of the recited deed except as recited; these recitals will be intended to be the statements of the grantors only.

Idem, 310

7. A mere recital in a deed does not conclude all the parties; there must be a direct affirmation, so intended by all the parties, in order to bind all. And this intention may be gathered from the whole instrument.

Idem, 310

EVIDENCE.

1. If evidence offered to be introduced on a trial of a cause is relevant to the issue, it should be admitted. It is for the jury to determine what effect it shall have.

Underwood v. McVeigh, 409

2. Husband whose wife is a distributee of a deceased legatee of testator, is not a competent witness to increase the liabilities of the sureties of the administrator.

Murphy's adm'r & als. v. Carter & als., 477

3. An administrator whose wife is such a distributee, is not equally interested on both sides, so as to render him a competent witness for this purpose.

Idem, 477

4. When parol evidence is admissible in suit upon a bond to prove it was a Confederate contract.

See *Confederate Contracts*, No. 2, and *Sexton v. Windell's adm'r,* 534

5. Upon a sale of hogs by weight each to be not less than a certain weight, the purchaser refuses to receive them, and they are weighed in parcels by third persons, at the request of the vendor. An experienced drover of hogs, accustomed to butchering and weighing them, who was present when the hogs were weighed, and saw them and attended to the weighing them, may give the jury his opinion as to the weight of each hog.

McCormick & Co. v. Hamilton, Wood & Co., 561

6. As the hogs had not been weighed separately, the opinion of the witness is not substitutional, but is original evidence; and the best which under the state of facts is attainable.

Idem, 561

7. A certificate of the clerk of the Circuit court of Monroe county, West Virginia, of the records of which court the records of the former county court of Monroe form a part, of the copy of a judgment rendered in said county court, is proper evidence of the judgment.

Gatewood's adm'r v. Goode, 880

8. On a trial for an assault with intent to kill, the witness upon whom *the assault was alleged to have been made, was asked if he did not tell his wife that the prisoner acted only in self defence. The answer to the question may tend to criminate himself, and the testimony is inadmissible; and, 2d, it required him to state a communication supposed to be made to his wife; which, if made, was a confidential communication, and which he was not bound to disclose.

Murphy's case, 960

EXECUTIONS.

1. The act of May 28, 1870, sess. acts 1869-70, p. 162, to prevent the sacrifice of personal property at forced sales, which requires the officer selling the property for a debt contracted before the 10th of April, 1865, when required by the debtor, to sell upon a credit of twelve months, is not unconstitutional as impairing the obligation of the contract, or as being in violation of § 4, article 11, of the State constitution, prohibiting the enactment of a stay law.

Garland v. Brown's adm'r, 173

2. The bonds taken at sales under this act are in the nature of forthcoming bonds; and the creditor is not bound to receive them as so much paid on his debt.

Idem, 173

EXECUTORS AND ADMINISTRATORS.

1. Testator made his will in 1859, and died in 1863. By his will he gives to A and her children \$20,000, and directs his executor to invest it in bonds of the State of Virginia. In 1864 the executor filed his bill to have the direction of the court in the administration of the estate; and under an order of the court authorizing him to invest the moneys in his hands in Confederate or State bonds, he invested in Confederate bonds. These and nearly the whole of his testator's personal estate became worthless by the results of the late war; and it turns out that he owned a considerable amount of debts. **Held:**

1. The executor is not responsible, under the circumstances, for the failure to invest the \$20,000 given to A and her children in bonds of the State of Virginia.

Crouch & als. v. Davis' ex'or, 62

2. As it did not appear that the creditors were willing to receive the Confederate money, the executor is not responsible for the loss sustained by the investment.

Idem, 62

3. It appearing that a large number of debts were due to the deceased, many of them by persons living out of the State, others reported bad, and others good or doubtful, if the executor has not brought suit to recover those reported good or doubtful, from persons living in the State, the burthen is on him to show that they could not be recovered.

Idem, 62

2. A testator owning lands in Arkansas, and there being no agent of his there, his executor in Virginia may employ and pay an agent to attend to it.

Idem, 62

3. In the condition of the country from 1867 to 1870, executors were well justified in not investing a legacy in State bonds, though directed to do so by testator's will made in 1853.

Perry v. Smoot & als., 241

4. Testator dies in 1836. By his will he gives certain specific and general legacies, and then directs that certain land and his personal property shall be sold, which with debts due to him, shall be a fund for the payment of his debts. An administrator c. t. a. qualifies and executes a bond with sureties, the condition of which only binds them for the faithful administration of the personal estate, and that he shall "deliver all the legacies contained and specified in the will. He sells the land, and out of the general fund pays debts; but upon a settlement of his accounts is largely in arrear." **Held:**

1. The sureties are not liable for the due administration of the land.

Murphy's adm'r & als. v. Carter & als., 477

990 *2. Though the condition of the bond does not use the word "pay" but only "deliver," yet this last word will cover the general as well as the specific legacies.

Idem, 477

3. The land and personal property and debts being made one common fund by the testator, it was not maladministration by the administrator to use the proceeds of the land in payment of debts.

Idem, 477

4. The real and personal fund should be applied in payment of debts *pro rata*, according to their respective values.

Idem, 477

5. To ascertain the amount with which each fund is to be charged, accounts should be stated, 1st. Of the combined fund derived from the sale of the real estate and from personalty; 2d. The total amount of legal disbursements made out of both funds; 3d. What amount of the combined fund was derived from real estate and what amount from personal estate; 4th. Then to ascertain by the rule of proportion, what part of the disbursements were made out of the land fund; and by the same ratio what proportion of the balance due from the administrator is chargeable to the land fund and what proportion is to be chargeable to the personal fund.

Idem, 477

5. A husband, whose wife is entitled to a distributive share of a deceased legatee of the testator, is not a competent witness to prove that certain debts paid by the administrator, were paid out of the proceeds of the land, so as to increase the amount for which the sureties are liable.

Idem, 477

6. The administrator whose wife is one of said distributees, is not equally interested on both sides, so as to render him a competent witness for this purpose.

Idem, 477

7. An administrator, c. t. a., lives in the dwelling house of his testator, and a part of the furniture is retained and used by him until it is consumed by fire with the house. Though he had with him the younger children of the testator, for whose board he was paid, the furniture must be considered as having been taken as his own, and he must account for its value.

Strother & als. v. Hull & als., 652

8. In 1851 H. dies, leaving several children, and a considerable estate real and personal. He directs by his will, that on the marriage of his eldest daughter Ann, she shall have possession of the home place if she will keep the younger children with her, and take good care of them; and this she does. He directs his executor to manage his estate until the 1st of January, 1861, when it is all to be divided equally among his children. S. the husband of Ann becomes administrator c. t. a., takes possession of the estate, and does not invest the money, nor does he settle his administration account. **Held:**

1. Ann and her husband were entitled to the home place free of rent, and to be paid a reasonable board for the younger children whilst they lived with them.

Idem, 652

2. The accounts of S as adm'r c. t. a. up to January 1st 1861, are to be settled as guardian's accounts, and the interest compounded; and his sureties are responsible for the amount so found against him up to that time. *Idem*, 652
3. Though S is responsible after the 1st of January 1861, for compound interest upon the shares of such of the children as he continued to act for as guardian *de facto*, his sureties are not so chargeable. *Idem*, 652
4. S not having settled his accounts as administrator, and showing no sufficient reason for his failure to do so, is not to be *allowed commissions, except upon receipts after the 1st of January 1861. 991 *Idem*, 652
9. Prior to January 1st 1861, land left to two of the sons, who were to account for the same in the division, was sold under a decree of the court, by S as commissioner, and he was decreed to hold the proceeds as part of the assets of his testator's estate. His official bond in fact covered only the personal assets. *Held*:
1. The proceeds of the sale of the land were not in his hands as adm'r c. t. a., and should not be brought into his administration account. *Idem*, 652
2. But in no case are the sureties bound for them, as their bond did not cover the real estate. *Idem*, 652
3. S is entitled to his commissions as commissioner on the proceeds of this sale, viz: five *per cent.* on the first \$300 and two *per cent.* on the balance. *Idem*, 652
4. In settling his accounts as to the proceeds of this land, the mode stated in *Humphreys' adm'r & als. v. Carter & als.* is to be pursued. *Idem*, 652
10. The bill by the devisees not claiming damages for injury done to fences and buildings on the land, S cannot be subjected to the payment of such either in his account as administrator, or with the devisee. *Idem*, 652
11. One of the children having died in 1862, the amount found due to her by the administrator, should bear interest from the date of her death. *Idem*, 652
12. The interest of the deceased child is divided, and the share of each of the survivors is credited to them in their accounts with the administrator. The final decree, after giving to each the amount reported by the commissioner, gives each a further decree for his and her share of the estate of the deceased child. This is an error which might have been corrected by motion to the Circuit court, under the statute, Code, ch. 181, § 5, p. 743, and this court would, therefore, dismiss the appeal, or correct and affirm it, with costs, to the appellees, if there was no other error in the decree. *Idem*, 652
13. An administrator is invested by law with full dominion over the assets, and with a full discretion for the liquidation

and settlement of all claims due to or from the estate. He may make settlements and compromises with creditors, and give them confessions of judgment.

Boyd's sureties v. Oglesby & als., 674

14. An administrator of a deceased partner may settle and compromise with the surviving partner, with a view to the interests of the estate he represents. And if he acts fairly, in good faith, and with due regard to the interest of the estate, the distributees will be bound by his acts, and he will be protected. *Idem*, 674

15. The administrator of O, a deceased partner, who had the sole management of the business of the partnership, is employed by G, the surviving partner, to wind up the partnership affairs; and after the input capital is returned, he enters into a contract with G, to allow the latter a certain sum for his share of the net profits; and G relinquishes to the administrator all the remaining assets of the partnership. At the time this contract is made there is a large claim in suit against one of the debtors of the firm, who sets up a payment of \$1,000, as having been made to O; but which he had not entered on the books of the concern; and this contest delays the trial of the case until the debtor who was solvent when the contract was made, becomes insolvent; and then the credit is allowed by the jury, and there is a verdict and judgment for the balance. *Held*:

992 *1. The verdict and judgment is conclusive that the debtor was entitled to the credit. *Idem*, 674

2. It being owing to the conduct of O, the deceased partner, that the administrator and surviving partner were not informed of the true state of the account when the contract between them was made, and also that the delay in the suit had occurred; in estimating that contract the estate of O is to be charged with the \$1,000, and also the amount of the judgment. *Idem*, 674

16. The amount of commissions to be allowed to an administrator or executor is not fixed by law, and though five *per cent.* on receipts is generally allowed, yet this allowance may be increased; and the court of probate is the most competent tribunal to make the allowance; and this court will be disinclined to disturb the allowance, especially after a long acquiescence in it by the distributees of the estate. *Idem*, 674

17. See *Administration No. 2, and Elliott & wife & als. v. George & als.*, 780

18. C, as administrator of B, sells ten shares of bank stock to M, upon which B had borrowed money from the bank, and had given his notes; and M pays the full price of the stock to C, on C's undertaking, as adm'r of B, to pay the notes. C pays one note, but does not pay the other, and the bank retains the amount out of the dividends on the shares. *Held*: Neither the estate of B nor the official sureties of

C, as administrator, are responsible for the failure of C to perform his undertaking.

Childress & als. v. Morris, 862

19. What is a personal decree against administrators. See *Guardian and Ward*, No. 6, & *Lincoln's adm'rs v. Stern & wife*, 816

20. It is error to render a personal decree against administrators upon a claim against their testator, without having first ordered an account of their testator's estate. *Idem*, 816

FELONY.

1. The act of March 30th, 1871, sess. acts 1870-71, p. 332, does not give justices of the peace jurisdiction to try a case of felony; and the conviction and punishment of a party by a justice of the peace for an assault and battery, will not bar a prosecution for wounding with intent to kill, by the same act for which he was punished by the justice.

Murphy's case, 960

2. If the accused has been indicted and convicted in the County court having jurisdiction of such offence generally, the conviction will not be a bar to an indictment for a felony, in the perpetration of which the assault and battery was committed.

Idem, 960

FRAUDS.

1. See *Husband & Wife*, No. 1, 2, 3, 4, 5, 6, 7, and

Gregory & al. v. Winston's adm'r & als., 102

2. For fraudulent sales, see *Judicial Sales*, No. 3, and *Underwood v. McVeigh*, 409

3. On the effect of fraud upon the question of enforcing a contract, there is a marked distinction between contracts which are void *ab initio*, and contracts which are void as to third persons, but are valid between the parties.

Harris v. Harris' adm'r, 737

4. See, on this subject, *Equitable Defences*, *passim* and *Idem*, 737

GUARDIAN & WARD.

1. D qualified as guardian of C, in August 1858, and acted as such until his death in April 1861. His ex'or W acted as guardian of C, until April 1862, and had the account of D settled, showing due from him to C \$4,133.98; for which sum W gave his bond to B, who qualified as guardian of C in April 1862; and afterwards paid B at different times, \$2,551. B ceased to act as guardian of C in December 1863, when S became her guardian. The income of the estate of C in the hands of the guardians was not equal to the expenditures upon her; but her whole income including that in the hands of the ex'ors of her father, during the whole period of the guardianship, was equal to her expenses; and these were only suitable to her estate and condition of life. **Held**:

1. The estate of D is to be charged with the amount found due from him; and cred-

ited for the money paid by his ex'or W, at its scaled value.

Bennett v. Claiborne & als., 366

2. B having received the amount of an ante-war bond, and paid ante-war expenses of C, incurred during the guardianship of D, these payments to the amount of said bonds are not to be scaled. *Idem*, 366

3. The guardians are entitled to have the whole income of C applied to pay their expenditures upon her. *Idem*, 366

2. As to investments of ward's money, by the order of the County court, see *County Courts*, No. 1, 2, and

Whitehead's adm'r v. Whitehead & als., 376

3. The notice to be given by the commissioner in settling accounts of guardians and other fiduciaries, see *Accounts*, No. 4, and *Idem*, 376

4. A guardian of an infant having, when he was appointed, given a bond with sureties, afterwards without a rule upon him or order of court requiring it, comes into court and gives another bond with other sureties. The last bond is valid and relates back to his appointment as guardian; and the sureties in the first bond are discharged; and are not necessary parties to a bill by the ward against the guardian and his sureties for the settlement of his accounts.

Sayers v. Cassell & als., 525

5. The guardian not having been allowed any thing for the board, clothing and schooling of his ward, under the circumstances of this case should not be charged with interest upon the small amount of the money of his ward in his hands. *Idem*, 525

6. Bill by S and J his wife against W and A, adm'rs c. t. a. of L, stating L was guardian of J, and asking for an account of L's guardianship. W, in his answer, says he acted as guardian of J, and settled his account as such in 1860, and paid over the balance found due to S. Asks if L is to be held to have been guardian, he may have the benefit of the settlement. There is no record evidence of L's qualification as guardian of J, and he never acted as such. He died in 1863. Comm'r's report shows the money certainly received paid by W to S; but there were two claims due J which W says were not collected by L, and there was a third claim upon the estate of M who died in July 1863. These three claims amounted to \$976.60. There was no proof of the condition of the first two debtors at any time; and whilst the comm'r reports the claims and their amounts he does not say L is liable for them. The court decrees that S and wife do recover of the adm'rs of L, viz: W and A, the sum of \$976.60, as of the date of April 1st, 1868, with interest on the principal; and that they pay the plaintiffs costs. **Held**:

1. The court erred in treating L as guardian of J, without proof of his legal appointment and due qualification as such.

Lincoln's adm'rs v. Stern & wife, 816

2. In holding the estate of L, responsible for said outstanding claims reported to be due to L, under the circumstances of this

case, without having first directed an enquiry into the present and past condition thereof; whether the same were collected or collectible by L; and if they or any of them have been lost, whether the loss occurred by the default or neglect of L.

Idem, 816

3. The decree is a personal decree against W and A, the administrators of L; and it was error to enter a personal decree against them without having first ordered an account of their testator's estate.

Idem, 816

HEIRS.

How proceeds of sale of infant's land will pass. See *Infants*, No. 1, and

Vaughan v. Jones & als., 444

HUSBAND AND WIFE.

1. A woman about to be married, may dispose of her fortune as she pleases; provided it is done with proper motives, and without an intention to deceive her husband.

Gregory & al. v. Winston's adm'r & als., 102

2. The equity which arises in cases of this nature depends upon the peculiar circumstances of each case, as bearing upon the question, whether the facts proved do or do not amount to sufficient evidence of fraud practiced on the husband.

Idem, 102

3. The ground upon which such transactions are invalidated as against the husband, is the fraud of the wife.

Idem, 102

4. Although a settlement by the intended wife is voluntary, and not disclosed to the intended husband, it is not, therefore, necessarily fraudulent. The court will consider the nature of the provision, the situation of the husband in point of pecuniary means, and any other facts which tend to show that no fraud was intended.

Idem, 102

5. It is clear that an obligation founded on a valuable consideration, executed *bona fide* pending a treaty of marriage, cannot be set aside merely because it is concealed from the husband.

Idem, 102

6. The equity in favor of the husband does not arise unless it can be clearly made out, that at the time of the conveyance of her property by the wife there was an engagement of marriage between them.

Idem, 102

7. In this case a bond is given for the purchase money of land, and the deed of trust to secure it recites the bond; and that, as well as the conveyance to her, are immediately put upon record. This does not indicate any expectation or desire to keep the transaction concealed from the intended husband.

Idem, 102

8. A bill by husband and wife, in right of the wife, is the bill of the husband, and the wife is joined for conformity. The coverture of the wife is not, therefore, an excuse for delay in bringing a suit.

Harrison & als. v. Gibson & als., 212

9. When a husband not a competent witness to increase liabilities of sureties of administrator. See *Executors and Administrators*, No. 5, and *Murphy's adm'r & als. v. Carter & als.*, 477

10. Husband examined as a witness on a criminal trial, is not bound to state what he had communicated to his wife in relation to the action of the accused.

Murphy's case, 960

11. In such a case the wife is not a competent witness to prove what her husband, who was the person assaulted, stated to her in relation to the conduct of the accused, though at the time of the statement the husband and wife did not live together; but had not been divorced.

Idem, 960

INDICTMENTS.

1. In an indictment for stealing bank notes, it is sufficient to state that the notes were for a certain sum of money, without stating their value, under the act, Code of 1860, ch. 194, §§ 15, 16.

Adams' case, 949

2. In such a case, since the statute, the value of the bank notes is not traversable.

Idem, 949

3. It seems that in an indictment for an attempt to commit a rape, the word *ravish*, as descriptive of the offence attempted, is not necessary, but the words attempting "feloniously carnally to know" are sufficient.

Christian's case, 954

*INFANTS.

1. The real estate of R a female infant is sold under decrees of court, and turned over to V, her guardian, upon his giving bond and security for the faithful accounting therefor. In 1862 R married B, to whom V paid over the estate, upon his giving security to indemnify V; and in 1864, R died, still under the age of twenty-one years, leaving a child which survived her but a few hours, and her husband who survived the child. **Held**: The proceeds of the real estate of R descended as real estate to her child, subject to a life estate in her husband; and upon the death of the child it passed as real estate to the heirs of the child on the part of the mother.

Vaughan v. Jones & als., 444

INSURANCE COMPANIES.

1. See *Attachments*, No. 2, 3, and *Rollo, assignee, v. Andes Ins. Co.*, 509

2. Under the act of February 3, 1866, when a foreign insurance company shall cease to do business in the State, and its liabilities fixed and contingent, to citizens of this State, shall have been satisfied or terminated, the treasurer is authorized to deliver to such company the bonds and other securities deposited with him. Though the company has ceased business in the State, and its liabilities to citizens of the State have been satisfied or terminated, the bonds in the hands of the treasurer cannot be attached by

a foreign creditor; but they must be delivered by the treasurer to the company.

Idem, 509

INTEREST.

1. Upon a sale of a house and lot upon credits extending through several years, separate bonds are taken for the interest. They will bear interest from the time they fell due.

Grame v. Cullen & als., 266
Hunter v. Johnson & als., 266

2. When interest to be compounded against an executor and his sureties. See *Executors & Administrators*, No. 8, and *Strother & als. v. Hull & als.*, 652

JUDGES.

1. A judge of a Circuit court to which a cause has been transferred under § 5, ch. 171, sess. Acts 1869-70, p. 227, may be compelled by mandamus from the Supreme Court of Appeals, to hear and determine the case.

Cowan v. Fulton, J., 579

JUDGMENTS.

1. When a verdict and judgment in suit by surviving partner against a debtor of the partnership, is conclusive against the distributees of the deceased partner.

See *Executors & Administrators*, No. 15, and *Boyd's sureties v. Oglesby & als.*, 674

2. In March, 1861, a judgment is recovered in Monroe county against W, S, and G, the latter living in Bath county. G died during the war, leaving real estate in Bath. The judgment is a lien upon the real estate of G, in Bath, as between the parties thereto, though not docketed.

Gatewood's adm'r v. Goode & als., 880

3. Though a *fi. fa.* was issued on the judgment, and levied on the property of W, and that returned by the sheriff to W, in obedience to the ordinance of the Virginia Convention of 1861, this did not discharge the lien of the judgment on the land of G.

Idem, 880

4. The lien of the judgment on the lands of G in Bath county, was neither lost nor impaired by reason of the division of the State of Virginia into two States, and the falling of the county of Monroe into the State of West Virginia.

Idem, 880

5. The certificate of the clerk of the Circuit court of Monroe county, West Virginia, of the records of which court the records of the former county court of Monroe form a part, is proper evidence of the judgment.

Idem, 880

JUDICIAL SALES.

1. One of two adjoining lots owned by the same parties, is sold at auction 996 *under the decree of the court. At the time of the sale nothing is said of an easement running from the unsold lot through the one sold, for carrying water from the former to a culvert in the street; and such easement could not be seen on the lot sold, and was not known to the pur-

chaser. The purchaser is entitled to have his lot free from the easement.

Scott & als. v. Beutel & als., 1

2. In 1863 proceedings were instituted in the District court of the U. S. at Alexandria, under an act of Congress, to confiscate the real estate of M. Before the condemnation M appeared by counsel and filed his answer which, afterwards, on the motion of the attorney for the U. S., was struck out; and the court not allowing M to appear in the cause, decreed that the property should be sold at auction by the marshal. This was done, and the property was conveyed to the purchaser. Upon appeal by M to the Supreme court of the U. S. the decree was reversed; and when the case went back to the District court it was dismissed. In ejectment by M against the purchaser to recover the property. Held: The decree having been made in the absence of M was a nullity, and the deed of the marshal passed no title to the purchaser.

Underwood v. McVeigh, 409

3. In proceedings by attachment against M, judgment is rendered against him, and there is an order for a sale, and a sale and conveyance to the purchasers, of the real estate attached. HELD:

1. The judgment and conveyance made under the judgment and order by the sheriff, divested M of his legal title to the property; unless the said sale was fraudulently made, and the confirmation thereof was procured by fraud; and the purchaser was privy to such fraud, or had notice of the same, or of such circumstances as would put a prudent *bona fide* purchaser upon enquiry in respect thereto.

Idem, 409

2. But if the purchaser combined with others to purchase the property at the attachment sale, at a sacrifice; and if, in pursuance of such combination, they so acted as to prevent competition at said sale, or to prevent the said property realizing a fair value, then such combination and action was fraudulent; and the deed of the sheriff passes no title to the purchaser.

Idem, 409

4. Upon a bill by a creditor to enforce a deed of trust to secure debts, H the debtor purchased part of the land conveyed, at a judicial sale, and paid the purchase money, and was entitled to a deed; but it had not been made. This is not such a cloud upon the title as will avoid the sale, on the objection of H.

Hudgins v. Lanier, Bro. & Co., 494

5. Decree for public sale of land or with consent of H, the grantor, at private sale, H having consented to a private sale to R at a certain price, the commissioners sold to M at a higher price. H could not withdraw his consent to a private sale, so as to set aside the sale as made, as not made in pursuance of the decree.

Idem, 494

6. It is no just cause for vacating a judicial sale, that only a few bidders were present. The only enquiry for the court is,

whether the terms of the decree have been pursued, and the property sold at an adequate price. *Idem*, 494

7. An advance of \$100 upon the price paid for the property, \$5,000, is no such substantial and material advance upon the price as would justify the court in annulling the sale and ordering a new sale. *Idem*, 494

8. A judicial sale of land is excepted to, 1st: Because the land was sacrificed; 2d: Because one of the commissioners to sell was interested in the purchase of one-half the land; 3d: Because a material advance was offered by a substantial bidder; 4th: Because there was no memorandum. These are valid objections, and the sale was properly set aside.

Teel & als. v. Yancey & als., 691

9. It is not a valid objection to a judicial sale of land, that one of the *commissioners was a plaintiff in the suit, in his own right and as administrator, and also had an interest in the land sold, both in his own right and as trustee of another, and as next friend of the infants. *Idem*, 691

10. In May, 1863, there is a decree for the sale of land, and in August, 1863, there is a sale by commissioners, who announce publicly the terms of sale to be, on a credit of one, two and four years; the purchase money to be paid in the currency which may be in use when the respective payments fall due; but with the privilege to the purchaser to pay one-half of the purchase money upon the confirmation of the sale by the court. The land which was worth in gold \$80 per acre, sold for \$142 per acre; and the sale being confirmed, the purchasers paid one-half the purchase money with Confederate currency, executing their bonds for the other half, which fell due in August, 1865 and 1867. They must pay off these bonds in the currency of the United States; that being the currency in use when they fell due. *Idem*, 651

11. In a suit brought in 1858, by judgment creditors of W for the sale of his lands for the payment of their debts, he answers and consents to a sale before an account is taken of the priority of the debts; but an account is ordered at the same time the land is decreed to be sold. The land is sold, and though W excepts because the price is inadequate, it is confirmed. The account is taken, showing debts much more than sufficient to absorb the fund; but the report is recommitted to enquire for other debts. W then removes to a distant county. Subsequently, by the death of a son, W becomes entitled to another tract of land, and in 1863, the plaintiffs file their petition asking that this land may be sold for the payment of their debts. Of this petition W has no actual notice, and does not seem then to have had counsel in the cause. The land is sold without giving W a day to pay the debts, and purchased by C, who pays the purchase money and obtains a conveyance. W afterwards applies by petition and cross-bill to have the sale set aside. HELD:

1. W having consented to the first sale before an account of his debts and their priorities was taken, and not having withdrawn that consent, and the account taken, though not confirmed, showing that the proceeds of both sales are not sufficient to pay the debts of W, and he not in his petition showing errors in that report, or that he has been injured by the sale of the last tract sold, the failure to have an account of his debts and their priorities before that sale, is not good ground for setting it aside, as against the purchaser.

Crawford & als. v. Weller & als., 835

2. It is not *per se* error to decree a sale of land to enforce judgment liens without giving the debtor time to redeem, as in the foreclosure of mortgages, though such a practice ought in general to be pursued; but as W does not show he has sustained any damage by the failure to do it, it is not ground for setting aside the sale. *Idem*, 835

3. It is no ground of complaint on the part of W, that the court decreed a sale of the land for Confederate money. If the creditors were willing to receive such money in payment of debts due before the war it was to the advantage of W, that it be so sold. And the creditors allowing the property to be sold for this money, without objection, it is not for them afterwards to object to receive it in payment of their debts. *Idem*, 835

4. W having been served with process and having answered, he continued to be a party in the cause during all the subsequent proceedings. The petition for the sale of the land and the sale were proceedings in the cause, and W must be taken as cognizant of these proceedings. And there not being any error on the face of the proceedings, the purchasers are not to be affected by any irregularities not apparent on their face. *Idem*, 835

998 *12. In a suit by creditors for the sale of the land of their debtors, a decree is made with their consent, for the sale, but the sale made is set aside and the land rented out. After this one of the debtors dies intestate, leaving heirs. Then another decree is made reviving the suit against his administrator, and directing a *scire facias* against the heirs; and with the consent of the parties before the court, commissioners are directed to execute the previous decree of sale. They sell, and the sale is confirmed, and the purchase money being paid, a conveyance is ordered and made, and this is confirmed. These decrees and the sale having been made when the heirs were not before the court, the decrees are erroneous, and these and the sale must be set aside.

Sexton v. Crockett & als., 857

JURORS.

1. If a venireman has formed, and still more if he has formed and expressed a decided opinion as to the guilt or innocence of the accused, no matter on what ground it was formed, whether from having heard the

evidence on some former trial or examination, or from mere rumor or otherwise, he is an incompetent juror to try the case. If on the other hand his opinion is merely hypothetical, he is not incompetent on that ground.

Jackson's case,

919

2. If a venireman has formed an opinion as to the guilt or innocence of the accused, from having heard the evidence on a former trial or examination of the case, it would be difficult if not impossible to regard such opinion otherwise than as decided or substantial, within the meaning of the rule; and he would generally if not always be considered an incompetent juror, even though he might think and say that he could give the accused an impartial trial. *Idem,*

919

3. If a venireman has formed his opinion of the guilt or innocence of the accused from mere rumor, the presumption, in the absence of evidence to the contrary, is, that such opinion is merely hypothetical, and will be so considered even though he speaks of it as a decided or substantial opinion, if he says he has no prejudice against the accused, and thinks he can give him a fair and impartial trial. But if the court be satisfied either from the venireman's own statement or otherwise, that the opinion is in fact decided and substantial, he will be an incompetent juror. *Idem,*

919

4. In all cases great weight is justly due to the opinion of the court before whom the venireman are questioned and examined in regard to their competency as jurors.

Idem, 919

LACHES AND LAPSE OF TIME.

1. See *Equitable Jurisdiction & Relief*, No. 7, 8, & *Bryne & wife v. Edmonds*,

200

2. Though a delay of fourteen years after a right has accrued, does not create a statutory bar, it will, with other circumstances, be very persuasive against the justice of the claim. Relief refused in this case.

Harrison & als. v. Gibson & als.,

212

3. The decided cases do not fix any period as limiting the demand for an account. If from the delay which has taken place, it is manifest that no correct account can be rendered, that any conclusion to which the court can arrive, must, at best, be conjectural, and that the original transactions have become so obscured by time and the loss of evidence and the death of parties, as to render it difficult to do justice, the court will not relieve the plaintiff. If, under the circumstances of the case it is too late to ascertain the merits of the controversy, the court will not interfere, whatever may have been the original justice of the claim. *Idem,*

212

4. A bill by husband and wife, in right of the wife, is the bill of the husband; and the wife is only joined for conformity. The coverture of the wife is not, therefore, an excuse for delay in bringing the suit.

Idem, 212

999 *LANDLORD AND TENANT.

1. The saving in favor of infants, married women or insane persons in § 36, ch. 135, of the Code, in relation to actions of ejectment, does not apply to actions of ejectment brought by the lessee to recover possession of the leased premises, which had been recovered by the landlord under the 16th section of ch. 138 of the Code.

Leonard v. Henderson,

331

2. H, the owner of a ground rent in fee, secured upon a lot of ground owned in fee by L, brought ejectment against V, the tenant in possession, to recover the lot, for the failure of L to pay the rent; and there was a judgment by default in favor of H, who proved by his own testimony, that the rent was due; and there was no sufficient distress upon the premises. At this time L was an infant under twenty-one years of age. After one year from the time H was put in possession, but within five years after L came of age, he brought ejectment against H to recover the lot. *HOLD:*

1. L is barred by the statute, ch. 138, § 7, and cannot recover. *Idem,*

331

2. Though L was not a party to the action of H, yet V, the tenant in possession, was, and that under § 16, ch. 138, is sufficient. And the proof by H was sufficient.

Idem, 331

3. In unlawful detainer by landlord against lessee or vendor against vendee, to recover the land leased or sold, though the lessee or vendee can not question the title of his lessor or vendor as at the time of the sale, he may show in his defense, that his lessor or vendor had since conveyed the land to another person.

Dobson v. Culpepper & wife,

352

4. The lessee or vendee can not question the title of his lessor or vendor in an action against him by a vendee of such vendor or lessor, to recover the land. *Idem,*

352

LARCENY.

1. See *Criminal Jurisdiction & Proceedings*, No. 4, and *Harvey's case,*

941

2. In an indictment for stealing bank notes, it is sufficient to state that the notes were for a certain sum of money, without stating their value, under the act, Code of 1860, ch. 194, §§ 15, 16.

Adams' case,

949

3. In such a case, since the statute, the value of the bank notes is not traversable.

Idem, 949

LAWYERS.

1. The Council of the City of Richmond may lay a tax upon lawyers as such.

Ould & Carrington v. The City of Richmond,

464

2. How the tax may be laid. See *Taxes*, No. 2, and *Idem,*

464

LEGACIES AND LEGATEES.

1. Though the rule that a legacy will be held as a satisfaction of a debt due from the

testator to the legatee, still nominally exists, the tendency of the modern decisions is, to consider the bequest a bounty, and not the discharge of an obligation; and the courts now lay hold of any circumstances, however trifling, for the purpose of repelling the presumption that the legacy was intended as a satisfaction of the debt.

Crouch & als. v. Davis' ex'or, 62

2. A case in which legacies held not in satisfaction of a debt. *Idem*, 62

3. Testator gives several legacies; and says whatever balance he is worth he gives to his sister C. He owns both real and personal estate, but there is no mention in the will of real estate, and at the time of his death the personal estate was ample to pay the debts and legacies; but it is lost after his death. The legacies as well as the debts are a charge upon the real estate. *Idem*, 62

4. Though the testator died in 1863 when Confederate treasury notes were the currency of the country, yet the will having been made in 1859, this is the time to which we are to look to ascertain his intention; and *the legacies are not, therefore, payable in Confederate currency. *Idem*, 62

5. In 1859 testator makes his will and gives a legacy of \$20,000 to A and her children, and directs it to be invested in Va. State bonds. He dies in 1863; under the circumstances the executor is excused for not investing it in State bonds. *Idem*, 62

6. Testator made his will in 1858 and died in 1867. By his will he gave to a daughter \$10,000 and directed his executors to invest it in State bonds in her name. She was of age when testator died. The executors did not invest the money in State bonds, but paid her the interest regularly upon it. In the condition of the country from 1867 to 1870, the executors were well justified in not investing the money in the State bonds.

Perry v. Smoot & als., 241

7. See *Executors and Administrators*, No. 4, and

Murphy's adm'r & als. v. Carter & als., 477

8. G by his will gives his slaves and their increase to his wife for life, and at her death to his daughter for her life; and from and after the decease of his wife and daughter, he emancipates them and their increase; and he directs a fund to be provided and accumulated until such times as his slaves may be entitled to their freedom under his will; and then to be applied to their use. The wife lives until 1868, and holds the slaves until they are freed by the results of the war; when they leave her. The persons who had been slaves of G and their increase do not answer the description of the legatees described in the will, and are not entitled to the legacy.

Johns v. Scott & als., 704

9. For the principles governing the construction of bequests to classes, see the opinion of *Bouldin, J.* *Idem*, 704

LIMITATIONS—STATUTE OF.

1. The saving in favor of infants, married women and insane persons in § 36, ch. 135, of the Code, in relation to actions of ejectment, does not apply to actions of ejectment brought by the lessee to recover possession of the leased premises, which had been recovered by the landlord under § 16, ch. 138, of the Code.

Leonard v. Henderson, 331

2. H, the owner of a ground rent in fee, recovers possession of the premises for the failure of L, the lessee to pay the rent. Though L is then an infant he must sue to recover the possession in one year, or he will be barred. *Idem*, 331

3. For limitations in cases of appeal, see *Appeals*, No. 3, and

Callaway v. Harding, 542

4. See *Appeals*, No. 5, and

Sexton v. Crockett & als., 857

MANDAMUS.

1. A judge of a Circuit court to which a cause has been sent under § 5 of ch. 171, sess. acts 1869-70, p. 227, may be compelled by mandamus from the Supreme court of appeals to hear and determine the case.

Cowan v. Fulton, J., 579

2. The judge to whose court a cause was sent, being of opinion that the said act is unconstitutional, refused to hear the case, and directed it to be struck from the docket. This is not a judgment in the cause which will prevent the issue of a mandamus to him to hear the case. *Idem*, 579

MISDEMEANORS.

1. A party is described in an information as the "keeper of a house of entertainment," and on this prosecution he is acquitted. In a second information he is described as "keeper of an ordinary." The offence charged in both being the same not only in kind but in fact, the acquittal in the first case is a bar to the second.

Day's case, 915

MUNICIPAL OFFICERS.

1. Under art. 6, § 20, of the Constitution of Va., the mayor of a city is the chief executive officer of his city, and as such is authorized to supervise the other officers thereof, in the execution of their duties. In investigating charges against the chief of police, he *acts as the chief executive officer of the city, and not as a court; and a writ of prohibition will not lie to restrain him from proceeding with the investigation.

Burch, Mayor, v. Hardwicke, 51

2. The mayor, when acting as chief executive officer, is in no sense, or to any degree, the inferior of the corporation court; nor is he in any wise subject to his superintendence. They are distinct and co-ordinate departments of the corporate government.

Idem, 51

NEGLIGENCE.

1. The general rule is, that a party has a right to demur to the evidence; and an action for negligence is no exception to the rule.

Trout v. Va. & Ten. R. R. Co., 619

2. In an action against a railroad company for injury to the plaintiff's horses, if it appears that the road runs through the plaintiff's land, and the horses got upon the track of the road without any negligence or default of his, and were killed by the company's engine, the company will be liable for the damages sustained by the plaintiff, if the damage was done by the failure of the engineer to take the proper care to avoid doing the injury. *Idem*, 619

NON EST FACTUM.

1. A special plea of *non est factum*, which admits the execution and delivery of the bonds sued on, but avers that they were to be redelivered to the defendant when he should request it, is not a good plea.

Harris v. Harris' ex'or, 739

PARDONS.

1. A is convicted of a misdemeanor and fined \$500, and the court sentences him to be imprisoned for four months, and until he pays the fine. The Governor remits so much of the sentence as orders A's imprisonment for four months. The Governor has no authority to remit the fine, and does not intend it by his pardon. See Code of 1860, ch. 17, §§ 24 & 25, p. 122.

Wilkerson, sheriff for, &c. v. Allan, 10

2. The effect of the pardon was to remit the four months' imprisonment; but it did not affect the remaining part of the judgment. *Idem*, 10

PARTIES.

1. When a party in interest not before the court is concluded by a decree in which another party in the same interest is a party in the cause. See *Trusts and Trustees*, No. 1, and *Commonwealth of Virginia v. Levy & als.*, 21

2. When next of kin may sue in equity to impeach an award. See *Arbitration and Award*, No. 2, and *Moore v. Luckess' next of kin*, 160

3. If a landlord or vendor sells and conveys the land, an action against the lessee or vendee to recover it, must be by the purchaser.

Dobson v. Culpepper & wife, 352

4. When sureties in a guardian's first bond not necessary parties.

Sayers v. Cassell & als., 525

PAYING MONEY INTO COURT.

1. When the court will order a defendant to pay money into court, See *Equitable Jurisdiction and Relief*, No. 4, 5, and *Farmer v. Yates & wife*, 145

PENALTIES.

1. A is convicted of a misdemeanor and fined \$500; and the court sentences him to be imprisoned four months and until the fine is paid. The Governor remits the imprisonment for four months. This does not affect the remaining part of the judgment; but A must still pay the fine.

Wilkerson, sheriff for, &c. v. Allan, 10

2. The sheriff discharges A without the payment of the fine. This does not discharge A's liability for the fine to the Commonwealth; and he may be taken in execution by a *capias pro fine*. *Idem*, 10

1002 *PERMANENT IMPROVEMENTS.

1. In whose cases, and upon what principles, a party making permanent improvements upon land, which belongs to another, will be allowed compensation therefor; see the opinion of *Moncure, P.*

Græme v. Cullen & als., 266

Hunter v. Johnston & als., 266

PLEADINGS—AT COMMON LAW.

1. What is not a good special plea of equitable defence. See *Equitable Defences, passim*, and *Harris v. Harris' ex'or*, 737

2. What is not a good special plea of *non est factum*. See *non est factum*, No. 1, and *Idem*, 737

PLEADINGS—IN EQUITY.

1. Where the attempt is to enforce a legal demand in equity, and the need of a discovery is the alleged ground of equity jurisdiction, and there is no averment in the bill that the discovery is material or necessary, the bill is demurrable.

Childress & als. v. Morris, 802

PRACTICE—AT COMMON LAW.

1. If evidence offered to be introduced on the trial of a cause is relevant to the issue, it should be admitted. It is for the jury to determine what effect it shall have.

Underwood v. McVeigh, 409

2. For the instruction which should be given in an action upon a Confederate contract. See *Confederate Contracts*, No. 3, and

Sexton v. Windell's adm'x, 534

3. For the principles governing demurrers to evidence, see *Demurrers to Evidence*, No. 1, 2, and

Trout v. Va. & Ten. R. R. Co., 619

PRACTICE—IN CRIMINAL CASES.

See *Criminal Jurisdiction & Proceedings*.

PRACTICE IN CHANCERY.

1. In a creditor's suit by Y against F, in his own right and as adm'r of A, Y claims as a judgment creditor of F, as adm'r of A; and F, in his answer, admits he owes his intestate's estate for land purchased in intestate's life time \$1,100. On the filing of this

answer the court may make a decree that F. shall pay said \$1,100 into court, or to a receiver; and this though F is one of the next of kin of A.

Farmer v. Yates & wife, 145

2. For the rules governing in such cases, see the opinion of *Moncure, P.*

Idem, 145

3. How equity may correct an award without setting it aside. See *Arbitrations & Award*, No. 2, and

Moore v. Luckess' next of kin, 160

4. What averments in a bill will be treated as facts to be answered. See *Equitable Jurisdiction & Relief*, No. 10, and

Morrison's ex'ors v. Grubb, 342

5. The defendant having denied the allegations of the bill as to his possession of certain bonds, proceeds to state how and when he became possessed of them. The whole statement must be taken together as his answer. *Idem*, 342

6. There cannot be a decree between co-defendants in a cause where there is no decree in favor of the plaintiff.

Ould & Carrington v. Myers & als., 383

Myers v. Ould & Carrington & als., 383

7. See *Trusts* No. 9, 10, 11, and *Judicial Sales*, No. 5, 6, 7, and

Hudgins v. Lanier, Bro. & Co., 494

8. When claim not set up in the bill cannot be decreed. See *Executors & Administrators*, No. 10, and *Strother & als. v. Hull & als.*, 642

9. See *Administration* No. 2, and *Elliott & wife & als. v. George & als.*, 780

10. Where the attempt is to enforce a legal demand in equity, on the ground of a want of discovery, and it appears at the hearing that the discovery was not necessary, the bill will be dismissed.

Childress & al. v. Morris, 802

1003 *11. It is error to make a personal decree against ex'ors for a debt due from their testator, without having first ordered an account of their testator's estate.

Lincoln's adm'rs v. Stern & wife, 816

12. When there may be a sale of land to satisfy judgment heirs, before account of the debts and their priorities is taken. See *Judicial Sales*, No. 11, and

Crawford & als. v. Weller & als., 835

13. For practice in judicial sales, see

Idem, 835

14. C, a judgment creditor of S, files his bill against S, to subject his lands, consisting of five small tracts, to satisfy his judgment. S answers, and says he has sold a part of his land to M and a part to G, and a part was settled on his wife by marriage agreement. And since the filing of the bill he had been adjudged a bankrupt on his petition. C amends his bill and makes G, the wife, and the assignee in bankruptcy, defendants. A commissioner reports the plaintiff's judgment, \$548.87, and other judgments, in all \$1,284.62; all docketed before the mar-

riage contract; the assessed value of all the lands, \$1,745.50 cts.; the annual rental of all \$75; the land sold M and G of one-fifth value of the whole. The assignee has sold 213 acres of the land, not including the wife's, which was not embraced in the schedule. The court decrees sale of wife's land on a credit, and directs personal security, the obligors to waive the homestead exemption. **HOLD:**

1. The commissioner having reported that the lands sold M and G was one-fifth of the value of the land, there is no necessity for further enquiry as to the lands purchased by them, before the decree for the sale of the wife's land.

Sively, by, &c. v. Campbell & al., 893

2. It was not necessary to show the assessed value of the wife's land before decreeing a sale. *Idem*, 893

3. It was not necessary to have a separate report of the number of acres held by the wife, as that sufficiently appears.

Idem, 893

4. Under the circumstances of this case, the presumption is that M's deed, though it is not in the record, was prior to the marriage contract, and therefore M was not a necessary party. *Idem*, 893

5. The fact that S went into bankruptcy after the bill was filed, could not oust the jurisdiction of the State court as to the wife; nor could it as to S; and the assignee did not object. *Idem*, 893

6. *Quare*: If the court may require the purchasers under a decree and their sureties to waive the homestead exemption.

Idem, 893

PREScription.

1. There can be no prescriptive right to an easement through one lot for the benefit of one adjoining, where both lots have been owned by the same person until a late day.

Scott & als. v. Beutel & als., 1

PROHIBITION.

1. In a case of prohibition, if the order of the court is final in form and disposing of the whole case, though it should have been interlocutory, a supersedeas may be awarded to it.

Burch, Mayor, v. Hardwicke, 51

2. In such a case, whether the order is final or not, must be determined by looking to the order itself; and not by enquiring whether it should or should not have been final.

Idem, 51

3. The common-law mode of proceeding in prohibition has been modified by the statute, Code of 1860, ch. 155, p. 658; and the ultimate prayer, both of the petition, and declaration when one is necessary, which is not always the case, is that a writ of prohibition may be awarded; and when the case shall have been fully heard, whether on petition and answer, or on declaration and formal pleadings, the judgment, whether for or against issuing the writ, will be a final judgment.

Idem, 51

1004 *4. Where the whole case is presented by the petition and answer to the rule, and only a question of law is involved, the court may decide the case finally upon these papers; and no other or further proceedings are necessary. *Idem*, 51

PUBLIC OFFICERS.

1. The treasurer of the State who holds bonds of a foreign insurance company doing business in the State, under the act of February 3d, 1866, as amended by the act of March 3d, 1871, is not liable to be summoned as a garnishee by a foreign creditor of the insurance company.

Rollo, assignee v. Andes Ins. Co., 509

2. A public officer of the State can not be made liable by attachment at the suit of an individual, for funds in his hands, clothed with a trust under the authority of a public law. *Idem*, 509

RAILROAD COMPANIES.

1. In an action against a railroad company for injury done to the plaintiff's horses, if it appears that the road runs through the plaintiff's land, and the horses got upon the track of the road without any negligence or default of his, and were killed by the company's engine, the company will be liable for the damage sustained by the plaintiff, if the damage was done by the failure of the engineer to take the proper care to avoid doing the injury.

Trout v. Va. & Ten. R. R. Co., 619

RAPE.

1. It seems that in an indictment for an attempt to commit a rape, the word ravish, as descriptive of the offence attempted, is not necessary; but the words attempting "feloniously carnally to know," are sufficient.

Christian's case, 954

2. What evidence not sufficient to convict of the offence of attempting to commit a rape upon a woman of easy virtue.

Idem, 954

RECEIVERS.

1. When a receiver of a court may maintain a motion against a sheriff and his sureties, for money collected by the sheriff.

Goss & als. v. Southall, Receiver, 825

RECITALS IN DEEDS.

See *Estoppels, passim*, and *Bower & als. v. McCormick & als.*, 310

RICHMOND—CITY OF.

1. The Council of the City of Richmond may lay a tax on lawyers as such.

Ould & Carrington v. City of Richmond, 464

2. How it may be laid. See *Taxes*, No. 2, and *Idem*, 464

SALES BY SAMPLE.

1. § 101, of ch. 193, sess. acts of 1870-71, p.

99, prohibits the sale of goods by sample, &c., by any person not a resident merchant, mechanic or manufacturer, and applies to citizens of the State who are not merchants, &c., as well as to citizens of other States; and the charge in the information that the party is not a resident merchant, &c., is not equivalent to the charge that he is not a resident citizen. The question, therefore, does not arise whether the statute is in violation of the constitution of the United States.

Speer's case, 935

2. The word "resident" in the statute, in connection with the words merchant, &c., does not import a personal residence; but refers to the place of business; and any person, though a citizen of, and living in another State, may take out a license to transact business as a merchant, &c., in the State; and the statute, therefore, is not unconstitutional.

Idem, 935

3. The statute is not a regulation of commerce, but is simply a revenue law.

Idem, 935

SCALING DEBTS AND PAYMENTS.

1. What payments by guardian are or are not to be scaled. See **Guardian & Ward*, No. 1, and *Bennett v. Claiborne & als.*, 366

2. See *Equitable Jurisdiction and Relief*, No. 14, and

Penn & al. v. Reynolds, 518

3. When part of a debt evidenced by bond may be scaled. See *Bonds*, No. 5, and

Barnetts v. Miller's adm'r, 551

4. When debt to be scaled. See *Confederate Contracts*, No. 6, and

Tams v. Brannaman, 809

5. See *Sheriffs*, No. 1, and

Goss & als. v. Southall, Receiver, 825

SHERIFFS.

1. By a decree in a cause in 1860 a sheriff is directed to collect certain money, and deposit it in a Savings bank. In 1866 he returns that he had collected it in May 1862, but the Savings bank refused to receive it. In October 1866 he is directed to pay it to a receiver. The receiver gives the sheriff and his sureties notice that he will move for judgment against them for the amount. The court has authority under § 40, of ch. 49, Code of 1860, to render judgment in favor of the receiver. And the money should not be scaled.

Goss & als. v. Southall, Receiver, 825

SPECIFIC PERFORMANCE.

1. In a suit for the specific performance of a parol agreement for the sale of land by the heirs of the alleged purchaser against the heirs of the alleged vendor, the principles announced in the case of *Wright v. Puckett*, 22 Gratt. 370, approved, reaffirmed and acted on.

Pierce's heirs v. Catron's heirs, 588

STATUTES.

1. Code of 1860, ch. 209, §§ 19, 20, in relation to the discharge of a person in custody for a fine, construed in
Wilkerson, sheriff for, &c. v. Allan, 10
 2. The act, Code of 1860, ch. 155, in relation to prohibition, construed in
Burch, Mayor, v. Hardwicke, 51
 3. Art. 6, § 20, of the constitution of Virginia, in relation to municipal officers, construed in
Idem, 51
 4. The act of May 28, 1870, sess. acts 1869-70, p. 162, to prevent the sacrifice of personal property at forced sales, construed in
Garland v. Brown's adm'r, 173
 5. The proviso to § 2, of the act of April 29, 1867, Sess. acts 1866-67, p. 967, in relation to the inspection of tobacco, construed in
Glass v. Davis & als., 184
 6. The act, ch. 135, § 30-34, and the act, ch. 136, construed in
Grame v. Cullen & als., 266
 7. The act, ch. 138, § 17, of the Code, construed in
Leonard v. Henderson, 331
 8. § 16, of ch. 132, Code of 1860, prescribing duty of commissioner in settling accounts of fiduciaries, construed in
Whitehead's adm'r v. Whitehead & als., 376
 9. The act of February 3d, 1866, as amended by the act of March 3d, 1871, in relation to the foreign insurance companies, construed in
Rollo, assignee, v. Andes Ins. Co., 509
 10. See *Construction of Statutes*, No. 1, and
Callaway v. Harding, 542
 11. The act ch. 171, § 5, Sess. acts 1869-70, p. 579, in relation to the transfer of causes to the Circuit courts, construed in
Cowan v. Fulton, J., 579
 12. The act of March 5th, 1870, called the Enabling act is a valid act, except the proviso.
Teel & als. v. Yancy & als., 691
 13. The act Code of 1869, ch. 49, § 40, construed in
Goss & als. v. Southall, Receiver, 854
 14. The act ch. 193, § 101, Sess. acts of 1870-71, p. 99, in relation to sales of goods by sample, construed in
Speer's case, 935
 - 1006 *15. The act Code of 1860, ch. 194, § 15, 16 in relation to stealing bank notes &c., construed in *Adams' case*, 949
 16. The act of March 30th, 1871, Sess. acts 1870-71, p. 332, construed in
Murphy's case, 960
- SURETIES.
1. When sureties of an executor not liable for proceeds of land. See *Executors and Administrators*, No. 4 and 9, and
Murphy's adm'r & als. v. Carter & als., 477
 - Strother & als. v. Hull & als.*, 652

2. When their bond will cover specific legacies. See
Idem, 477
3. When debts are paid out of a combined fund of land and personalty, how the debts are to be apportioned between the funds. See
Idem, 477
and *Strother & als. v. Hull & als.*, 652
4. When sureties of an ex'or are and are not liable for compound interest. See *Executors and Administrators*, No. 8, and
Idem, 652
5. When sureties of an administrator are not liable on his undertaking. See *Executors and Administrators*, No. 18, and
Childress & als. v. Morris, 802

TAXES.

1. The Council of the City of Richmond may lay a tax on lawyers as such.
Ould & Carrington v. The City of Richmond, 464
2. The ordinance of the council provides, that lawyers and others shall be divided into six classes, and that those in each class shall pay a certain sum as his tax; and it directs that the committee of finance shall place each lawyer in the class to which they shall think he properly belongs, looking to all the circumstances of the case. And it is provided that when the committee shall have completed their classification, public notice shall be given, and any lawyer dissatisfied with his classification, may appear before the committee and have it corrected if erroneous. HELD: The tax is not an income tax, nor are the duties imposed upon the committee legislative but ministerial; and the ordinance is not unconstitutional.
Idem, 464

TOBACCO WAREHOUSE.

1. Under the first proviso to the 2d section of the act of April 29, 1867, in relation to inspection of tobacco, Sess. acts 1866-67, p. 967, the owners of a public warehouse may close it as such at any time, in the mode therein prescribed. And thereupon the authority of the inspector ceases, and the lease of the warehouse terminates.
Glass v. Davis & als., 184
2. The owners of a public warehouse may close it on a day certain, and open it on the same day as a private warehouse, where everything is to be done as in a public warehouse, except the inspection of tobacco.
Idem, 184

TRUSTS AND TRUSTEES.

1. L, a citizen of New York, devises to the people of the U. S., a large estate, \$306,000, in New York, and a farm worth \$10,000, in Virginia, for the purpose of establishing a school on the farm in Va., for the children of warrant officers of the U. S. Navy, &c. If the U. S. declined to accept the trust, he gave the property, on the same trusts, to the State of Va. In a suit in New York, by the executors, for the construction of the will, the

United States is made a party, and appears to maintain the devise. The court held the trust void. *Held*:

1. The U. S. represented the trust in the New York suit; and the decree is conclusive upon Va., though she was not a party. *Commonwealth of Va. v. Levy & als.*, 21

2. The trust is in its nature indivisible; and if the decree in the New York court does not conclude*the commonwealth of Va., as to the land here, still the trust can not be executed according to the intention of the testator; and the trust must therefore fail, and the heirs are entitled to the land. *Idem*, 21

2. Deed of trust to two trustees, to secure debts, empowers the two, or either of them, to sell upon the demand of the creditor. If one of the trustees refuses to unite in the sale, the other may make a valid sale.

Grame v. Cullen & als., 266

Hunter v. Johnston & als., 266

3. The house on the lot in a city conveyed in trust, is burned down, and the grantor in the deed employs workmen to build another house, upon an agreement to give them a lien upon the lot and house for the cost of the building. The workmen are not informed of the first lien, until after they have nearly completed the building; though it was duly recorded. The whole property is subject to satisfy the first lien.

Idem, 266

4. The act, ch. 135, § 30-34, "concerning the action of ejectment," and the act, ch. 136, "concerning the allowance for improvements," do not apply to this case. They are confined to cases of ejectment, or cases in which a decree or judgment is rendered against any defendant for land.

Idem, 266

5. Though the builders have obtained a second deed of trust on the property, and claim that only the value of the lot, without the house, should be applied to satisfy the first lien, this is not such a cloud upon the title as forbade the trustee to sell under the first deed; especially as the grantor in the deeds had obtained an injunction to a sale of the property on that ground; which had been dissolved before the advertisement of the second sale.

Idem, 266

6. The trustee should sell according to the provisions of the deed.

Idem, 266

7. The vendor of a house and lot transfers to the vendee an insurance policy upon the house, and takes a deed of trust to secure the purchase money. The house is afterwards consumed by fire. The debt not being paid, the vendor is not bound to pursue the insurance company, but may enforce payment by a sale of the property.

Idem, 266

8. A deed of trust to secure grantors' creditors names none of them, but requires a majority of them to direct a sale. The only mode of proceeding open to them, is by bill in equity, where the necessary parties may be conveyed, and the trust enforced under the supervision of the court.

Hudgins v. Lanier, Bro. & Co., 494

9. Bill by a creditor makes grantor, trustee, and judgment creditors, defendants, and bill taken for confessed. There having been no objection for want of proper parties, the want of such parties is no objection to the proceedings. *Idem*, 494

10. If there were other creditors besides those named in the bill, they could have asserted their claims before the commissioner who was directed to take account of debts.

Idem, 494

11. The creditors before the court made no objection to a sale under the deed; and as the bill was taken for confessed as to them, it is to be presumed they desired a sale. If they did not constitute a majority of the creditors it was for H, the grantor, who objected to the sale, to show it. He alone knew their names or number. *Idem*, 494

UNLAWFUL DETAINER.

1. In unlawful detainer by vendor against vendee, to recover possession of the land sold, if D has complied with his contract so that he is entitled to a conveyance, he may set up the defence under the statute in this proceeding.

Dobson v. Culpepper & wife, 352

USURY.

1. A contracts to build for G in the city of Richmond, certain houses, according to a plan and specifications, for the sum of \$54,700, payable in annual instalments of \$12,000, to bear interest at the rate of \$7.30 *per cent. per annum*, to be secured by deed of trust on the property. If the interest

1008 *was a part of the contract price of the buildings, the contract is not usurious. If it was for the loan of money or other thing, or for the forbearance of a debt due, it was usurious.

Grame v. Adams, 225

2. A claims that he entered into another subsequent contract with G, which was to bear six *per cent.* interest. If the first contract was usurious, all the usury included in it must have been excluded from the second, or it is usurious.

Idem, 225

3. To constitute a new contract the first must be rescinded and set aside by the parties to it, and the second adopted as a substitute for the first with the intention to be governed thereafter by its terms.

Idem, 225

4. The price at which the work was done under the second contract was just as much greater than that provided for in the first, as the difference of the interest on that first sum at six and \$7.30 *per cent. per annum* for the whole time of the credit, viz: \$57,800; and when the work was completed notes payable as agreed on in the contract, were taken, bearing six *per cent.* interest from their date until payment. If the addition to the first sum contracted for was for the loan of money or other thing, or for the forbearance of a debt due, the second contract is usurious; but if it was not for such loan or forbearance it was not usurious.

Idem, 225

5. Forbearance, in the sense of the statute in relation to usury, is the giving a further

day for the return of a loan when the time originally agreed on is passed; and if the rate of interest agreed on for such forbearance is over six *per cent. per annum*, it is usurious. *Idem*, 225

6. In May 1866 T executes his bond to S for \$2,400 payable in gold. The considerations of the bond proved, was a debt due before the war, of uncertain amount, and \$1,670 in United States currency advanced at the date of the bond, when this currency was as 129 1-8 for gold and 121 for silver. As it does not appear what was the amount of the ante-war debt, usury is not proved.

Turpin v. Sledd's ex'or, 238

VENDOR AND PURCHASER.

1. S and others sell to W in 1851, a wharf at Norfolk, and covenant to allow him to use a dock belonging to them in connection therewith, as long as they continue to own it and the adjoining premises. The wharves were originally built out into Elizabeth river and the tide ebbs and flows into the dock; but they are within the port warden line, a line drawn along the channel of the river under an act of the General Assembly; and they were built so long since that no persons living have any knowledge when they were built, and they always have been held as private property. **Held**:

1. *Quare*: If any title which the commonwealth might at an earlier day have asserted to this dock, if not expressly surrendered, has not been abandoned in favor of those claiming to be owners thereof.

Hardy v. McCullough & als., 251

2. In the absence of any claim by the Commonwealth, and in the face of the apparent waiver and abandonment as aforesaid, W and those claiming under him, cannot rely upon that supposed title of the Commonwealth in derogation of the express contract of W to the contrary.

Idem, 251

2. Upon a sale of a house and lot upon credits extending through several years, separate bonds are taken for the interest. They will bear interest from the time they fell due.

Grame v. Cullen & als., 266

Hunter v. Johnston & als., 266

3. C and wife sell her land to D, but do not convey it to him. D fails to comply with his contract; and C and wife convey the land to G, the son of C's wife; and then C and wife bring unlawful detainer to recover the land. **Held**:

1. If D had complied with his contract,

so that he was entitled to a conveyance, he might have set up the defence under the statute in this proceeding.

Dobson v. Culpepper & wife, 352

2. Though D cannot question the title of C and wife, as at the time of the sale, he may show in his defence, that they had since conveyed the land to G.

Idem, 352

3. By their conveyance to G, C and wife lost their right to recover the land from D; and the action should have been in the name of G; and D could not question the title of G.

Idem, 352

WILLS.

1. W had one son S, who was married, and an idiot son J, in Va. and several children who had years before his death, moved to the North west. S lived on the land of his father, and he and his wife had for many years taken care of both W and his son J. In December 1861 W made his will, by which he gave the whole of his property, except \$200, to his son S; and for this S was required to take care of J. W seems to have been influenced principally by the services which S and his wife had rendered and would have to render to himself and J, and in part by the fear that any thing he gave to his other children would be confiscated; and he expressed to S the wish that when the care of himself and J had ceased, that S would do what he thought was right with his brothers and sisters, in regard to the residue of his estate, if any remained after a just compensation to S for his services; and of this S was left to judge. There was no evidence of fraud or undue influence upon W. The devise is absolute, and no trust in favor of the other children of W is attached to it.

Whitesel & als. v. Whitesel & als., 904

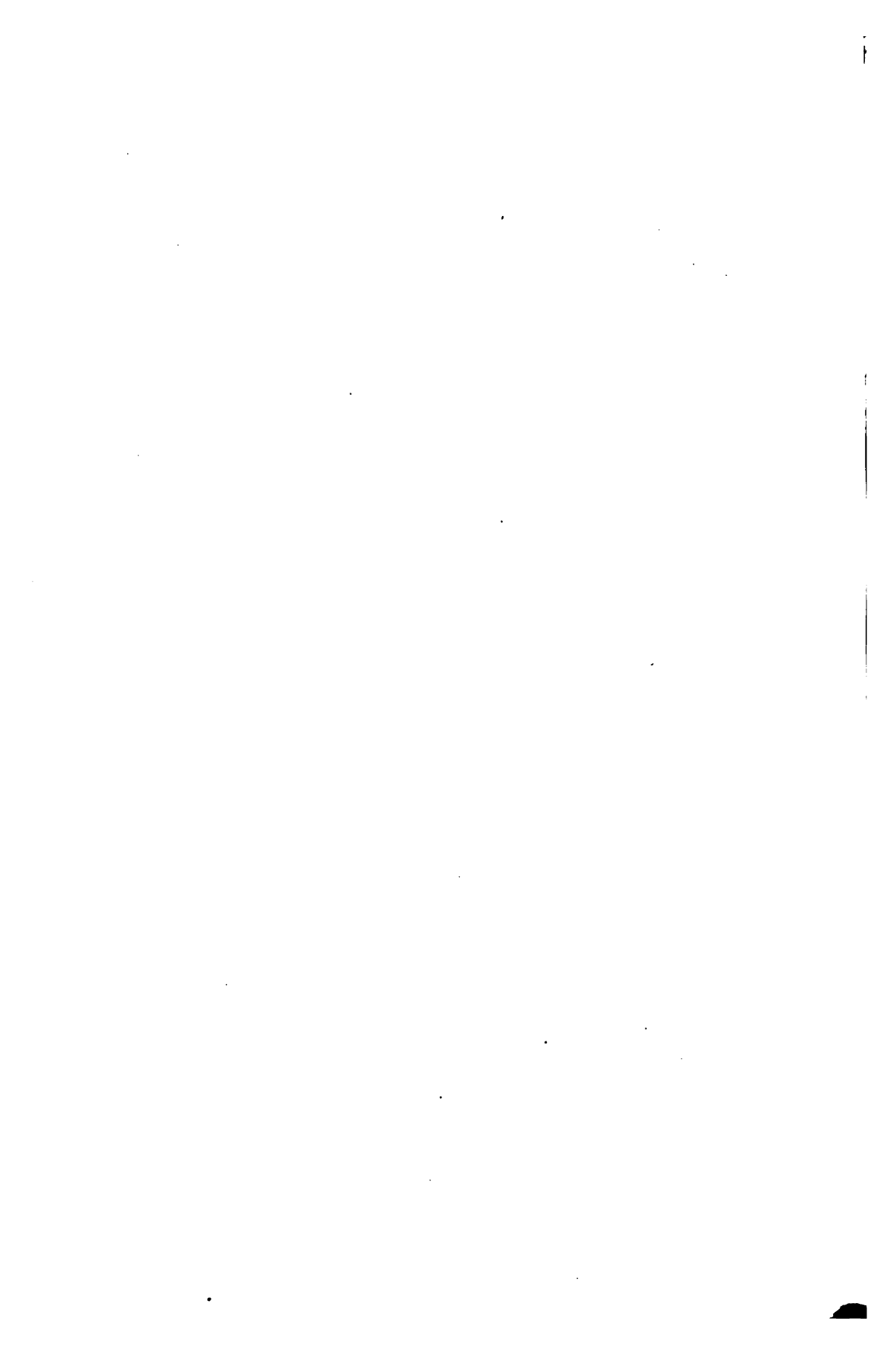
WITNESSES.

1. When husband of a distributee, or an administrator, is not a competent witness. See *Executors and Administrators*, No. 6, 7, and

Murphy's adm'r & als. v. Carter & als., 477

2. When wife is not a competent witness to prove what her husband had stated to her in relation to the conduct of the prisoner on trial. See *Criminal Jurisdiction and Proceedings*, No. 8, and

Murphy's case, 960



X

